
Case No. A-24-0788

IN THE NEBRASKA COURT OF APPEALS

DAVID W. FRENCH & BRIAN D. NOLAN.,

Petitioners/Appellant,

v.

CITY OF OMAHA ZONING BOARD OF APPEALS,

Respondent/Appellee.

APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

NEBRASKA CASE NO. CI 23-3741

The Honorable W. Russell Bowie III, District Court Judge

BRIEF OF APPELLEE CITY OF OMAHA ZONING BOARD OF APPEALS

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Statutes Cited:

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I. JURISDICTIONAL STATEMENT

Appellee admits this Court has jurisdiction over this appeal pursuant to Neb Rev Stat §§ 25-1902, 25-1911, and 25-1912.

II. STATEMENT OF THE CASE

A. Nature of the Case

The case originated when the Appellant, David W. French, appealed, to the district court of Douglas County, Nebraska, a decision of the City of Omaha Zoning Board of Appeals ("ZBA") to grant zoning variances to City of Omaha setback and bufferyard requirements. (T-2-119). The ZBA approved zoning variances for a parcel of property located southwest of 168th and Shirley streets in Omaha, Nebraska owned by McNeil Company and Builders, LLC. Vol II, Exhibit 1, pgs. 45:15-25, 46. The appeal to the district court was made in accordance with Neb Rev Stat §§ 14-413 and 14-414.

A hearing on the Appellant's appeal was held before the district court on August 12, 2024. Vol. I, 1:11. After the hearing, the district court took the case under advisement. Vol. I, 41:3-5. On September 23, 2024 the district court issued a written order affirming the ZBA's decision in its entirety. (T561-563).

The Appellant subsequently appealed the decision of the district court to this Court. (T565). The case is now before this Court on appeal of the district court's affirmance of the decision of the ZBA.

B. Issue Presented to the Court Below

In accordance with Neb Rev Stat § 14-414, the district court was charged with determining whether the ZBA's approval of the requested

variances was "illegal" or "was not supported by the evidence and [was] thus arbitrary, unreasonable, or clearly wrong." *Lamar Co. of Nebraska, LLC v. Omaha Zoning Board of Appeals*, 271 Neb 473, 476, 713 N.W.2d 406 (2006). While the petition for review requesting district court review of the ZBA decision was approximately 30 pages long and contained voluminous allegations, the district court accurately summarized the legal issues raised by the Appellant as follows: 1) the ZBA acted illegally, 2) the ZBA committed procedural due process violations, and 3) McNeil's hardships were self-imposed. (T562).

In addition to the above legal issues, Appellant requested that the district court consider additional evidence outside of the record created at the Zoning Board of Appeals hearing, in accordance with Neb Rev Stat § 14-414. This statute does provide the district court with the discretion to appoint a referee to receive additional testimony, or to receive additional testimony itself. The Appellants requested to introduce exhibits 5, and 7-13, found in Volume I of the Bill of Exceptions of this appeal, and the ZBA objected to the introduction of each of these exhibits. (T561).

C. How the Issues were Decided and what Judgement was Entered

The district court ruled that "there was substantial evidence in the record to support the Board's decision" to grant the variances, and affirmed the ZBA decision in its entirety. It specifically found that the ZBAs decision was "unanimous" and "neither illegal, arbitrary, unreasonable, or clearly wrong." (T536). In making this decision, it noted that the ZBA thoughtfully considered the issues, and in fact did not approve the setbacks as requested by McNeil Corporation. (T536). It approved smaller, more limited setback variances. (T 563).

With regard to the Appellant's request to have the district court consider evidence not offered to the ZBA, the court noted that although it had the discretion to consider the additional evidence, it declined to do so. (T561). The ZBA's objections to the introduction of exhibits 5, and 7-13, were sustained. (T561). The exhibits were not considered by the district court, and are not part of the record. Appellant has not appealed this decision to not consider the documents, although he does inappropriately cite to these exhibits in his brief.

D. Scope of Review

When "reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law." *Lamar Co. v. Omaha Zoning Board of Appeals*, 271 Neb 473, 713 N.W.2d 406 (2006). "Where competent evidence supports the district court's factual findings, an appellate court will not substitute its factual findings for those of the district court." *Eastroads, LLC v. Omaha Zoning Board of Appeals*, 261 Neb 969, 874 628 N.W.2d 677, 682 (2001).

III. PROPOSITIONS OF LAW

1. "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the zoning board of appeals shall have the power in passing upon appeal, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction, or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done." Neb Rev Stat § 14-411. *Eastroads, LLC v. Omaha Zoning Board of Appeals*, 261 Neb 969, 976 628 N.W.2d 677, 682 (2001).

2. Any person or entity "aggrieved by any decision of the zoning board of appeals […] may present to the district court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of such illegality." Neb Rev Stat § 14-413.

3. "On appeal, a district court may disturb the decision of a zoning board of appeals only when the decision is illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong." *Lamar Co. of Nebraska, LLC v. Omaha Zoning Board of Appeals*, 271 Neb 473, 476, 713 N.W.2d 406 (2006); *Eastroads v. Omaha Zoning Board of Appeals*, 261 Neb 969, 628 N.W.2d 677 (2001); *Bruning v. City of Omaha Zoning Board of Appeals*, 303 Neb 146, 150; 927 N.W.2d 366, 369-370 (2019).

4. It is not the role of the district court, acting as an appellate body, "to determine whether [it] would make the same decision under the same applicable standard." *Rousseau v. Zoning Bd. Of Appeals of Omaha*, 17 Neb.App. 469, 479, 764 N.W.2d 130, 137 (2009).

5. Administrative agencies, including zoning boards of appeal provide "expertise and an opportunity for specialization unavailable to the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not be taken lightly by the judiciary." *Eastroads v. Omaha Zoning Board of Appeals*, 261 Neb 969, 979 628 N.W.2d 677, 684 (2001) quoting *Bowman v. City of York*, 240 Neb 201, 210, 482 N.W.2d 537, 544 (1992).

6. An appellate court may only disturb the decision of the

district court if it finds that the "district court abused its discretion or made an error of law." *Lamar Co. of Nebraska, LLC v. Omaha Zoning Board of Appeals*, 271 Neb 473, 476, 713 N.W.2d 406 (2006); *Eastroads v. Omaha Zoning Board of Appeals*, 261 Neb 969, 628 N.W.2d 677 (2001); *Bruning v. City of Omaha Zoning Board of Appeals*, 303 Neb 146, 150; 927 N.W.2d 366, 369-370 (2019).

7. 'Unnecessary hardships' generally address a use prohibited by an ordinance." *Bruning v. City of Omaha Zoning Board of Appeals*, 303 Neb 146, 151, 927 N.W.2d 366, 370 (2019).

8. Practical difficulties "generally address improvements which conflict with [zoning] restrictions." *Bruning v. City of Omaha Zoning Board of Appeals*, 303 Neb 146, 151, 927 N.W.2d 366, 370 (2019).

9. Self-imposed hardships and the desire to build a bigger building or increase profits, standing alone, do not constitute an unnecessary hardship or practical difficulty. *Bruning v. City of Omaha Zoning Board of Appeals*, 303 Neb 146, 153, 927 N.W.2d 366, 371 (2019), *Rousseau v. Zoning Bd. Of Appeals of Omaha*, 17 Neb.App. 469, 478, 764 N.W.2d 130, 136 (2009).

10. An appellate court "cannot consider as evidence statements made the parties at oral argument or in briefs, as these matters are outside the record." *Bedore v. Ranch Oil Co.*, 282 Neb 553, 574, 805 N.W.2d 68, 85 (2011).

11. "Neb. Ct. R.App.P. §2-109(D)(1)(f) and (g) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not

exist." *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb 327, 342, 754 N.W.2d 406, 424 (2008).

V. STATEMENT OF THE FACTS

The ZBA, as Appellee, presents the below Statement of Facts to be considered in lieu of the Statement of Facts presented by the Appellant. As discussed in the Argument section of this brief, the Appellant cites, as fact, statements not contained within the record. They also present many statements as fact with no citation at all.

This case is before the Court on the Appellant's appeal of the district court's affirmance of the ZBA's grant of zoning variances to McNeil Company and Builders, LLC ("McNeil"). McNeil owns two parcels of property near 168th and Shirley streets in Omaha, Nebraska upon which it desires to build 201-unit apartment complex. Vol II, Exhibit 1, pg. 3:11-16. One of the parcels is located southwest of 168th and Shirley Streets, and one is located northwest of 168th and Shirley. Vol II, Exhibit 1, pg. 3:11-16, Exhibit 17. As of 2022, both of the lots are zoned R7, allowing the construction of multifamily apartment units. Vol II, Exhibit 1, pg. 106-109.

During the course of planning the development, McNeil determined that it needed to obtain zoning variances to City of Omaha setback requirements for the lot located southwest of 168th and Shirley Streets. Vol II. Exhibit 1, pg. 47. No variances were requested for the parcel that is located north of 168th and Shirley. On February 17, 2023 McNeil applied for several variances from City of Omaha zoning regulations pertaining to the southwest lot, specifically Lot 162, having an address of 16801 Pine Street. Vol II, Exhibit 1, pg. 47.

McNeil specifically requested variances from the setback requirements found in Omaha Municipal Code § 55-246 and the buffer

requirement found in Omaha Municipal Code § 55-716. Vol II, Exhibit 1, pgs. 3:22-25, 4:1-10, 66, 104. Specifically, it requested the required 35-foot front yard setback be reduced to 15 feet, the required rear yard setback of 25 feet be reduced to 10 feet, and a reduction of the buffer between property zoned R3 and R7 from 30 feet to 10 feet. Vol II, Exhibit 1, pgs. 3:23-25, 4:1-10, 122; Exhibit 17. As justification for the variance requests, it cited the irregular shape of the lot, combined with a sanitary easement and intermittent waterway which bisect the lot. Vol II, Exhibit 1, pgs. 3:17-21, 5:10-17, 47, 122. The shape of the southwest lot, as well as the sanitary easement and intermittent water way, are depicted in Vol II, Exhibit 17.

A public hearing was held in front of the ZBA on April 13, 2023. Vol II, Exhibit 1, pg. 3:2. At the hearing Kent Rasmussen, an architect, testified on behalf of McNeil. Vol II, Exhibit 1, pg. 4:23-25. At the hearing, he testified as to why McNeil was requesting a variance to the rear and front yard setbacks and the bufferyard between R3 and R7 districts. The primary reason was that McNeil was attempting to move a multi-family residential building and a pool away from the single-family homes. Vol II. Exhibit 1, pgs 4:10-25, 5:1-3, 18-25, 6:1-9, 24:16-25, 25:1-8.

During his testimony, he displayed the original site plan submitted to the City Council in 2022 when the property was rezoned to R7, which is shown on Vol II, Exhibit 1, pg 52. Vol II, Exhibit 1, pg. 5:5-8. (The site plan is shown upside down, with the lot southwest of 168th and Shirley shown on the top of the page.) He compared this to the new site plan showing the requested variances while testifying to the ZBA. Vol II, Exhibit 17. Vol II, Exhibit 1, pg. 5:18-25.

With regards to the apartment building, Rasmussen testified he was attempting to move the apartment building away from the neighboring residential homes on Shirley street by pushing the

building into the rear setback of the lot and closer to the commercial buildings to the rear of the property. Vol II, Exhibit 1, pgs. 5:18-25, 6:1-9, 24:16-25, 25:1-8. The specific building being pushed back is shown on Exhibit 17 as A6. Vol II, Exhibit 1, pg. 24:12.

Omaha Municipal Code requires a 25-foot rear yard setback on properties zoned R7. Vol II, Exhibit 15, pg 2. While building A6 could be built within both the front and rear yard setbacks required by city code, moving into the 25-foot rear setback would allow him to provide more of a buffer between the apartment building and the single-family homes. Vol II, pg. 24:4-21.

With regards to the front yard setback and bufferyard, Rasmussen testified that McNeil was requesting variances to the front yard setback and bufferyard in an effort to move a pool, and the noise associated with it, to an internal portion of the property away from residential properties. Vol II, Exhibit 1, pgs. 6:10-21, Exhibit 17. McNeil was also attempting to position the clubhouse of the pool in such a way to point traffic to the clubhouse inwards and away from the residential neighbors. Vol II, Exhibit 1, pg. 25:14-23, Exhibit 17. This was an intentional design choice to ensure headlights did not shine into neighboring homes. Vol II, Exhibit 1, pg. 37:16-25.

Rasmussen further testified that due to the irregular shape of the lot, and the sanitary easement and wetland, accomplishing this move required variances to both the front yard setback and bufferyard. Vol II, pgs. 6:22-25, 7:1-3. It simply could not move it to the interior where the sewer and intermittent waterway were located. Vol II, Exhibit 1, pg 6:22-25. Omaha Municipal Code requires a 35-foot front yard setback for multi-family properties zoned R7. Vol II, Exhibit 15, pg 1. It requires a 30-foot buffer yard between properties zoned R3 and R7. Vol II, Exhibit 1, pg. 4:8-10, Exhibit 16, pgs. 1-2. McNeil needed to build within both to accomplish its objectives.

A number of neighbors testified in opposition to the granting of the requested variances, including the Appellant. Reasons for their opposition included visual blight, Vol II, Exhibit 1, pg. 8:2, 16:3-13; and increased density and traffic, Vol II, Exhibit 1, pg. 15:3-21. Additionally, there was also an underlying concern due to the fact that McNeil was requesting variances after it had indicated to the Omaha City Council that it would not need variances at a previous hearing when it requested that the property be rezoned to R7. *See generally* Vol II, Exhibit 1, pgs. 18:20-25, 19, 20:1-13.

Finally, Mr. French, the Appellant, testified that he had concerns about the garbage pickup design, Vol II, Exhibit 1, pg. 20:23-25, fire protection, Vol II, Exhibit 1, pg. 22:16-25, and the fact that McNeil had previously subdivided the land in 1999. Vol II, Exhibit 1, pgs. 21:20-25, 22:1-11.

After hearing from all of the interested parties, the ZBA closed the public hearing deliberated, and discussed the requested variances at length. Vol II, Exhibit 1, pgs 28:18-25, 29-44. During discussion, the ZBA actually determined that the McNeil did not need variances as large as it had requested. Vol II, Exhibit 1, pg 38:5-18. McNeil was questioned by the ZBA, and the ZBA determined it did not need to reduce the buffer yard from 30 to 10-feet; it only needed to reduce it to 25 feet. Vol II, Exhibit 1, pg 31:1-25. McNeil did not need to reduce the front yard setback from 35-feet to 15-feet; it only needed to reduce it to 25 feet. Vol II, Exhibit 1, pg 32:1-18. While the rear yard setback was approved as requested, the rear neighbors were all commercial and had not opposed the variance request. Vol II, Exhibit 1, pg. 34:5-15.

After discussion, ZBA member Brian Mahlendorf stated:

> "I think – I think there are a couple of things here. I appreciate the neighbors coming down. And I know there's been some challenges along the way, but all in all, is there a hardship here? And I would say, on, the lot shape's pretty unique, pretty nonstandard. Two, the wetlands and, three, the sewer easement all pose challenges." Vol II, Exhibit 1, pg. 44: 15-25.

The ZBA went on to approve the reduced variances, as amended by the ZBA, subject to the condition that McNeil double the landscaping between the R7 and R3 zones. Vol II, Exhibit 1, pg. 45:15-25, 46:1-18.

After this hearing, the Appellants appealed the ZBAs decision to the Douglas County district court. The district court, after examining the record from the ZBA hearing, ruled that there was "substantial evidence in the record to support the Board's decision." (T562). The court found that the ZBA chairman was methodical in his quest to allow all person to speak and present evidence. (T562). He noted that the ZBA was thoughtful, and actually scaled back the variances that were requested. (T562). He specifically ruled that the ZBA's "unanimous decision was thoughtful, and neither illegal, arbitrary, unreasonable, or clearly wrong, and should be affirmed." (T563). The Appellants now appeal this order of the district court.

VI. SUMMARY OF THE ARGUMENT

The district court was obligated to affirm the ZBA's decision to grant the variances unless it found that the ZBA's decision was "illegal or not supported by the evidence, and thus arbitrary, unreasonable, or clearly wrong." Neb Rev Stat § 14-413, *Lamar Co. of Nebraska, LLC v. Omaha Zoning Board of Appeals*, 271 Neb 473, 476, 713 N.W.2d 406 (2006). The district court found that it was not, and affirmed the ZBAs decisions. (T562). This court may only disturb the decision of

the district court if it finds that the "district court abused its discretion or made an error of law." *Lamar Co. v. Omaha Zoning Board of Appeals*, 271 Neb 473, 713 N.W.2d 406 (2006).

The Appellant makes four assignments of error. Appellant claims the ZBA and district court's decisions were 1) not supported by the evidence, 2) unreasonable, 3) arbitrary, and 4) clearly wrong. The ZBA believes the evidence established otherwise.

The decision of the ZBA comports with the law of zoning variances in Nebraska. As stated by the district court in its order, the ZBA's decision was supported by the evidence, and was not unreasonable, arbitrary, or clearly wrong. The ZBA found that the irregular shape of the lot, and the sewer easement and intermittent waterway that bisect the lot, constituted unnecessary hardships. (Vol II, Exhibit 1, pg. 44:15-25). These characteristics, which were unique to this lot, reduced the buildable area, and constituted a hardship. This was done after the ZBA reviewed the site plan in Exhibit 17, and extensively questioned McNeil. *See generally* Vol II. The ZBAs logic was sound, and should not be disturbed on appeal.

Further, in affirming the ZBA's decision in its entirety, the district court found that the hardships were not self-imposed. McNeil obviously did not create the sewer easement or the intermittent waterway, and these independently support the variances. While McNeil did subdivide the lot in 1999 by removing a small portion to accommodate a residential home, this act is 1) too far removed in time to be in the chain of causation, and 2) not the type of act the Supreme Court has considered to be a self-imposed hardship. As for the other specific arguments of the Appellant, they are either attempts to relitigate factual issues, not based in the law, or simply false.

VII. ARGUMENT

A. The Appellant's statement of facts presents statements outside of the record as facts.

As a threshold matter, it is important to note that Appellants' statement of facts contains numerous statements presented as fact, but are not part of the record. The brief cites to exhibits that are not part of the record, cites to argument as fact, and also fails to provide citations for many purported facts.

As discussed above, the Appellants offered exhibits 5, and 7-13 at the appeals hearing before the district court. (Vol. I., pgs. 26:5-17, 27:15-17, 28:5-1,14-17, 29:5-8, 29:19-25, 30:1-10, 17-22). The ZBA objected. (Vol I. pgs. 26:5-17, 27:18-20, 28:9-10, 18-19, 29:9-10, 30:1-2, 11-12, 23-25.) The district court sustained the ZBA's objection and declined to admit exhibits 5, and 7-13, and the exhibits are not part of the record. (T561). This decision was not appealed. Despite this, Appellant liberally cite to these exhibits. Additionally, Appellants frequently cite to and present as fact statements from Volume I of the Bill of Exceptions, which contains a transcript of the arguments at the hearing before the District Court. Finally, many of the statements presented as fact contain no citation at all.

An appellate court "cannot consider as evidence statements made the parties at oral argument or in briefs, as these matters are outside the record." *Bedore v. Ranch Oil Co.*, 282 Neb 553, 574, 805 N.W.2d 68, 85 (2011). Additionally, "Neb. Ct. R.App.P. §2-109(D)(1)(f) and (g) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist." *Sturzenegger v. Father Flanagan's*

Boy's Home, 276 Neb 327, 342, 754 N.W.2d 406, 424 (2008). For this reason, the Appellee requests that this court refer to Appellee's statement of facts in lieu of the Appellants.

B. The ZBA and district court's decisions were supported by the evidence, and were not illegal, unreasonable, arbitrary, or clearly wrong.

The Appellant has assigned, as error, his contention that the ZBA's and district court's decisions were not supported by the evidence, were unreasonable, were arbitrary, and were clearly wrong. When considering 1) the deference required to be given to both the ZBA and district court, 2) law of zoning variances, and 3) the facts of this case, this Court is required to affirm the order of the district court.

1. <u>The decisions of the ZBA and the district court are entitled to deference.</u>

This Court's review "is narrowly limited to whether the [district] court abused its discretion or committed an error of law in affirming the board's decision affirming the board's decision granting the variance[s]." *Eastroads, LLC v. Omaha Zoning Board of Appeals*, 261 Neb 969, 979 628 N.W.2d 677, 684 (2001). It is not the role of the district court, acting as an appellate body, "to determine whether [it] would make the same decision under the same applicable standard." *Rousseau v. Zoning Bd. Of Appeals of Omaha*, 17 Neb.App. 469, 479, 764 N.W.2d 130, 137 (2009). An appellate court will not substitute the district court's factual findings for its own when supported by competent evidence. *Eastroads*, 261 Neb at 8977, 628 N.W.2d at 683.

The Nebraska Supreme Court has recognized that "administrative agencies, including zoning boards of appeal provide

"expertise and an opportunity for specialization unavailable to the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not be taken lightly by the judiciary." Eastroads, LLC 261 Neb at 979 *quoting Bowman v. City of York*, 240 Neb 201, 210, 482 N.W.2d 537, 544 (1992).

2. The Law of Zoning Variances in Nebraska

i. *Authority of the Zoning Board of Appeals*

A zoning board of appeals is statutorily authorized to relax the 'strict letter' of zoning codes by granting a variance to a zoning regulation when either 'practical difficulties' or 'unnecessary hardships' are present, "so long as the spirit of the ordinance [is] upheld and substantial justice done." *See Eastroads, LLC v. Omaha Zoning Board of Appeals*, 261 Neb 969, 976 628 N.W.2d 677, 682 (2001).

Neb Rev Stat § 14-411 provides as follows:

"Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the zoning board of appeals shall have the power in passing upon appeal, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction, or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done."

ii. *What constitutes an unnecessary hardship or practical*

difficulty

While there is no precise definition of "unnecessary hardship" or "practical difficulty," the Nebraska Supreme Court has provided guidance on what does and does not qualify. Unique characteristics that limit the buildable area of lot can constitute an unnecessary hardship or practical difficulty. *See Eastroads*, 261 Neb at 973, 628 N.W.2d at 681. In *Eastroads,* the zoning board of appeals decided a state right-of-way of way limited the buildable area on a lot, and constituted a hardship justifying a variance. The Supreme Court upheld this decision.

"Standing alone, neither the desire to build a larger building, see *Alumni Control Board v. City of Lincoln*, 179 Neb 194, 137 N.W.2d 800 (1965), nor the desire to generate increased profits, see *Bowman v. City of York*, 240 Neb 201, 482 N.W.2d 537 (1992), constitutes a sufficient hardship to justify a variance." *Rousseau v. Zoning Board of Appeals of Omaha*, 17 Neb.App. 469, 478, 764 N.W.2d 130, 136 (2009). Additionally, self-imposed hardships, standing alone, do not constitute a hardship. *see Bruning v. City of Omaha Zoning Board of Appeals*, 303 Neb 146, 153, 927 N.W.2d 366, 371 (2019). A party cannot create its own hardship, and use the variance process to obtain relief. *Id.*

However, even if one of these factors is present, a unique characteristic that independently qualifies as a hardship or practical difficulty can justify a variance. *Eastroads*, 261 Neb 677, 628 N.W.2d 677 (holding that even if one of the cited hardships is self-imposed, the existence of a separate and independent hardship requires the granting of a variance.) The law simply is that the desire to build a larger building, the desire to increase profits, or an action that is self-imposed, cannot be the sole hardship or practical difficulty used to justify a variance. *Eastman*, 261 Neb at 978, 628 N.W.2d at 684.

Additionally, just because it is possible to develop a lot in compliance with zoning ordinances does not mean a variance is always inappropriate. As to this point, the case of *Rousseau v. Zoning Board of Appeals of Omaha*, 17 Neb.App. 469, 764 N.W.2d 130 (2009) is particularly relevant. In this case, the applicant for a variance admitted it was possible to build a multi-family dwelling and comply with zoning regulations. However, the zoning regulations prohibited the particular style of building she wanted to build. *Rousseau,* 17 Neb.App. at 471, 764 N.W.2d at 132.

The Nebraska Court Appeals noted that desire to build the style of building was not the *sole* hardship or practical difficulty. The density of the area made the application of zoning regulations difficult, as they were designed for suburban, rather dense urban, areas. This served as an independent and unique hardship. The court stated,

> "generally, it is the zoning board of appeals' duty, and not the function of a court, to make this kind of decision. The Legislature has granted zoning boards of appeals significant leeway in making decisions and has required district courts to uphold a board's decision, barring illegality, insufficient evidentiary support, or an arbitrary, unreasonable, or wrong decision." *Rousseau*, 17 Neb.App. at 478, 764 N.W.2d at 137.

Citing this language, even though the record showed a different style of building could be built in conformance with zoning regulations, the appellate court ruled district court did not abuse its discretion in affirming the zoning board of appeals decision. *Id.*

Finally, it is important to point out what has generally been considered to qualify as a self-imposed unnecessary hardship or practical difficulty. An example of a self-imposed hardship is

developing a lot, without permission, and then using lost profits or the cost of compliance as the unnecessary hardship or practical difficulty. A party cannot unilaterally and without approval begin using agriculturally zoned property for commercial purposes, and then use the loss of commercial income, which it should not be collecting in the first place, as the basis of its hardship in a variance request. *Id. 303 Neb at 154, 927 N.W.2d at 372.* Similarly, a party cannot construct a building outside of required setbacks, and then use the cost to demolish the building and rebuild within setbacks as the basis of a hardship in a variance request. *See Eastroads, LLC v. Omaha Zoning Board of Appeals*, 261 Neb 969, 977, 628 N.W.2d 677, 683 (2001), *discussing Frank v. Russell*, 160 Neb 354, 70 N.W.2d 306 (1955).

3. Under the facts of this case, there was an unnecessary hardship or practical difficulty.

The district court ruled that there was substantial evidence for the ZBA to grant the requested variances. A review of the record supports this contention. The ZBA specifically and clearly found hardships that were unique to this lot. The ZBA president, after the ZBA had questioned McNeil, deliberated at length, and stated the following with regards to the hardships: "And I would say, on, the lot shape's pretty unique, pretty nonstandard. Two, the wetlands and, three, the sewer easement all pose challenges." Vol II, Exhibit 1, pg. 44: 15-25.

This decision was not illegal, and was supported by the evidence. The site plan, found in Exhibit 17, clearly shows non-buildable area created by the shape of the lot, the sewer easement, and the intermittent waterway on the lot southwest of 168th and Shirley. The irregular shape of the lot accentuated impact of the setbacks, and the sewer easement and intermittent waterway ran through the middle of the lot. While a parking lot can be constructed

over the easement or in the intermittent waterway, a building cannot. All three of these unique factors reduced the areas where buildings could be constructed, necessitating the move into the setbacks.

Considering the deference the district court was required to show the ZBA, this court should affirm the district court's order. The district court found the thoughtful deliberation of the ZBA to be significant. (T563). The variances, as approved, ensured the "spirit of the ordinance[s] were observed" and "substantial justice was done," as required by Neb Rev Stat § 14-411.

As for the variance to the rear yard setback, the entire purpose for the variance was to pull building A6 away from the single-family homes and move it closer to the commercial development in the rear of the property. Vol II, Exhibit 1, pg 5:18-25, 6:1-9. Because of the sewer easement and the intermittent waterway that bisected the property, a large portion of the middle of the lot was not available to build on, and the building had to be moved into the rear setback. The ZBA also noted that there was no objection from the commercial neighbors, Vol II, Exhibit 1, pg 34:23-25, and this move benefited the residential neighborhood. Vol II, Exhibit 1, pg 43:1-5. The spirit of the ordinance was observed, and substantial justice was done.

With regards to the variance to the front yard setback and the buffer yard between R3 and R7 properties, the variance was necessitated by a decision to move the pool, and its noise, to the interior of the property by swapping the club house and pool. Vol II, Exhibit 1, pg 6:10-21. The swap of the pool and clubhouse also would cause traffic would point inwards and away from the single-family homes. (Vol II. Exhibit 1, pg 25:20-23.) This was an intentional choice to ensure headlights from cars point away from the single-family homes. Vol II. Exhibit 1, pg 37:16-25. Again, the spirit of the ordinance was maintained and substantial justice was done.

Finally, the district court found the fact that the ZBA did not approve the variances as requested, and the level of thoughtfulness this implied, to be significant. The ZBA ultimately approved scaled-down variances, and doubled the landscaping requirements between the R3 and R7 properties. McNeil requested a 20-foot reduction in the front yard setback; the ZBA approved a 5-foot reduction. Vol II, Exhibit 1, pg 45: 6-9. McNeil requested a 20-foot reduction to the bufferyard; the ZBA approved a 5-foot reduction and mandated that landscaping requirements in the buffeyard be doubled. Vol I, page 45: 10-14, 17-20. While the rear yard setback was approved as requested, The ZBA noted, and found significant, the fact that the site plan purposely infringes the most into the rear yard setback which borders commercial properties, lessening the burden on the residential neighbors. Exhibit Vol II, Exhibit 1, pg. 45:1-5.

The ZBA, in granting the variances, thoughtfully ensured the spirit of the zoning ordinances were protected, as it was statutorily required to do. The shape of the lot, combined with the sewer easement and intermittent waterway, clearly reduced the buildable area of the lot. Contrary to the assignments of error in this case, the ZBA's decision to grant variances was supported by the evidence, were reasonable, were not arbitrary, and were not clearly wrong. The district court did not abuse its discretion in affirming the variances, and this Court should not disturb the district court's decision.

Additionally, just because it was possible to develop the property without variances, does not mean the ZBA acted illegally in approving the variances. In the Appellants brief, there is some implication that McNeil is looking to build a larger residential unit and increase profits. However, as was the case in *Rousseau v. Zoning Bd. of Appeals of Omaha,* supra, the desire to build a larger building is not the hardship used to justify the variance. McNeil cited three separate hardships

unique to this lot, none of which had to do with the desire to build a larger building.

C. Appellants specific arguments either lack merit or are attempts to relitigate the ZBA hearing

In his argument the Appellant lists five specific reasons why he believes the ZBAs decision was not supported by evidence, unreasonable, arbitrary, and clearly wrong. They are 1) the application for variances was not ripe, 2) there was no hardship or practical difficulty, 3) if there was a hardship or practical difficulty, it was self-imposed, 4) the ZBA ignored inaccurate and contradictory statements made by McNeil, and 5) the ZBA testified for McNeil. The ZBA will briefly respond to each.

i. Ripeness

The Appellant states, without legal authority, that the variance requests were not ripe. Ripeness is simply not a relevant requirement. Appellant cites no law pertaining to when a variance may be requested. McNeil had hired an architect that developed a site plan. The plan that showed a need for variances. McNeil was authorized to take this before the ZBA[1].

ii. The ZBA ignored the lack of a hardship or practical difficulty.

[1] To clarify assertions in Appellant's brief, Appellant, in his ripeness argument, selectively quotes counsel for the ZBA as stating the variance request would be moot if a different neighbor was successful in an adverse possession lawsuit against McNeil. When the transcript of the hearing the Appellant quotes from his read in its entirety, it becomes clear that counsel for the ZBA clearly differentiated between practical mootness and legal mootness. Vol I, pg 6:10-25, 7:1-4. Additionally, at the time of the hearing, counsel for the ZBA was under the mistaken assumption that the adverse possession claim pertained to the parcel of land where variances were being requested, the parcel southwest of 168th and Shirley streets. The adverse possession claim actually applied to the parcel of land that is northwest of 168th and Shirley. *See* CI 22-9684.

As outlined extensively above, the ZBA thoughtfully and deliberately considered the variance requests. It did not rubber stamp McNeil's request. The ZBA found the shape of the lot, and the sewer easement and intermittent waterway, were hardships or practical difficulties. Vol II, Exhibit 1, pg. 44:21-25. The district court found substantial evidence supported this decision, and Appellant has provided no reason to disturb this decision.

iii. The unnecessary hardships or practical difficulties were self-imposed.

The unnecessary hardship and practical difficulties were not self-imposed. The ZBA found that there were three hardships or practical difficulties: 1) the shape of the lot, 2) the sewer easement, and 3) the intermittent waterway. The record is completely void of any evidence that McNeil created the sewer easement or the intermittent waterway. This, in and of itself, requires affirmance of the ZBAs decision., as these practical difficulties independently support the variances even without considering the shape of the lot. While the Appellant seems to suggest McNeil had an obligation to attempt to negotiate to move the sewer easement, he provides no legal justification of this assertion.

While it is true, as the Appellant testified at the ZBA hearing, that the property was subdivided to form a residential lot in 1999, and that had this not been done the pool clubhouse would not require a variance, he provides no support for the contention that an act that occurred approximately 25 years ago qualifies as a self-inflicted hardship. This simply stretches causation past its logical point. Additionally, as discussed in depth above, this is not the type of conduct courts have found constitutes a self-inflicted hardship. McNeil did not unilaterally violate the zoning ordinances and then site the cost of compliance as its hardship. *See Frank v. Russell*, 160 Neb

354, 70 N.W.2d 306 (1955).

iv. The ZBA ignored McNeil's misleading, inaccurate, incomplete, and contradictory statements.

The Appellant claims the McNeil made misleading, inaccurate, incomplete, and contradictory statements at the ZBA hearing, and that the ZBA ignored this. Not only is this an inappropriate attempt to relitigate the factual findings and credibility determinations, it is simply false. The ZBA acknowledged that the McNeil's plans had changed since its request to rezone the property, discussed the change, and attributed it to "the journey of development" rather than intentional deception. Vol II, Exhibit 1, pg. 41. The district court noted this in its order, and it found all the ZBA findings were support by substantial evidence. It is not the duty of this Court to substitute its own findings to substitute for the findings of the district court. *Eastroads*, 261 Neb at 975, 628 N.W.2d at 681-682.

v. The ZBA testified for McNeil.

The Appellant also claims the ZBA testified for McNeil. This is false. While it did publicly deliberate in accordance with the Open Meetings Act, it never testified for the McNeil.

D. The ZBA did not Act with Gross Negligence, and an Award of Court Costs is not Appropriate

Finally, the Appellant claims the ZBA acted with gross negligence in granting the variances, and for this reason he is entitled to an award of court costs. Throughout this brief, the ZBA has discussed how it held a thoughtful, thorough hearing on the issue. It stands by the record in this case, and believes there is no evidence it acted with gross negligence, or even negligence for that matter.

VIII. CONCLUSION

The ZBA decision to grant the variances was not "illegal," was "supported by the evidence" and thus was not "arbitrary, unreasonable, or clearly wrong." The district court order affirming the decision of the ZBA should be affirmed.

WHEREFORE, the Defendant/Appellant prays that the decision of the District Court be affirmed.

DATED this 26th day of March, 2025.

CITY OF OMAHA, Appellee

BY: */s/ Tyler E. Hiipakka*

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Neb. R. App. P. § 2-103(C)(3)(a) because this brief, inclusive of all pertinent parts, contains 6,603 words, using the word count of the word-processing system used to prepare the brief, Microsoft Word 2019, which is an amount no more than the 15,000 words permitted by the Rule.

2. This brief complies with the typeface and type style requirements of Neb. R. App. P. § 2-103(A)(4) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019, 12 pt. Century Schoolbook Font.

/s/ Tyler E. Hiipakka
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Certificate of Service

I hereby certify that on Wednesday, March 26, 2025 I provided a true and correct copy of this *Brf of Appe City of Omaha Zoning Board* to the following:

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