

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

Jordan Community Action Group, an  
unincorporated entity, Michelle Bisek,  
Christa Oldsberg, and Heidi Lawrie,

Court File No. 70-CV-10-30197

Plaintiffs,

v.

**ORDER  
GRANTING SUMMARY JUDGMENT  
& JUDGMENT FOR PLAINTIFFS**

The City of Jordan,

Defendant.

The above-entitled matter came before the Honorable Diane M. Hanson, Judge of District Court, on May 10, 2011, at the Scott County Judicial Center, pursuant to Plaintiffs Jordan Community Action Group, Michelle Bisek, Christa Oldsberg, and Heidi Lawrie ("Plaintiffs")'s motion for summary judgment in a declaratory judgment proceeding involving Defendant City of Jordan ("City")'s granting of a conditional use permit to the Ballard-Sunder Funeral Home to operate a crematorium. Phillip R. Krass, Attorney at Law, appeared on behalf of Plaintiffs. Paul A. Merwin, Attorney at Law, appeared on behalf of the City.

Based upon the file, record, submissions, the arguments of council, and all of the proceedings herein, this Court makes the following:

**FILED** *JH*

**JUN 27 2011**

**ORDER**

**SCOTT COUNTY COURTS**

1. Plaintiffs' motion to strike from the record the City's May 4, 2011, submission of exhibits that were issued after the City's adoption of Resolution 8-23-2010 (Resolution Authorizing a Conditional Use Permit (CUP) to Operate a Crematorium Facility) on August 2, 2010, is hereby **GRANTED**.
2. Plaintiffs' motion for summary judgment, requesting that Resolution 8-23-2010 be declared null and void is hereby **GRANTED**. Said Resolution, and the conditional use

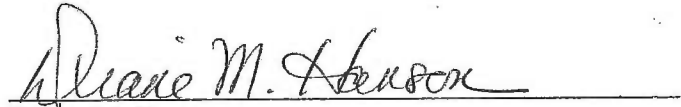
permit contained therein, is hereby declared null and void as contrary to the law. The granting of Plaintiffs' motion for summary judgment results in a declaratory judgment for Plaintiffs.

3. The attached memorandum of law is incorporated herein as the Court's findings of fact and conclusions of law.

**LET JUDGMENT BE ENTERED ACCORDINGLY**

DATED: JUNE 25, 2011

BY THE COURT:



Diane M. Hanson  
Judge of District Court

**JUDGMENT**

I DO HEREBY CERTIFY THAT THE FOREGOING ORDER  
CONSTITUTES THE JUDGMENT OF THIS COURT.

DATE 6/27/11  
GREGORY M. ESS  
COURT ADMINISTRATOR, SCOTT COUNTY, MINN.

DEPUTY 

**MEMORANDUM**  
**Jordan Community Action Group, et. al. v. City of Jordan**  
**Scott County Court File No. 70-CV-10-30197**

**Undisputed Facts and Procedural History**

This case concerns the Ballard-Sunder Funeral Home (“Funeral Home”)’s application for a conditional use permit to install and operate an onsite crematory; Defendant City of Jordan (“City”)’s action with respect to the application; and Plaintiffs Jordan Community Action Group, Michelle Bisek, Christa Oldsberg, and Heidi Lawrie (“Plaintiffs”)’s challenge to the City’s issuance of the permit. Plaintiffs are all residents of the City of Jordan.

The Funeral Home is located at 104 First Street West in Jordan, Scott County, Minnesota, where it has been operating as a funeral home since the early 1900’s. Long after the Funeral Home began its operation, the City enacted a zoning ordinance (“Ordinance”). Pursuant to the Ordinance, the Funeral Home is located in a C-1 zoning district. A C-1 zoning district is a neighborhood business district established to allow commercial uses complementary to and in close proximity to residential uses, with the primary emphasis on local retail facilities such as grocery and convenience stores. In addition to numerous express permitted uses, the Ordinance specifies two conditional uses for the district: funeral home and residential. The Funeral Home never applied for or received a formal conditional use permit. Rather, it has operated as a “grandfathered” use in the district.

On June 15, 2010, the Funeral Home applied to the City for a conditional use permit to “install and operate a cremation facility as part of the [Funeral Home]’s current operation.” The Ordinance does not identify or define a crematory as a use of any type. The application was referred to the planning commission. The planning commission collected and reviewed information about the proposed use and then conducted a public hearing on July 13, 2010. In

addition to the presentation of material and comments favorable to the application, a number of citizens, including some of the Plaintiffs, expressed concerns about emissions; noise; the industrial nature of the use; its impact on nearby properties, including a daycare; its impact on the nearby C-2 district; storage, screening, and traffic; and the extent of the expansion of the existing building. Following the public hearing, the planning commission unanimously recommended that the city council approve the Funeral Home's application for the conditional use permit.

The application was then placed on the agenda of the city council's July 19, 2010, meeting. The council reviewed information from the planning commission and then heard comments from the public. In addition to comments in support of the application, a number of citizens, including some of the Plaintiffs, expressed concerns about health and safety issues; emissions; the expansion of the existing building; and the impact of the use on nearby properties. Following the public hearing, the city council moved to approve the planning commission's recommendation to approve the application for the conditional use permit. The motion carried by a 3-2 vote.

On August 2, 2010, the city council adopted Resolution 8-23-2010: Resolution Authorizing a Conditional Use Permit (CUP) To Operate a Crematorium Facility ("Resolution").

The Resolution included, among others, the following findings of fact:

1. Pursuant to Section 11.35, subd. 3, of the Jordan City Code, the Subject Parcel is currently zoned C-1 Neighborhood Commercial which provides that a funeral home is a conditional use. Interpreting Section 11.35 to include crematoria as part of funeral homes is consistent with the definitions in Minnesota Statutes Sections 149A.02.
2. A June 14, 2010, letter from Timothy Koch of the Minnesota Department of Health, Mortuary Science Section, states that of the 51 crematories in the State of Minnesota, 42 are owned by funeral homes.

3. Pursuant to the City's comprehensive plan, the Subject Parcel would be zoned C-2 Central Business District which provides that a funeral home is a conditional use.

Pursuant to the Resolution, the approval of the application for the conditional use permit was subject to the following conditions:

1. emissions must not exceed 20 percent opacity;
2. combusters must be equipped with afterburners that maintain flue gases at 1,200 degrees Fahrenheit for at least 0.3 seconds;
3. ash must be stored and transported in a way that avoids its becoming airborne;
4. the funeral home will only use the crematory for its own clients; and
5. the Applicant will provide copies of maintenance records and its crematory license to the City for the City's annual review of compliance with the conditions of the conditional use permit.

On August 16, 2010, the City issued a building permit for the installation of a crematory facility in the Funeral Home. On December 7, 2010, the City issued a certificate of occupancy for the use of a "crematory within funeral home."

On December 14, 2010, Plaintiffs served and filed their complaint in this matter, seeking a declaratory judgment declaring the Resolution null and void as unlawful, along with injunctive relief. At the same time, Plaintiffs moved for a temporary restraining order. The motion was heard on December 16, 2010, and denied on that same day. The denial was based upon the Court's determination that Plaintiffs had failed to make a showing of irreparable harm and that there was no pending action by the City to be restrained or enjoined.

On February 18, 2011, Plaintiffs filed their current motion for summary judgment, requesting judgment as a matter of law on their declaratory judgment claim. In their memorandum in support of the motion, Plaintiffs argued that the findings of fact in the Resolution were insufficient as a matter of law to support the granting of a conditional use permit; that a crematory is not an authorized conditional use under the Ordinance; and that the Resolution unlawfully expanded a nonconforming use. Based upon those arguments, Plaintiffs



asserted that the City's issuance of the conditional use permit was arbitrary, capricious, and unreasonable.

In support of their motion, Plaintiffs submitted the following:

- Application for Conditional Use Permit, dated June 15, 2010;
- Memo to the Members of the Planning Commission, dated July 13, 2010;
- Excerpts from the Ordinance;
- Minutes of the July 13, 2010, Jordan Planning Commission Meeting;
- Minutes of the July 19, 2010, City Council Meeting;
- Resolution 8-23-2010;
- Building Permit No. 166-10, dated August 16, 2010;
- Certificate of Occupancy, dated December 7, 2010;
- An unpublished Court of Appeals opinion.

On May 4, 2011, the City submitted its response to Plaintiffs' motion. In its memorandum, the City argued that its approval of the conditional use permit was reasonable and based upon sufficient findings; that a crematorium is an allowable conditional use as part of a funeral home, based upon the definitions contained in Minnesota Statutes; and that the Funeral Home was not a nonconforming use, but a conditional use. The City additionally argued that Plaintiffs' complaint should be dismissed as moot and requested summary judgment as a matter of law in favor of the City.

In support of its response, the City submitted the following:

- The Minnesota Department of Health's Findings of Fact, Conclusions of Law and Order in the Matter of the Need for an Environmental Assessment Worksheet for the Ballard-Sunder Crematory (incomplete and undated, but apparently issued in 2011);
- September 3, 2010, letter from city attorney to city administrator;
- October 11, 2010, letter from city attorney to councilmember (including excerpts from the Ordinance);
- October 27, 2010, memo from city attorney to city administrator;
- Inspection notice, dated December 7, 2010;
- Inspection notice, dated December 9, 2010;
- Certificate of Occupancy, dated December 7, 2010;
- The City of Jordan record regarding Resolution 8-23-2010 (152 pages).

On May 8, 2011, Plaintiffs submitted their reply memorandum, including a copy of an additional unpublished Court of Appeals opinion. On May 9, 2011, Plaintiffs filed a motion to strike certain exhibits submitted by the City. Specifically, Plaintiffs requested that the 2011 Minnesota Department of Health's Findings of Fact, Conclusions of Law and Order, along with letters and memos generated after the adoption of Resolution 8-23-2010, be stricken as outside of the City's record for the adoption of the Resolution.

Plaintiffs' motions were scheduled for hearing before the undersigned Judge on May 10, 2011. As a threshold matter, Plaintiffs indicated that they were pursuing summary judgment only with respect to their claim for a declaratory judgment and that they were no longer pursuing injunctive relief. Regarding their motion to strike, Plaintiffs asserted that the Court's determination of the validity of the City's action should be based upon the record and not on incomplete documents generated after-the-fact. Plaintiffs then made arguments in support of their motion for summary judgment consistent with those contained in their submissions: that the findings in the Resolution were insufficient as a matter of law to support the issuance of the conditional use permit; that a crematory is not an authorized conditional use under the Ordinance; and that the City had unlawfully expanded a nonconforming use.

The City conceded that the Minnesota Department of Health's Findings of Fact, Conclusions of Law and Order, along with letters and memos generated after the adoption of the Resolution, were not part of the record before the City at the time of the adoption, but asserted that the documents were relevant in that they contained the same arguments made by Plaintiffs at the hearing on their request for a temporary restraining order. Notwithstanding the foregoing, the City indicated that it was not strongly opposed to the documents being stricken.

The City then made arguments in support of its position that were consistent with those contained in its submissions, with a few notable inconsistencies. The City maintained that Plaintiffs' lawsuit was moot in that the crematory had already been constructed, but then indicated that this was really an argument for the Funeral Home to make, had it chosen to intervene. The City maintained that its findings were more than sufficient to support the approval of the conditional use permit, including its finding that a crematory can be part of a funeral home. The City argued that the latter finding was rational, based upon its review of Minnesota Statutes and standard practices. The City then conceded that adding the crematory to the Funeral Home was an expansion of the use, but argued that Minn.Stat. § 462.357, subd. 1e, had been broadened in 2002, allowing for the improvement of nonconforming uses and that the Funeral Home and the City had followed proper procedures. The City requested summary judgment as a matter of law in favor of the City and in the alternative, in the event that the Court granted Plaintiffs' motion, a remand to the City for new findings.

Following the hearing, the Court took the matter under advisement.

### **Summary Judgment Standard**

Summary judgment is appropriate when "there is no genuine issue as to any material fact and...either party is entitled to judgment as a matter of law." Minn.R.Civ.P. 56.03. Here, the parties agree that the Court's review of the City's adoption of the Resolution is limited to the existing record, that there are no triable issues of fact, and that the Court can decide the case as a matter of law.

### **Plaintiffs' Motion to Strike Submissions by the City as Outside of the Reviewable Record**

In its memorandum in opposition to Plaintiffs' motion for summary judgment, the City concedes that "in land use cases, the record before the Court is limited to the record which was



developed before the City in making its decision.” However, the City submitted documents that are clearly outside of that record, arguing that the Court should consider them because they contain arguments made by Plaintiffs in support of Plaintiffs’ earlier request for a temporary restraining order. The City presumably included these submissions because Plaintiffs had originally requested injunctive relief in their pleadings. In light of Plaintiffs’ indication that they are no longer pursuing injunctive relief, which the Court views as a withdrawal of said claim, these submissions are irrelevant and outside of the record that the Court can properly consider in its review. Accordingly, Plaintiffs’ motion to strike is granted.

### **Mootness**

As a threshold matter, the City argues that Plaintiffs’ action should be dismissed as moot. A case is moot if there is no justiciable controversy for a court to decide. Kahn v. Griffin, 701 N.W.2d 815, 821 (Minn.2005). A justiciable controversy is one that “involves definite and concrete assertions of right, In re Risk Level Determination of J.V., 741 N.w.2d 612, 614 (Minn.App.2007), and “allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts.,” State ex rel. Sviggum v. Hanson, 732 N.w.2d 312, 321 (Minn.App.2007).

Here, the Funeral Home has applied for and obtained a conditional use permit to operate a crematory on site. Plaintiffs, a group of citizens residing in the City, are seeking a declaratory judgment that the permit is null and void as contrary to law. This issue is not moot because the Funeral Home presumably has a continuing interest in operating the crematory; Plaintiffs have a right to a determination regarding the lawfulness of the City’s action; and the District Court may rule in Plaintiffs’ favor, granting them the relief they request.

The City argues that because the crematory has been constructed and is ready to operate, Plaintiffs' action is moot, citing Apple Valley Square, 472 N.W.2d 681 (Minn.App.1991). In that case, a party initiated a declaratory judgment action, alleging that a municipal re-zoning decision, made a year earlier, was wrong. At the time of the commencement of the action, the city had issued and sold bonds, and the property owner had substantially completed the construction of a large structure.

Here, Plaintiffs initiated their lawsuit just a few months following the City's approval of the Resolution, and while the Funeral Home has constructed the crematory, it is an addition to an existing facility and did not involve the use of municipal funding or financing. Moreover, a ruling in Plaintiffs' favor would not prevent the Funeral Home from installing components of the crematory in another facility. Accordingly, an award of effective relief is not impossible, and Plaintiffs' action is not moot.

#### **Standard of Review Regarding Municipal Action Pursuant to a Zoning Ordinance**

Minnesota cities are empowered to engage in land use planning and to enact zoning ordinances for the purpose of promoting the public health, safety, morals, and general welfare. Minn.Stat. § 462.357, subd. 1. The decision to make policy, including rules or regulations, is generally part of an agency's quasi-legislative power. Eagle Lake of Becker County Lake Association v. Becker County Board of Commissioners, 738 N.W.2d 788, 793-94. As part of this power, municipalities may amend ordinances to, among other things, identify, define, and change the status of various uses, including conditional uses, and to re-zone property. Minn.Stat. § 462.357, subd. 4. The standard of review for legislative and zoning determinations is whether the municipality has acted consistently with the statutory mandate and whether there is a reasonable basis for the decision. Eagle Lake, at 794. This is a narrow and deferential standard.

In addition to legislative authority, municipalities also exercise quasi-judicial power. Typically, a decision to grant or deny a conditional use permit is a quasi-judicial decision that should also be afforded great deference. Citizens for a Balanced City v. Plymouth Congregational Church, 672 N.W.2d 13, 22 (Minn.App.2003). The standard of review for judicial determinations, such as the granting of a conditional use permit, is whether or not the decision was reasonable. Id.

The line between the legislative and judicial functions of an agency is not always clear, and the two functions may merge at some points. Eagle Lake, at 794. For example, when exercising its quasi-judicial function “an agency must frequently decide controversies on the basis of new doctrines, not theretofore applied to a specific problem, though drawn to be sure from broader principles reflecting the purposes of the statutes involved and from the rules invoked in dealing with related problems.” Id., *citing* N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759, 770-71 (1969). Regardless of whether policies or standards are specifically spelled out in rules or regulations, agencies must have the discretion to carry out their judicial function and decide issues at hand. Id., *citing* N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 292 (1974).

In Eagle Lake, Becker County approved a conditional use permit allowing property owners to create a recreational vehicle campground on the shoreline of Eagle Lake. When the property owners applied for the permit, the use was allowed as a conditional use with certain restrictions. However, during the permit approval process, the county placed a moratorium on shoreland development and subsequently amended their ordinance to further restrict the use. Despite the amendment, the county approved the conditional use permit, determining that they should apply the ordinance in effect when the application was filed, as opposed to the amended

ordinance. Although the ordinance was silent on that issue, the county board made the decision based upon their past practice. The Eagle Lake Association then challenged the board's decision, arguing that the board had improperly made a legislative determination during a judicial proceeding. The Court of Appeals upheld the board's decision, finding that the board had the discretion to take this type of limited legislative action in an adjudicatory proceeding and that the board's action was reasonable under the circumstances. Eagle Lake, at 794.

In circumstances where a county or city must interpret its own existing zoning ordinance in order to make either a legislative or judicial determination, as in Eagle Lake, such an interpretation is reviewed as a question of law. Medical Services, Inc. v. City of Savage, 487 N.W.2d 263, 266 (Minn.App.1992), *citing* Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604, 608 (Minn.1980). Three rules of construction apply: (1) ordinances' terms should be construed according to their plain and ordinary meanings; (2) ordinances should be construed strictly against the city and in favor of the property owner; and (3) zoning ordinances must be considered in light of their underlying policy goals. Id.<sup>1</sup>

### **The Crematory as an Expansion of a Nonconforming Use**

As a preliminary matter, the Court takes judicial notice of the Ordinance in its entirety. While the parties have provided the Court with selected excerpts from the Ordinance, the Court cannot decide the issues in this case without the ability to review the Ordinance in its entirety, including all of its general provisions, definitions, and the purposes of its various zoning

---

<sup>1</sup> In Medical Services, the property owner applied for a conditional use permit to construct an infectious waste processing facility in an industrial zone. At the time of application, the city's zoning ordinance did not identify or define the use. However, the ordinance did allow as permitted uses "all fabricating, manufacturing, production, processing and storage of materials, goods and products." When the city refused to amend its ordinance to identify the use as a conditional use and then enacted a moratorium on the issuance of conditional use permits in industrial zones, the property owner sought a declaratory judgment that the use was actually a permitted use in the zone under the existing ordinance. The Court of Appeals ruled in favor of the property owner, finding that the use was a permitted use under the plain language and policy goals of the ordinance.



districts. Additionally, the Court finds that it is necessary to consider Plaintiffs' arguments out of order and will first address the crematory as an expansion of a nonconforming use.

Plaintiffs argue that the Funeral Home is a nonconforming use and that the installation of a crematory is an unlawful expansion of that use under the Ordinance. Pursuant to the Ordinance, a nonconforming use is defined as "a use of land, buildings, or structures legally existing on the effective date of this Chapter which does not comply with the regulations herein governing the zoning district in which such use is located. Any use which has been allowed as a conditional use shall not be considered non-conforming." Ordinance, § 11.02.125. A conditional use is defined as "a use of property which is not a permitted use or accessory use and which requires approval by the Council." Ordinance, § 11.02.44. A permitted use is defined as "a use which is not an accessory use or a conditional use and which is permitted outright in a zoning district."

A nonconforming use is typically one that predates the enactment of a zoning ordinance that prohibits the use. So, the use must either be permitted to remain, usually without expansion or enlargement, or be eliminated by use of eminent domain. The public policy behind this doctrine is to increase the likelihood that such uses will in time be eliminated due to obsolescence, exhaustion, or destruction, leading to a uniform use of the land consistent with the overall comprehensive zoning plan. *See County of Freeborn v. Claussen*, 203 N.W.2d 323, 325 (Minn.1972).

A conditional use, on the other hand, is one that has been identified and defined as a use that may be approved and/or otherwise allowed in a specific zone, as long as certain conditions are met. Typically, conditional uses are compatible with the overall purpose of the zoning district, but may be subject to appropriate requirements, such as ones related to parking and



traffic, storage, site layout, setbacks, landscaping, etc. Conditional uses are not prohibited uses or ones that are necessarily intended to be eliminated.

Here, the Funeral Home began its operation prior to the enactment of the Ordinance. It is located in zoning district C-1, a neighborhood business district in downtown Jordan. The purpose of the C-1 district is to “allow commercial uses complimentary to and in close proximity to residential uses. The primary emphasis is on local retail facilities such as grocery and convenience stores.” Ordinance, § 11.35, Subd. 1. The Ordinance identifies two conditional uses for the district: funeral home and residential. Accordingly, the Funeral Home is not a permitted use, but may be allowed as a conditional use.

It is undisputed that the Funeral Home never applied for or obtained a conditional use permit for its operation as a funeral home, and the Ordinance is silent with respect to whether or not such a pre-existing conditional use must go through the formal conditional use permit process. However, the Ordinance specifically states that “any use which has been allowed as a conditional use shall not be considered non-conforming.” Thus, the Funeral Home, as operated before the installation of the crematory, may be properly characterized as a grandfathered conditional use that has been allowed but not formally approved. Moreover, the use is reasonably compatible with the purpose of the district (commercial uses complimentary to and in close proximity to residential uses) and subject only to conditions related to access and traffic circulation. Notably, it is not a prohibited use or one that the City is seeking to eliminate from the district.

Plaintiffs assert that “it is undisputed” that the Funeral Home is a grandfathered nonconforming use, arguing that its expansion, as conceded by the City, is unlawful under the

Ordinance.<sup>2</sup> However, despite somewhat inconsistent statements at the May 10, 2011, hearing, the City, in its written memorandum, did contend that the Funeral Home is by definition a conforming use. The Court finds that this interpretation of the Ordinance, based upon its plain language, including its definition of nonconforming use, and in light of the Court's foregoing analysis, is reasonable. Accordingly, Plaintiffs' above argument, premised upon the characterization of the Funeral Home as a nonconforming use, must fail.

### **The Crematory as a Conditional or Permitted Use Under the Ordinance**

Plaintiffs more persuasively argue that the City has unreasonably and unlawfully determined that a crematory and a funeral home are identical allowable conditional uses in the C-1 district. The City asserts that a crematory is allowed as a conditional use under the Ordinance as part of a funeral home, based upon its finding that Minnesota Statutes define a crematory as part of a funeral home and its finding that 42 out of 52 crematorium in the State of Minnesota are owned by funeral homes.

Minn.Stat. § 149A.02, subd. 20, defines a funeral establishment as:

any place or premise devoted to or used in the holding, care, or preparation of a dead human body for final disposition or any place used as the office or place of business of any person that provides funeral goods or services to the public.

Minn.Stat. § 149A.02, subd. 34, defines preparation of the body as:

embalming of the body or such items of care as washing, disinfecting, shaving, positioning of features, restorative procedures, application of cosmetics, dressing, and casketing.

Minn.Stat. § 149A.02, subd. 16, defines final disposition as:

the acts leading to and the entombment, burial in a cemetery, or cremation of a dead human body.

Minn.Stat. § 149A.02, subd. 9, defines cremation as:

---

<sup>2</sup> The Ordinance provides that no nonconforming use shall be expanded or enlarged, a provision that is arguably more restrictive than Minn.Stat. § 462.357, subd. 1e.

the reduction of a dead human body to essential elements through direct exposure to intense heat and flame and the repositioning or movement of the body during the process to facilitate reduction, the processing of the remains after removal from the cremation chamber, placement of the processed remains in a cremated remains container, and release of the cremated remains to an appropriate party.

For purposes of comparison, the Merriam Webster Dictionary defines a funeral home as “an establishment with facilities for the preparation of the dead for burial or cremation, for the viewing of the body, and for funerals.” Cremation is defined as “to reduce (as a dead body) to ashes by burning.” A crematory is defined as “a furnace for cremating; an establishment containing such a furnace.”

Based upon the above, the Court cannot find that the definitions of a funeral home and a crematory are identical or that a funeral home, by definition, includes a crematory. A funeral home prepares the bodies of deceased persons for final disposition. Cremation is a final disposition process. *See* Minn.Stat. § 149A.94 (requiring final disposition of every dead human body by burial, entombment, or cremation, pursuant to permit). While they are related services, they are not the same. Cremation involves the rendering of a human body into ash by means of incineration and pulverization. It requires the use of a specialized furnace and various motorized mechanical devices, and is comprehensively regulated by Minn.Stat. § 149A.95 (crematories and cremation). Moreover, it requires specific licensing pursuant to Minn.Stat. § 149A.52. Notably, Minn.Stat. § 149A.91, the statute that regulates preparation of the body, does not reference cremation.

Moreover, while the City also found that forty-two crematories in the State of Minnesota are owned by funeral homes, it obtained and reviewed more detailed documentation on only eight crematories. Of those eight crematories, six are expressly allowed as permitted, conditional, accessory, or incidental uses in various zones, including rural and industrial

(Maplewood, Minneapolis, Minnetrista, Rochester, Hopkins, Brooklyn Park); one is not expressly identified in the zoning ordinance but allowed in an industrial zone (St. Paul); and one is allowed to operate as part of a funeral home in a neighborhood business zone in which the funeral home is a permitted use (Eagan). Almost all of these crematories are long-term or grandfathered uses, three are in cemeteries, and the only one established within the past ten years is expressly allowed as a conditional use (Brooklyn Park). It is not clear that the City conducted any other analysis of the relevant ordinances for these uses or the specific purpose or nature of the zones in which they were established or allowed. Based upon this information, the Court cannot find that the City reasonably relied on an established history or tradition of defining crematories and funeral homes as identical uses, or uses consistent with neighborhood business zones.<sup>3</sup>

In Prior Lake Aggregates, Inc., et al., v. City of Savage, et al., 349 N.W.2d 575 (Minn.App.1984), a case cited by Plaintiffs, the Minnesota Court of Appeals examined a situation in which the City of Savage denied a property owner's application for a special use permit for the operation of an asphalt manufacturing plant in the owner's sand and gravel pit. The property owner was operating the sand and gravel pit as a grandfathered nonconforming use under the city's zoning ordinance. The ordinance, however, did allow such a use in the zone pursuant to a special permit. The ordinance also specifically provided for other special uses "similar in nature to the above uses and which, in the opinion of the Village Council, will not be detrimental to the integrity of the Rural District." The Court of Appeals affirmed the city's determination that an asphalt plant (which involves the processing of materials that have been excavated) is not a use that is similar in nature to that of a gravel pit (which involves the

---

<sup>3</sup> The Eagan crematory, the only one identified by the City as being located in a neighborhood business zone, has been in operation for over fourteen years; there is no information provided regarding the purpose of the zone or the other permitted or conditional uses.



excavation of materials), even though the uses are related. The Court of Appeals noted that the city council had properly considered the character and purpose of the zone, permitted uses in the zone, and the council's desire to avoid a *de facto* amendment of their ordinance that might be viewed as "spot zoning."<sup>4</sup>

While Prior Lake Aggregates involves a case that may be procedurally distinguished from the present case (the denial of a special use permit, as opposed to the granting of such a permit), the city's decision was reviewed under the deferential standard of review that applies to a municipality's exercise of its legislative authority when interpreting its own ordinance. And, notably, in Prior Lake Aggregates, the ordinance included specific language that allowed the city to consider special uses not expressly identified in the ordinance without the need for an amendment of the ordinance.

Here, a review of the Ordinance indicates that it contains no such specific language. Rather, it expressly identifies only two conditional uses for the C-1 neighborhood business district: funeral home and residential. It expressly permits 57 uses, including a variety of stores and shops (antique, barber, candy, coin, florist, gift, ice cream, novelty, picture framing, popcorn, tailor, toy, etc.); drycleaning (drop-off and pick-up only); and repair (bicycle, clothing, jewelry and watch, musical instruments, television, and shoe). It permits only the most minimal production of goods, including baked goods for sale on the premises; upholstery services only in conjunction with furniture sales; photographic printing and processing; and picture framing. It does not include any use, as a permitted or conditional use, that involves incineration or

---

<sup>4</sup> "Spot zoning" refers to the classification of a small area of land in a manner that is not compatible with the surrounding neighborhood for the benefit of the property owner. Such preferential zoning amendments are at risk of being invalidated as legislative acts unsupported by any rational basis related to promoting public welfare. See Rochester Association of Neighborhoods v. City of Rochester, 268 N.W.2d 885 (Minn.1978).



pulverization, or the processing of a significant mechanical or organic creation into its elemental materials.

In contrast, the Ordinance does specifically address several other uses that might be viewed as related to a crematory. For example, a cemetery (Minn.Stat. § 149A.02, subd. 16, indicates that burial in a cemetery is a “final disposition” of a dead human body) is allowed as a conditional use in a rural residential district; an incinerator is allowed as a conditional use in an industrial district; manufacturing and processing is allowed as a conditional use in a highway commercial district. Notably, a funeral home is a conditional use in a multiple-family residential district as well as the C-1 neighborhood business district, but is a permitted use in the C-2 central business district,<sup>5</sup> a highway commercial district, and an industrial district.

Based upon the above, the Court finds that the City’s determination that a funeral home and a crematory are identical uses that should be similarly allowed as conditional uses in the C-1 neighborhood business district is not reasonable. A crematory is a use that is distinctly different from that of a funeral home and from the other expressly permitted and conditional uses in the district. The City’s approval of a conditional use permit for the crematory, based upon this unreasonable determination, was inappropriate and amounted to a *de facto* amendment of the Ordinance, a legislative decision made during the course of a judicial proceeding.

This view of the City’s action is bolstered by Findings of Fact 3 in the Resolution:

“Pursuant to the City’s comprehensive plan, the Subject Parcel would be zoned C-2 Central Business District...” This finding seems to indicate that the City has made a unilateral decision

---

<sup>5</sup> The City has asserted that the C-1 neighborhood business district and the C-2 central business district both allow a funeral home only as a conditional use, but the Court’s review of the Ordinance indicates that a funeral home is expressly identified as a permitted use in the C-2 district, which has a significantly expanded list of permitted uses, including auto sales, automobile service, bowling alley, bus terminal, meeting hall, offices, printing shop, theater, warehouse, etc. The stated purpose of the C-2 district is “to encourage continuation of a viable downtown by allowing prime retail sales and service uses, office, entertainment facilities, public and semi-public uses, and in special circumstances, residential use.” The C-2 district also lists a funeral home as a conditional use, an inexplicable inconsistency that the City may wish to address at some point.

to re-zone the Funeral Home's property. However, such re-zoning was never reviewed or recommended by the planning commission; nor was it properly noticed or voted upon.

Additionally, the Resolution does not contain findings to support such an amendment. While the City argues that this apparent amendment to the Ordinance is necessary but irrelevant, because the Funeral Home remains a conditional use in the C-2 district, the Court's review of the Ordinance, as noted above, indicates that the Funeral Home would, in fact, be a permitted use in that district, a distinct benefit for the Funeral Home. Such re-zoning could arguably be viewed as spot zoning.

Unlike the legislative action reviewed in the Eagle Lake case, the City's action here, the creation of a new conditional use and the apparent re-zoning of the subject property, cannot be viewed as reasonable discretionary action enabling the City to carry out its judicial function and decide issues at hand. The Ordinance does not contain any provisions that authorize such action without formal amendment, and the City has cited no historical or traditional practice as the basis for its action. Rather, the City engaged in legislative action and significant modification of the Ordinance without complying with the procedures required by the Ordinance for such action.

Pursuant to Sec. 11.11, subd. 3, of the Ordinance:

- A. **Criteria for Approval:** The Council may amend this Chapter and the zoning map in relation to land uses within a particular district or as to the location of district lines (rezoning). Amendments shall not be made indiscriminately but shall only be used as a means to reflect changes in the goals and policies of the City as reflected in the comprehensive plan, policies plan or changes in conditions in the City.
- B. **Procedure:** Amendment may be initiated by the Council, the Planning Commission or upon application of a property owner. Individuals wishing to initiate an amendment shall complete a zoning amendment application form and submit it to the City. Any amendment not initiated by the Planning Commission shall be referred to that commission for review, and no amendment shall be acted upon by the Council until it has received the Planning Commission recommendations.

The Ordinance contains additional procedural requirements with respect to notice and hearings; adoption of amendment to the Ordinance requires a 4/5ths majority vote of the council.

Additionally, pursuant to Minn.Stat. § 462.357, subd. 1, rezoning requires a city council to make a legislative judgment that a certain zoning classification will promote the “public health, safety, morals and general welfare.”

Here, while the planning commission did review and recommend the approval of the Funeral Homes’ application for a conditional use permit for the crematory, and hearings were conducted regarding that application, the concern here has to do with the improper mixing of legislative and judicial action: the exercise of significant legislative action without identifying it as such, precluding compliance with the Ordinance, Minnesota law, and the requirements of due process.

Under the Prior Lake Aggregates analysis, had the City denied the Funeral Homes’ application for the conditional use permit, such a decision would have been reasonable. The Court understands that there might be a conceivable close case where the granting of a similar application, under certain circumstances, could also be reasonable. But it does not appear to this Court that this is such a case. Accordingly, based upon all of the above, this Court finds that the City’s adoption of the Resolution, granting the Funeral Home’s application for a conditional use permit for the operation of a crematory in the C-1 district, was not reasonable and constituted an unauthorized and unlawful amendment of the Ordinance.

Due to the nature of the Court’s decision, remand for amended findings it not appropriate. However, the City and/or the Funeral Home may certainly pursue an amendment of the Ordinance and further action as appropriate.

**Analysis of the City’s Grant of the Conditional Use Permit**

Since the Court has found that the City's adoption of the Resolution was unlawful legislative action, it is not necessary to analyze the City's judicial action with respect to the granting of the conditional use permit, and the Court declines to do so.

DMH

A handwritten signature in black ink, appearing to be the initials 'DMH' with a stylized flourish extending to the right.