2014 WL 8392645 (Minn.) (Appellate Brief)
Supreme Court of Minnesota.

RDNT, LLC, a Minnesota limited liability company, Appellant,
v.
THE CITY OF BLOOMINGTON, a Minnesota municipal corporation, Respondent.

No. A13-0310.
April 24, 2014.

Brief and Addendum of Amicus Curiae Ebenezer Society

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***1 STATEMENT OF INTEREST**

The Ebenezer Society has been a leader in providing **elderly** care in the Twin Cities for nearly 100 years. [1] Since its founding in 1917, the Ebenezer Society has expanded its roots in our community by increasing the programs available to the **elderly** over time as the need and demand for **elderly**-care services has grown. Given its stature and heritage, the Ebenezer Society is acutely in tune with the needs of our senior citizens. And the need for increased **elderly**-care services is perhaps greater now than ever, as improvements in healthcare and progressive attitudes towards assisted-living facilities have resulted in increased life expectancy and demand for **elder** care throughout our community.

Ebenezer's interest in this case is to give a voice to the many families seeking care and comfort for the **elderly**. This population continues to have greater medical needs and requires places for them to live safely. If allowed to stand, the decision below and its progeny will cause the increasing need for **elder**-care facilities to be arbitrarily disregarded, even when alternatives exist that address the concerns of neighbors to a development.

INTRODUCTION

As *amicus curiae*, the Ebenezer Society sees the issue for this Court as quite simple: Whether the City of Bloomington may rely on disconnected excerpts from a ***2** comprehensive plan to stifle a proposed expansion of a senior citizen long-term care facility without taking into account proposed mitigating conditions. It cannot.

But from a broader perspective, if allowed to stand, this case will have pervasive and undesirable collateral effects. Of particular concern is the fact that the City and the appellate court seem to have ignored considerable efforts by the RDNT to mitigate the speculative concerns of the nearby residents. Ignoring these mitigating conditions is contrary to longstanding Minnesota law. Indeed, multiple appellate decisions have held that a city acts in an arbitrary and capricious manner when denying a Conditional Use Permit ("CUP") without allowing for mitigating conditions to be implemented, just as the City did here. When a city

arbitrarily chooses not to consider a senior housing facility's proposal of reasonable conditions, development stops and, in this case, the needs of the seniors in our community are neglected.

In this case, the Campus existed long before the low-density households opposing the proposed expansion. One should not dismiss the fact that those who are concerned about the Campus affirmatively decided to move next to the facility. This is especially important here because the record confirms that RDNT proposed mitigating conditions to address any neighborhood concerns, yet those factors were not considered at all or were summarily dismissed. From the perspective of this amicus, if the lower court decision is allowed to stand and the mitigating conditions that would resolve the concerns remain ignored, then senior citizens would be denied a safe, healthy living environment by isolated complaints of individuals who chose to live next to the same Campus.

***3** Unfortunately, while the trial court judge seemed to address these issues, the City's denial of the CUP application, and the court of appeals' decision to reverse the district court, were not supported by existing case law or public policy. This Court should reverse the court of appeals.

LEGAL ISSUES

I. THE CITY ARBITRARILY DENIED THE CUP APPLICATION BY FAILING TO CONSIDER MITIGATING CONDITIONS.

Several cases have addressed the mitigating conditions of a CUP applicant to resolve public and government concerns regarding the proposed land use. The consistent principle echoed throughout our case law is that a city arbitrarily denies a CUP application when it fails to appropriately consider the impact of the mitigating conditions on a proposed CUP. We are concerned that if allowed to stand, the decision below will have the long-term effect of disregarding those conditions in the future, thereby disregarding an essential piece of the analysis.

This Court has repeatedly emphasized the significance of mitigating conditions in CUP cases. For example, in *Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee*, this Court affirmed the district court's reversal of a CUP denial. 303 Minn. 79, 86, 226 N.W.2d 306, 310 (1975). In addressing the errors made by the city, this Court specifically addressed the failure of the city and opposing citizens to consider mitigating conditions that could have resolved the objections to the permit. *Id.* at 85-86, 226 N.W.2d at 209. Similarly, this Court reversed the denial of a CUP in *C.R. Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320, 328 (Minn. 1981). In *CR Investments*, this ***4** Court articulated the failure of the city and the citizens to consider mitigating conditions to absolve concerns over the use permit. *Id.* at 325. These long-standing, well-reasoned cases, reflect the reality that the law should encourage a collaborative process between city, citizens, and applicant in land-use permits.

Not only is the court of appeals' decision in this case irreconcilable with this Court's reasoning in *Minnetonka Congregation and C.R. Investments*, it also contradicts its own prior cases involving mitigating conditions made by an applicant. In *Trisko v. City of Waite Park*, for instance, the applicant sought to develop a granite quarry. 566 N.W.2d 349, 351 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997). Citizens opposed the permit based partly on concerns of increased traffic and dust, and the city denied the application. *Id.* at 351-52. The court of appeals reversed. *Id.* at 357. The court of appeals noted that the applicant had worked with the Department of Transportation in order to alleviate the traffic concerns, and offered to implement state-of-the-art technology to address the dust issue. *Id.* at 355. The court concluded that the city acted arbitrarily in denying the CUP based on "neighborhood opposition and the concern for public safety" in light of these mitigating conditions. *Id.* at 357.

The court of appeals reached a similar conclusion in *Yang v. County of Carver*, 660 N.W.2d 828 (Minn. App. 2003). Yang involved a CUP application to operate a custom slaughterhouse on an existing farm. 660 N.W2d at 829. The planning commission voted to deny the application, prompting the applicant to make several mitigating conditions in response to the commission's concerns. *Id.* at 831-32. The court of appeals reversed the city's eventual denial of the permit. *Id.* at 836. The court ***5** articulated several reasons why the denial was arbitrary, including the apparent oversight of the applicant's proposed

mitigating conditions limiting the scope of operations. *See id.* at 833-36. Based on these and other errors, the court concluded that the "county did not have a legally sufficient reason to deny the permit." *Id.* at 836.

But perhaps the most apt example of a city improperly overlooking mitigating conditions for the purposes of this case is the court of appeals' unpublished decision [2] in *duCharme v. Otter Tail Board of Commissioners*, No. A08-529, 2009 WL 1851445 (Minn. App. June 30, 2009) (Add. 1). There, the applicants sought to build a RV park on 22 acres of lake-front property in Otter Tail County. *duCharme*, 2009 WL 1851445 at *1 (Add. 1). The initial proposal, which called for 45 RV units and 19 boat slips, was presented to the planning commission at a public hearing. *Id.* Local residents attended the hearing and voiced a myriad of concerns over the proposed park, including: compatibility with the existing area, density, environmental impact of the lake, vegetation screening, traffic, dust, noise, and lighting. *Id.*

In response to the residents' concerns, the applicants proposed multiple mitigating conditions throughout the application process. *Id.* The applicants offered to plant trees near the highway to shield the park from visibility of motorists to alleviate concerns over the park's compatibility with the existing area. *Id.* The applicants also offered to modify the route and access roads to the park to mitigate the concerns related to traffic, parking, ***6** and general dust. *Id.* The applicants further offered to reduce the total number of RV units by 33%, and eventually to remove all boat slips. *Id.* at *1-2. Additionally, the applicants offered to prohibit all lake access from the RV park and any docking on the shoreline. *Id.* Nonetheless, the board denied the CUP application on the same grounds recommended by the planning commission. *Id.* at *3.

The court of appeals disagreed. *Id.* at *5. The court concluded that "although the planning commission heard testimony about [the applicants'] mitigation efforts during the public hearings, the county board did not address the effect of these efforts or impose any other traffic and density mitigation requirements as conditions of granting the CUP." *Id.* Because "the record indicates that the county board failed to make adequate findings as to why [the applicants'] proposed mitigation efforts and agreed-to conditions would not alleviate the concerns about traffic, density, and screening," the court reversed and remanded. *Id.* at *5.

We are concerned that the decision below drastically deviated from the lessons of *Trisko*, *Yang*, and *duCharme* and their progeny, as the mitigating conditions were not considered. Indeed, mitigating conditions are intended to create workable solutions to resolve concerns about a particular development. Yet, in this case those mitigating conditions were ignored. Workable solutions to remedy the neighbors' concerns were presented but summarily disregarded. As an organization devoted to providing safe and affordable care for the **elderly**, Ebenezer believes that disregarding such mitigating conditions will prevent long-term care organizations from adapting to the essential needs of this growing and vulnerable population.

***7** Here, RDNT made a host of offers to mitigate the traffic concerns of the homeowners and planning commission in this case. RDNT responded to the initial concerns of the neighbors by decreasing the total number of units in the expansion, reducing the building from four stories to three stories, capping the height of the building at 50 feet, increasing the setback, and further providing photo simulations to demonstrate that the expansion would not affect the neighborhood sightlines. RDNT also offered to further mitigate parking concerns by incorporating 50 underground parking spaces underneath the expansion, which created an excess of 92 parking spaces over and above the ordinance requirement. These compromises were designed to ensure that all parking would be provided onsite.

RDNT also offered to greatly expand the scope of its TDMP to include, amongst other things, cash incentives for carpooling employees, public-transit incentives for visitors, combined vendor deliveries, and consolidated delivery times. Furthermore, RDNT proposed a good-neighbor policy, which involved constructing speed bumps at the facility entrances, encouraging and requiring all employees to obey traffic laws, working with Google to achieve more accurate and direct online directions, replacing vendors who violate the TDMP policies, and retaining a traffic expert to monitor the success of its policies. RDNT even offered to extend the existing sidewalk along 100th Street, install a crosswalk, and expand the vegetation between the facility and the neighborhood. In fact, the Campus made nearly every conceivable attempt to mitigate the objections other than offering to simply build the expansion elsewhere. And each of these many mitigating conditions was either unfairly diminished

or completely disregarded by the City. By ***8** embracing a decision that summarily disregards mitigating conditions, the court of appeals unfairly disregarded established precedent requiring such consideration. That analysis will prevent the creation of reasonable and fair development opportunities in the future.

The failure to appreciate RDNT's mitigating conditions renders the denial of RDNT's CUP application arbitrary. *See Trisko,* 566 N.W.2d at 357; *Yang,* 660 N.W.2d at 834, 836; *duCharme,* 2009 WL 1851445 at *4-5 (Add. 5); *see also Tri-City Paving, Inc. v. Cass County Planning Com'n/Bd. of Adjustment,* No. A-11-2054, 2012 WL 4475742 at *6 (Minn. App. Oct. 1, 2012) (reversing denial of CUP application, in part, because the city wrongly weighed anecdotal testimony of neighbors greater than the proposed mitigating conditions to resolve the expressed concerns). This failure alone warrants reversal.

II. SOUND PUBLIC POLICY FAVORS ACCORDING INCREASED CREDENCE TO THE MITIGATING CONDITIONS MADE BY AN EXISTING HEALTHCARE FACILITY SEEKING TO EXPAND.

Compared to *Trisko, Yang, and duCharme,* the City's failure to truly take into account RDNT's mitigating conditions is especially problematic in this case. Unlike those cases, RDNT's CUP application related to a healthcare facility that was in existence long before the neighborhood seeking to prevent its current expansion. This is troublesome for two reasons.

***9** A. The City failed to give proper consideration to the fact that the CUP application involved a healthcare facility when it ignored RDNT's mitigating conditions.

A healthcare facility provides great public benefit. The current proposed expansion was a direct result of RDNT frequently being forced to discharge its short-term skilled-nursing residents because it lacked the room availability to transition these senior citizens into RDNT's assisted-living program. The added transition of switching facilities is difficult on these vulnerable seniors. Many of these senior citizens require medical attention and now must completely uproot and move to a different facility, oftentimes to a different city altogether. By ignoring RDNT's mitigating conditions in denying the CUP application, the City has done nothing to address the growing need for **elder** care in its community. Instead, it has effectively placed unnecessary hurdles between those needing care and the facilities capable of assisting them.

We are equally concerned that the City's analysis did not appreciate the evolving healthcare standards and regulations. RDNT currently operates fewer beds than were originally permitted in its previous CUP. Indeed, the City - as well as the court of appeals-never addressed the fact that the fewer number of beds currently operated by RDNT would logically result in less traffic than would have been generated by the maximum occupancy originally permitted by the City. Healthcare providers must continually adapt their facilities to meet new standards and regulations, some of which necessarily decrease the number of patients that an older facility can serve. Disallowing mitigating conditions, as the City did here, imposes an untenable double-standard on a healthcare facility: either risk noncompliance with federal and state healthcare ***10** regulations, or resign to an ever-decreasing capacity to serve your patients because expansion is not an option.

Furthermore, the City's failure to acknowledge RDNT's status as a healthcare provider wrongly overlooked the public interest in providing residential care facilities. In *Northwest Residence, Inc. v. City of Brooklyn Center,* the court of appeals addressed a special-use permit seeking to convert an existing building in a residential neighborhood to a healthcare facility for the mentally ill. 352 N.W.2d 764, 766 (Minn. App. 1984). The city denied the permit after neighbors complained at a public hearing that the facility would create traffic and parking problems and would generally reduce enjoyment in their properties. *Id.*

The court of appeals overruled the denial. *Id.* at 774. In doing so, the court noted that the city seemed to be imposing "special standards" not found in its ordinances when it denied the application. *Id.* at 773. The court concluded that:

> If... municipalities were permitted to establish special standards for the operation of residential facilities for the mentally ill, in this case stricter occupancy standards than are required under its own ordinances or state

> regulations, municipalities could effectively bar establishment of such facilities or make them economically infeasible. This result would be contrary to the state policy in favor of residential treatment.

Id.

This case is instructive. *Northwest Residence* involved a different type of permit than the CUP sought by RDNT. *See id.* at 766. But both cities failed to properly appreciate the public policy in favor of residential healthcare facilities in denying use ***11** permits. And both cities exceeded the parameters of their own ordinances in doing so. Like *Northwest Residence*, the City's failure to appreciate public policy in favor of residential healthcare facilities warrants reversal.

The mitigating conditions in this case were not made by a strictly commercial enterprise like an RV park or granite quarry. Rather, the mitigating conditions were made to increase the healthcare opportunities for senior citizens in accordance with our community's longstanding interests in providing exceptional healthcare and protection for the **elderly**. Given this reality, the City's denial of RDNT's CUP application is arbitrary and contrary to significant public-policy considerations.

B. The City failed to give proper consideration to the fact that the Campus predates the existence of the neighborhood, and ignoring mitigating conditions allows newer neighbors to control a longstanding healthcare facility.

The second public-policy problem in this case is that the City approved RDNT's land to be used as an **elder**-care facility long before the neighborhood was developed. Thus, by disregarding reasonable mitigating conditions that would resolve any neighborhood concerns, we are concerned that the neighborhood has received carte blanche power to regulate any future expansion of this **elder**-care facility. The neighbors' incredible power now exists irrespective of how great the need for assisted living grows in the community.

We are concerned that healthcare facilities should not be subject to such unbridled neighborhood power. If left alone, the court of appeals decision paves the way for small factions of citizens to dictate the healthcare opportunities of the community at large, even ***12** though they knowingly moved next to that healthcare facility and the concerns were addressed. And, to be clear, the collateral effects of this decision will reach well past **elder**-care facilities. Indeed, as presently constructed, the court of appeals' decision can be extrapolated throughout the healthcare industry as a whole, from urgent-care facilities to pediatric-care clinics and beyond.

With ever-evolving healthcare regulations and the increasing need for medical services in our community, healthcare facilities need reasonable avenues through which to renovate and expand their facilities. Incorporating reasonable mitigating conditions allows the senior center to assist the **elderly** while addressing the citizens' concerns. That is why we are greatly concerned that the City's analysis and the court of appeals' decision are so problematic -- a workable solution has been summarily disregarded.

By ignoring the fact that the Campus predates the neighborhood, the City has essentially allowed new-coming neighbors to dictate the future of a preexisting healthcare facility. And, by ignoring RDNT's offers to mitigate the concerns of this small group of citizens, there is nothing that the Campus can do about it. This is an untenable precedent at odds with public policy, and this Court should correct the City's mistake.

CONCLUSION

Minnesota prides itself on its excellent healthcare community and taking care of its senior citizens. Consistent with this pride, healthcare facilities need to evolve and adapt to meet the changing needs of our community. The City's denial, as well as the court

of appeals' subsequent decision, is fundamentally at odds with this longstanding ***13** communal pride. Indeed, handcuffing the expansion plans of a healthcare facility without exploring mitigating conditions benefits nobody.

A rational, big-picture approach is necessary for cities to accommodate the needs of changing populations while treating neighbors fairly. To do that, proposed mitigating conditions must be taken seriously. We are concerned that the City and the court of appeals failed to do that. Because the City's decision is contrary to existing Minnesota law favoring mitigating conditions in CUP applications and is contrary to sound public policy in maintaining excellent healthcare, we urge this Court to reverse the court of appeals.

Appendix not available.

Footnotes

1 Pursuant to Minn. R. Civ. App. 129.03, this brief has been authored in full by counsel for the Ebenezer Society, a subsidiary of Fairview Health Services. No monetary contribution toward the preparation or submission of this brief has been received from the parties to this dispute or anyone else.

2 Of course, unpublished decisions of the court of appeals are not precedential. Minn. Stat. § 480A.08(3) (2012). Nevertheless, this particular decision is instructive. The court of appeals reached the exact opposite holding in this case as it did in *duCharme*, despite strongly analogous facts. These paradoxical results further underscore the need for this Court to clarify the importance of mitigating conditions in CUP-application processes.

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