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

APPELLANT'S REPLY BRIEF
DAVID W. FRENCH

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I. JURISDICTIONAL STATEMENT

Appellant admits this Court has jurisdiction over this appeal.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant rejects Appellee's argument that this Court accept Appellee's statement of the case. The case originated when on April 13, 2023, the City of Omaha Zoning Board of Appeals' ("ZBA") decisions to grant zoning variances to McNeil Company and Builders, LLC ("Applicant") associated with its proposed development of 8.8 acres of land located at the northwest and southwest corners of the intersection of 168th and Shirley streets in Omaha, Nebraska. T215 – T218, T262. The land is an assemblage of two parcels owned by Applicant. T215 - T218, T248, T262. In 1999, Applicant re-subdivided the south parcel to remove approximately 2 acres at the northwest corner of the south parcel and sold it, thereby removing it from becoming part of Applicant's proposed development. T189-190, T249, T263. Appellant admits the appeal to the district court was made pursuant to Neb Rev Stat §§ 14-413 and 14-414.

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

Appellant admits Appellant subsequently appealed the decision of the district court to this Court. (T565). Appellant admits the case

now before this Court on appeal is the district court's affirmance of the decision of the ZBA.

B. Issues Presented to the Court Below

Appellant admits that in accordance with Neb Rev Stat §§ 14-413 and 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).

Appellant rejects Appellee's allegation that 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) Applicant's hardships were self-imposed. In fact, Appellant's legal issues raised by the Appellant in its Petition for Review and Petition's Brief, both filed with the District Court, present the same factual and legal issues raised with this Appellate Court in the instant including 1) lack of ripeness, 2) lack of existence of hardship/difficulty, 3) if any alleged hardship/difficulty existed, the same was self-inflicted by Applicant, 4) the ZBA ignored Applicant's misleading, inaccurate, incomplete, and contradictory statements (including Applicant's impeachment by Applicant's public statements), and 5) where the ZBA testified for Applicant. See Transcript, generally.

Appellant rejects Appellee's allegation that Appellant requested the district court consider additional evidence outside of the record created at the Zoning Board of Appeals hearing. At no time does Appellee challenge the accuracy or authenticity of the alleged "additional evidence" similar to Appellant not challenging the accuracy or authenticity of ordinances Appellee presented to the District Court. Appellee's allegation is a red herring and a side show. Appellant and objectors testified as to their contents at the April 13, 2023 ZBA

hearing and the facts that they purport to evidence as evidenced by other testimony and records such as the ZBA hearing's record in the instant, Appellant's *verified* Petition for Review, Appellant's Petitioner's Brief and Appellant's *sworn and under oath testimony* in support of the Petitioner's Brief. Moreover, each of the transcripts presented is certified as to its accuracy and completeness. By Appellee's flawed logic, there was no foundation to admit the ZBA's hearing transcript or the ZBA's ordinances into the record for this case.

Moreover, at relevant times, the documents are/were in the possession of ZBA's administrator. Appellant presented the alleged "additional evidence" to the District Court for judicial economy and as a professional courtesy. The parties had constructive notice and the District Court has/had judicial notice of the recorded documents on record at the Douglas County Recorder's office. Appellant presented the Douglas County Recorder's filed documents to the District Court for judicial economy and as a professional courtesy. The remaining transcripts were transcribed by a licensed court reporter, at Appellant's expense, and transcribe testimony from public hearings, held pursuant to the Open Meeting Act, are available to the public via external facing government websites. Such transcripts are/were offered to the District Court and this Court for judicial economy and as a professional courtesy.

Insofar as Appellee alleges that Appellant's recitation of testimony in the November 15, 2022 Omaha City Council hearing was inappropriate because Appellant *could have* delivered an entire written transcript to the ZBA on or before April 13, 2023, Appellant could not have done so for several reasons. First, Appellant and neighbors to Applicant's parcels received 3 business days' notice of the ZBA hearing. There was not ample time to create such a transcript. Second, the City of Omaha would not cooperate it doing the same. For example, when Appellant requested that the Omaha Planning Office provide such a transcript of the November 15, 2022 City Council

hearing (available right now on youtube.com) Appellant repeatedly received excuses such as 'we don't have resources to do so'. Prior to and after filing the appeal to the District Court in this case, at least twice, the Omaha Planning Office said it would prepare one or more written transcript(s) and certify as the accuracy of their contents and afterwards, the City of Omaha legal department reversed such offers to Appellant.

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

Appellant admits the district court affirmed the ZBA decision in its entirety. (T561-563).

Appellant disputes Appellee's allegations and insinuations that Appellant's factual statements (or reference to documents) in the ZBA record are of any lesser weight or merit than factual statements made by Applicant. After filing this appeal, Appellant learned that Mr. Rasmussen, Applicant's representative at the ZBA hearing, is not a licensed architect and has no duty of candor owed to a tribunal or government body. Appellant objects to the ZBA and its counsel's not giving equal weight to the accuracy and veracity of Appellant's statements or any of the public objectors at the ZBA hearing compared with the accuracy and veracity of Applicant's statements.

On the same vein, Applicant disputes Appellee's insinuation that Appellant's and the public objector's statements in the ZBA's record in the instant are to be treated as heresay and that Appellant's offering of written documents supporting facts presented in the ZBA's record should be ignored. Appellant's intent in offering such written documents is/was as a courtesy. The ZBA and the district court already had judicial notice of most of them, including written transcripts of public hearings (prepared by stenographers) - hearings at which the litigants and key speakers (e.g. Messrs. Rasmussen, Placzek, French, Nolan, and Kass) were in attendance and records of which are

accessible by the public and this Court for auditory inspection at any time.

Appellant rejects Appellee's argument that "exhibits" presented in support of Appellant's Petition for Review and Appellant's Brief with the District Court are not part of the record. The documents supplementarily assist with a factfinder better understanding the veracity of Appellant's and public objectors' already true statements. Excluding the "exhibits" from the record, to the extent the district court (and this Court) could not have/did not have judicial notice of them, does not make any less true Appellant and public objectors' true statements made at April 13, 2023 ZBA hearing. Many of the documents and their content are referenced in ZBA's record and are referred to in the Petition for Review and Petitioner's Briefs filed in the instant case. Appellant rejects Appellee's statement that Appellant inappropriately cites to documents in Appellant's brief before this Court, but as discussed above Appellant has revised Appellant's citations to the ZBA record.

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).

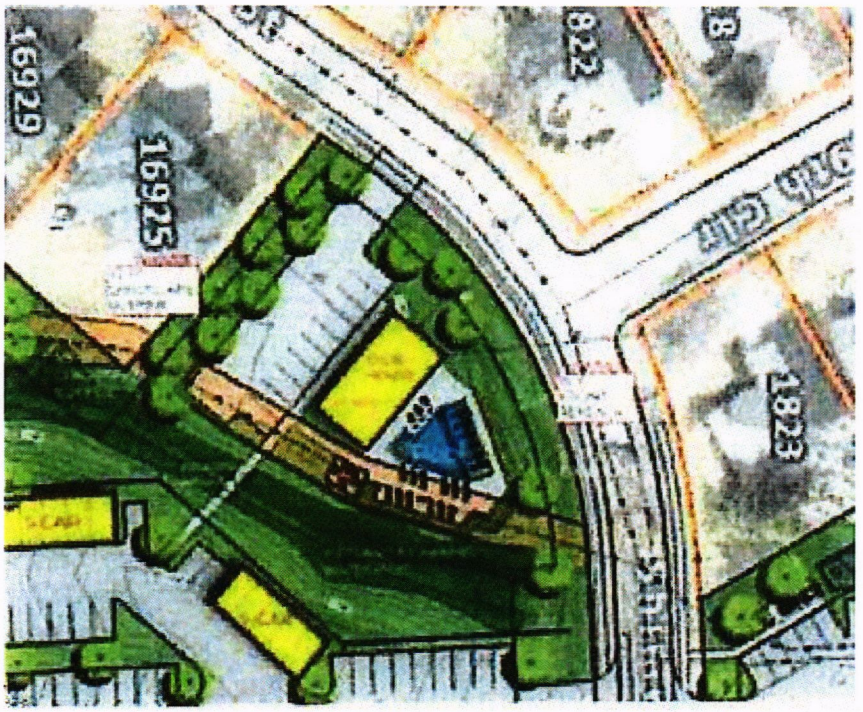
V. STATEMENT OF THE FACTS

Appellee complains that Appellant's statement of facts for its Appellant does not fully comply Neb. Ct. R.App.P. §2-109(D)(1)(f) and (g) regarding factual recitations be annotated to the record and cites *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb 327, 342, 754 N.W.2d 406, 424 (2008). Appellant apologizes to the Court and the other parties and their counsel. Appellant has no access to the Nebraska Supreme Court and District Court's e-filing systems. When Appellant's brief was due with for Appeal to this honorable court, Appellant was in possession of two volumes of the record, which Appellant received from another party in the case. Unbeknownst to Appellant, neither of the two large electronic file was the single integrated transcript and its actually 3 clerk generated PDFs that constitute the record for this appeal. Upon information and belief, the one PDF was too large to be emailed by the District Court to Appellant. In hindsight, during logistics of delivering documents to Appellant, the Clerk of the District Court erroneously thought that the co-petitioner in the District Court case was serving as Appellant's representative and legal counsel. Even if Petitioner had received it from the District Court, it was not clearly labelled as the Transcript.

Applicant owns two adjacent parcels in the Rose Garden Estates subdivision. T2, T51, T67, T81. The land is unimproved (former) farm land consisting on grass, weeds, and a river. T2, T3, T232, T465, T490. It is part of a subdivision platted in 1977 – a common neighborhood consisting of 263 parcels. T2-4, T42, T49, T51-2, T67, T81, T522. 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). T2, T3. Applicant subsequently sold the 264th parcel to a third party. T68, T82, T158, T164, T349-350; 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." T198; 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. T90-94. 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:



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

Applicant proposes to design and construct one integrated apartment complex on an assemblage of the two 'empty' parcels. T4; T40, T111, T232, T240, 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. T6-7, T15, T16, T40, T111, T118, T232, T240

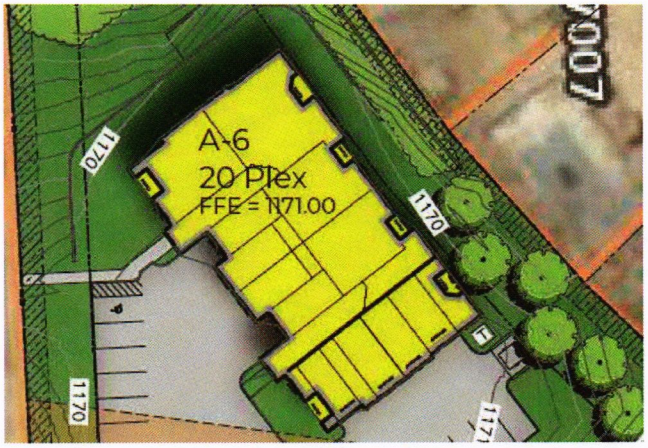
Applicant's land is located in Douglas County, Omaha, Nebraska. Petitioners and Applicant are residents of Douglas County, Omaha, Nebraska. T2, T1.

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. T3-4, T83. 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. T3-4, T111-113. A depiction of the Applicant's design (see green and yellow colored land) as of November 15, 2022 is:

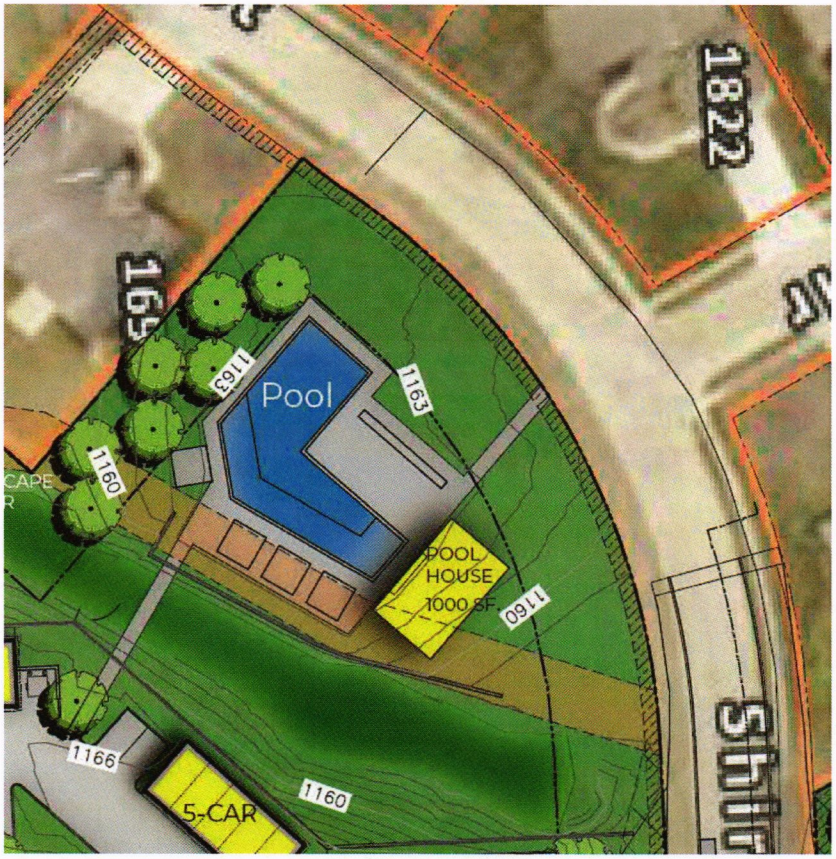
P. 109, Exhibit 1, Bill of Exceptions Vol. 2

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 below drawing, the parcel commonly known as 16925 Shirley Street is labelled "16_" and is located in the top right corner of the drawing. T220.

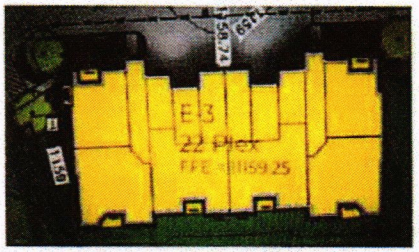


In November 2022, Applicant represented specifications for the 'club house' amenities as:

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



T220, 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. T4, T67, T81, T144-5. The lawsuit was filed and adjudicated at the Douglas County District Court and is commonly known as Case CI 22-9684. T67, T81. The Honorable W. Russell Bowie, district court judge, presided over both this law case and Case CI 22-9684. Pgs. 5-9, Bill of Exceptions Vol. 1. Part of the District Court's August 12, 2024 hearing in this case involved Judge Bowie inquiring about the two concurrent lawsuits involving the same land owned by Applicant. Pgs. 5-9, Bill of Exceptions Vol. 1.

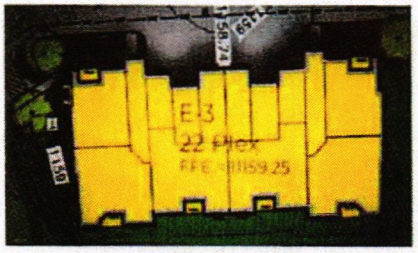
94 days following the November 15, 2022 City Council Meeting, Applicant applied for setback variances and proposed the following for its multi-story building located in the most southwest portion of its land comprised of 22 units with corresponding parking units (see

T49 and T110):

Evolving Design Preferences

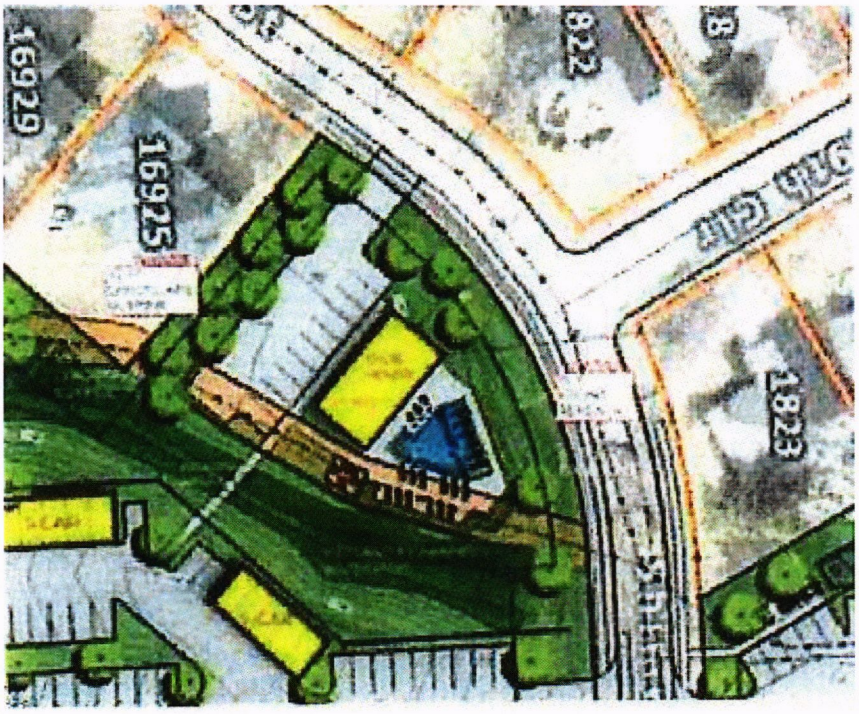
The variances requested for the South Lot arise from design preference, and are not necessary to develop the site.

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



T220; Exhibits 1 and 2, Bill of Exceptions Vol. 2.

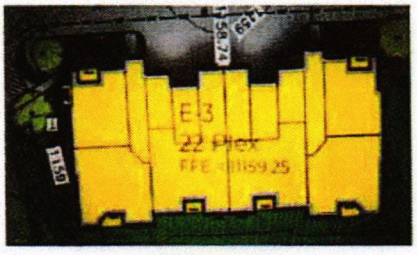
For its February 17, 2023 application to the ZBA, Applicant presented specifications for the 'club house' amenities as (see T48 and T49):



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



T220; Exhibits 1 and 2, Bill of Exceptions Vol. 2.

According to the ZBA, the pool/clubhouse design is "where two of the waivers come into play." T198; P. 30, Exhibit 1, Bill of Exceptions Vol. 2. However, all of Applicant's requested variances (graphical manifestations and verbal descriptions) are vague. T184, T240-2. 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). T184, T242. Rather, they are for 3 entire linear setbacks of Applicant's south parcel to be reduced. T184, T242.

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?" T17, T40, T232, T290, 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." T17, T40, T232, T290, 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." T17, T40, T232, T290, P. 2, Exhibit 14, Bill of Exceptions Vol. 2; and (d) "[t]his requested variance would grant special or peculiar favor to this applicant..." T17, T40, T232, T290, 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. T40-41, T111, T172, T240, 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." T40-41, T111, T172, T240, PP. 64-65, 72, Exhibit 1, Bill of Exceptions Vol. 2; (3) Applicant's site plan is a self-inflicted design choice. T40-41, T111, T172, T240, 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..." T40-41, T111, T172, T240, P. 4, Exhibit 1, Bill of Exceptions Vol. 2.

VI. SUMMARY OF THE ARGUMENT

Appellant disputes Appellee's assertions that, in the instant, the District Court's decisions were *not* 1) not supported by the evidence, 2) unreasonable, 3) arbitrary, and 4) 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).

Appellant rejects Appellee's claims that Appellant proposed only "four assignments of error" to the District Court's decisions and refers this honorable Court to actual Appellants Brief.

Appellant disputes Appellee's assertion that the ZBA "extensively questioned [Applicant]." This appeal exists because of the ZBA's rushed, hasty and results-based decisionmaking to grant the Applicant's 'wish(es)' for a large land area available for development to (1) offset the Applicant's pending threat of loss of project land to a third party's adverse possession claim, and (2) desire to potentially develop Applicant's a physically larger building in the westerly part of the south parcel (i.e. build a 22 unit building versus a 20 unit building as was proposed in November 15, 2022), and (3) expand boundaries on the entirety of 3 sides of the south parcel to further Applicant's pecuniary interests (i.e. potentially build a 201 unit apartments complex versus a 194 unit apartments complex). *See generally* Vol II. In so doing the ZBA intentionally ignored impeaching evidence of the Applicant's intent and created pretextual reasons to ineffectively attempt to rationalize the ZBA's decisions in the instant. *See generally* Vol II.

Evidence of this ZBA biased includes the absence of questioning of

Applicant as to the scope creep of the project (i.e. expansion of building sizes and building footprints on the south parcel) where the ZBA was on notice from objectors (1) of Applicant's statements to the City of Omaha a few months earlier that it could only develop its project into a maximum of 194 units while complying with applicable zoning ordinances, (2) of Applicant's statements to the City of Omaha a few months earlier that it not request zoning variances for the project, (3) of Applicant's preference to present to the ZBA a site plan design for improvements that cannot feasibly comply with applicable zoning ordinances, (4) that Applicant's land for the project was then-subject to an active lawsuit for adverse possession, (5) that Applicant's 1999 re-subdivision of the south parcel to create an approximately .2 acre parcel commonly known as 16925 Shirley Street and subsequent sale thereof, created and extenuated Applicant's alleged hardship/difficulty that is the crux for two of Applicant's requested variances, (6) that Applicant's proposed site plan was speculative, (7) that Applicant and ZBA did not limit the variances to a necessary remedy (such as moving setback w for x feet on y boundary for z line segment), and (8) the Applicant claims by its own public testimony Applicant can develop a $35,000,000 - $40,000,000 project without any variances. *See generally* Vol II. Importantly, Appellee does not dispute these facts. Consistent with the ZBA, the District Court abused its discretion by neither overturning the ZBA decision(s) nor order remand to the ZBA.

Appellant disputes Appellee's statement that the district court found that the hardships were not self-imposed. Neither the ZBA nor the District Court engaged in any analysis of objectors' comments presented to the ZBA. Frankly, the ZBA and District Court wholesale ignored the impeachability and substance, respectively, of all of objections raised at the ZBA hearing, including challenges to Applicant's credibility. Appellant cannot help but observe the ZBA dismissed the merits and substance of all objectors' comments as 'inconvenient truth.' Appellant would be remiss if Appellant didn't demonstrate that many (but not all) of Appellant's objections mirror those raised by the City of Omaha Planning Department T240.

In so doing, the ZBA court engaged in results-based decision making and dismissed practically all objections as sourced from classic NIMBYs – 'Not In My Backyard' spineless complaining troublemaking simpletons (all bark and no bite) who present noisy non-meritorious opposition to any development in any form and are proponents of conspiracy theories. The ZBA applied a broad brush of disinterest for objectors that colored all of the objectors as NIMBYs to be ignored. Emblematic of such is, during the ZBA hearing, the ZBA concerned more interested in whether absent commercial neighbors to the south of the south parcel objected rather than those who tendered written objections or attended in person. In its deafness, the ZBA summarily dismissed the substance of testimony of Mr. Kass, Mr. Nolan, and Mr. French, who collectively possess 3 doctorates and 21+ years of post high school education and in consultation by a licensed architect, in deference to the testimony of the Applicant, who by impeachment during the ZBA hearing has(d) demonstrated credibility issues and an inability to demonstrate (graphically) or articulate (verbally) the 'what' and 'why' for its requested variances.

A zoning board of appeals' treatment of a person as a NIMBY is fairly common in the United States; the treatment of objectors as NIMBYs borders on the psychological tactic of 'gaslighting' the objectors. Appellant has personally received this psychological treatment from the City of Omaha and City of Omaha personnel. In lieu of labelling me a NIMBY in my presence, Omaha / Douglas County personnel use 'code' words when introducing Appellant such as "he's opposed to development" (without me ever having testified or been asked whether I am opposed to development or any particular development) or, inside of a Douglas County courtroom, I heard "[Appellant] insulted the Applicant's architect's work." Those statements are a coded communication among Omaha / Douglas County personnel in lieu of saying "don't listen to or respond to anything that comes out of this guy's mouth; just ignore him – he's a noisy whiny NIMBY who is probably grabbing inapplicable arguments from Google search results; he'll go away if we keep ignoring him and his arguments."

Be that as it may, it does not change the facts in this case show the

ZBA's rush to favor the Applicant caused the ZBA to skip over analysis and not discuss the merits of the Omaha Planning Department's credible objections (among public commentors' credible objections) to the Applicant's variance request(s).

Appellant agrees with Appellee's assertion that the Nebraska courts have not precedentially ruled on whether the self-created hardships/practical difficulties that Appellant asserts are such. The absence of precedent makes this a case of first impression for the Nebraska appellate courts and this honorable court. As stated below, courts in other jurisdictions have adjudicated that Applicant's testimony and conduct in similar cases constitutes both an absence of hardship / practical difficulty and establishes Applicant's conduct complained of in the ZBA record as constituting self-created hardship(s) / practical difficulty(ies). For reasons stated below, the cases Appellee cites are the so distinguishable on facts and law as to not be precedent for the instant case.

This case is also a case of first impression for the Nebraska appellate courts and this honorable court because, after Appellant's reasonable inquiry, no other Applicant has come to a zoning board of appeals so prematurely and so disingenuously to ask for so much zoning variance relief. It took much chutzpah – extreme confidence without shame – for Applicant to claim hardship / practical difficulty that does not exist and engage in a charade that the 201 unit apartment project is the same as a 194 unit apartment project. In this case, the ZBA was complicit in the charade.

VII. ARGUMENT

A. The Appellant's statement of facts a correct record of facts.

Appellant has remedied citations in this reply. The reasons stated above, Appellant objects to Appellee's statement of facts.

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

Based on the arguments above, Appellant disputes Appellee's argument that this Court owes full deference to the ZBA and disputes that this Court is required to affirm the order of the district court.

1. The decisions of the ZBA and the district court are not entitled to deference.

Appellant admits 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).

Appellant rejects that the decisions of the ZBA and the district court here are entitled to deference as they were not supported by competent evidence. See *Eastroads*, 261 Neb at 8977, 628 N.W.2d at 683.

2. The Law of Zoning Variances in Nebraska

i. *Authority of the Zoning Board of Appeals*

Appellant admits that, in limited circumstances, a zoning board of appeals is statutorily authorized to relax the 'strict letter' of zoning codes *See Eastroads, LLC v. Omaha Zoning Board of Appeals*, 261 Neb 969, 976 628 N.W.2d 677, 682 (2001).

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 ruled a few times on what does and does not qualify. That said, all of those are cases are highly distinguishable from the facts of the instant case.

"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.*

A leading Nebraska case on zoning variances, the *Eastwoods* case, is so distinguishable as to be inapplicable as precedent here where it involved a piece of land that was mostly unusable due to soil that could not be built upon and overlay of a federal interstate right of way. *Eastroads, LLC v. Omaha Zoning Board of Appeals*, 261 Neb 969, 628 N.W.2d 677 (2001). In *Eastwoods*, strict application of zoning ordinances (i.e. not granting a setback variance) in light of existing conditions would have potentially rendered the entire piece of land as totally unusable. Id at 683-84. In contrast to the instant facts, adjacent residential parcels were *vacant* unimproved land. Id at 683-5. Also, in contrast to the instant scenario, the *Eastwoods* court held that even if the zoning board reduced one of the setbacks, the reduction would be of no consequence to the neighboring parcels because the landowner could not practically build a vertical structure within the physical area that received setback relief. Id. Equities favored the landowner in *Eastwoods* including because there were no accusations of misrepresentations or self-inflicted hardship / practical difficulty and the gravel pits and interstate right of way easement could not be moved. Id at 680-683. For brevity, Appellant has simplified

voluminous other distinctions between *Eastwoods* and the instant case.

Another leading zoning case on variances, the *Rousseau* case, is also so distinguishable as to be inapplicable as precedent. *Rousseau v. Zoning Board of Appeals of Omaha*, 17 Neb.App. 469, 764 N.W.2d 130 (2009). In Rousseau, a parcel in the Dundee neighborhood of Omaha burned down. Id. at 471. Omaha's zoning ordinances were enacted *after* the adjacent parcels were built and therefore, adjacent parcels did not comply with zoning ordinances and their non-compliance was 'grandfathered' in. Id. at 478. Equities favored the landowner in *Rousseau* because the land owner's variance requests were fully engineered, the land was not part of a single subdivision designed to have a specific 'look and feel', the variance request(s) were for de minimis inches, and adjacent parcels were already violating many of the same zoning ordinances from which the applicant requested relief. Id at 476-8. In contrast to the instant case, Applicant's land is part of a single subdivision – the Rose Garden Estates subdivision - designed to have a specific 'look and feel', which subdivision has 262 residents and 262 improved lots – none of which have zoning variances. T330-331. Moreover, for this appeal, parcels adjacent to Applicant's parcels have occupied their land for decades and Applicant has not 'used' or 'occupied' Applicant's parcels. Also, in contrast to the instant, in *Rousseau*, the variance requests were supported by an engineered proposal and not based on inaccurate or speculative site plan(s) for which no building permit could issue. Id. In *Rousseau*, the requested variances were de minimis and for inches. Id. at 476-478. The variances were based on actual needs of the landowner. Id. For brevity, Appellant has simplified voluminous other distinctions between *Rousseau* and the instant case.

3. <u>Under the facts of this case, there was no unnecessary hardship or practical difficulty.</u>

Appellant disputes Appellee's assertions that the ZBA's record includes "substantial evidence" (quoting Appellee) to grant the

requested variances in the instant. Appellant disputes that Applicant's purpose for the variance was not to increase the size of its proposed apartment complex. Applicant disputes that only neighbors – the alleged 'commercial neighbors' to the south of Applicant's land have/had standing to object to a ZBA grant of granting relief to Applicant to having to comply with zoning ordinances for the *entire* south setback of Applicant's south parcel. To the south of the Applicant's south parcel is a residential/commercial buffer area consisting of a landscaped, park-like setting, and extra wide walking path for the neighborhood to walk pets, push strollers, skateboard, and ride bicycles.

C. Appellants specific arguments have merit and are not attempts to relitigate the ZBA hearing

i. Ripeness

Appellant agrees with Appellee there exists no Nebraska case law or precedent where a zoning board of appeals grants variance for a real estate project (1) subject to an active pending active adverse lawsuit, (2) where the applicant's site plan and testimony cannot articulate the 'what' and 'why' as to why applicant needs relief from zoning ordinances, (3) where an applicant and zoning board of appeals engage in a fiction that an applicant is simply trying to expand its development from 194 units to 201 units, or (4) where an applicant asks for extensively more setback relief that it can articulate it needs and is not required to testify for itself as to what relief it actually needs. If the District Court's ruling in this case is affirmed, the floodgates will open for every landowner in Nebraska to preemptively and incessantly ask for setback variances based on little or no evidence because this case would set precedent that a landowner is entitled to relief before it can demonstrate a need for such relief.

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

As outlined extensively above the ZBA ignored practically all objections to the application. The ZBA treated objections as NIMBY-sourced objections and meritless. Appellant disputes that the pre-existing adverse possession lawsuit was irrelevant and re-emphasizes, in contradiction to statements in Appellee's response in this appeal, that the ZBA's counsel told the district court the variance requests and proposed site plan would become moot where the adverse possession claims prevailed against Applicant. Pg. 6, Bill of Exceptions Vol. 1.

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

Appellant agrees that Appellant suggests Applicant had an opportunity to negotiate to move the sewer easement where is was built during his ownership of the south parcel. T344-347. More importantly, today, Applicant has an existing opportunity to negotiate the move the sewer easement. In the District Court hearing, Appellee's counsel admits(ed) the same. Pg. 39, Bill of Exceptions Vol. 1.

According to author Osborne M. Reynolds, Jr.'s 1988 American Bar Association article, in jurisdictions (other than Nebraska) where an owner subdivides (or otherwise disposes of) a tract leaves himself with a "substandard" piece of land that allegedly cannot profitably be used in conformity with applicable setback restrictions, similar to the instant, and then seeks a variance, the analysis for denial of variance is similar to where one develops property in violation of zoning restrictions and then seeks a variance. Osborne M. Reynolds, Jr., Self- Induced Hardship In Zoning Variances: Does A Purchaser Have No One But Himself To Blame, 20 Urban Lawyer 1, at 11-12 (American Bar Association, Winter 1988) (citing Anderson & Mayo, *Land Use Control*, 29 SYRACUSE L. REV. 187, 210 (1978); *Variance Law in New York: An Examination and Proposal, 44 ALB L. Rev. 781 (1980)*, at 804-05, both concluding that a variance is nearly always denied under such circumstances); see also *Ferryman v. Weisser*, 3 A.D.2d 674, 158 N.Y.S.2d 587 (1957) (memorandum decision), and *Henry Steers, Inc. v. Rembaugh*, 259 A.D. 908, 20 N.Y.S.2d 72

(1940), *aff'd without opinion*, 284 N.Y. 6221, 29 N.E.2d 934 (1940), and *In re* Volpe, 384 Pa. 374, 121 A.2d 97 (1956). The rationale for denial is the subdividing owner has no one to blame but itself for the predicament. Id.; see also *Podmer's v. Village of Winfield*, 39 Ill. App. 3d 615, 350 N.E.2d 232 (Illinois Court of Appeals 1976) (holding the owner who subdivided land with knowledge of then-current zoning regulations was properly denied a variance for the retained portion of the land).

In the instant, similar to the *Podmer's* case, Applicant subdivided the south lot, thereby creating the 264th parcel of the Rose Garden Estates Subdivision, and sold it to increase Applicant's profits. *Podmer's v. Village of Winfield*, 39 Ill. App. 3d 615, 350 N.E.2d 232 (Illinois Court of Appeals 1976). Like in the instant, the plaintiff in the *Podmer* case, has no equities on its side having created the need for variance requests pertaining to the north and west sides of Applicant's south parcel. *Podmer's v. Village of Winfield*, 39 Ill. App. 3d 615, 350 N.E.2d 232 (Illinois Court of Appeals 1976).

iv. The ZBA and District Court ignored Applicant's misleading, inaccurate, incomplete, and contradictory statements.

Appellant disputes Appellee's argument(s) that Appellant attempts to relitigate factual findings. The ZBA and the District Court ignored practically all of objector's comments and hastily decided results-based decision(s).

v. The ZBA testified for Applicant.

Appellant disputes Appellee's assertion(s) that the ZBA did not testify in Applicant's favor.

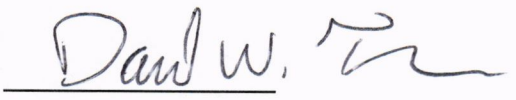
D. An Award of Court Costs is Appropriate

Appellant disputes Appellee's proposition(s) that an award of court costs is not appropriate.

VIII. CONCLUSION

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' transcription fees, 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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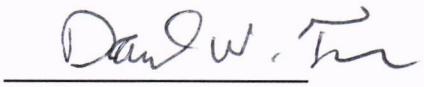
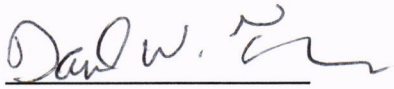
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 7,215 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.



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 4, 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).



Certificate of Service

I hereby certify that on April 4, 2025 I provided a true and correct copy of this *Brief of Appellant* to the following:

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