Not Reported in N.W.2d, 2011 WL 1642510 (Minn.App.)
(Cite as: 2011 WL 1642510 (Minn.App.))

H
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.
CONTINENTAL PROPERTY GROUP, INC., Respondent,
v.
CITY OF MINNEAPOLIS, Appellant.

No. A10–1072.
May 3, 2011.

Hennepin County District Court, File No. 27–CV–07–5826.
William R. Skolnick, Rolin L. Cargill III, LuAnn Petricka, Skolnick & Schiff P.A., Minneapolis, MN, for respondents.

Charles N. Nauen, Gregory J. Myers, Lockridge GrindalNauen P.L.L .P., Minneapolis, MN, for appellant.

Susan L. Naughton, League of Minnesota Cities, St. Paul, MN, for amicus curiae League of Minnesota Cities.

John M. Baker, Erin Sindberg Porter, Greene Espel P.L.L.P., Minneapolis, MN, for amicus curiae American Planning Association.

Considered and decided by SCHELLHAS, Presiding Judge; HALBROOKS, Judge; and STAUBER, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

***1** Appellant City of Minneapolis challenges the district court's decision that it violated respondent's procedural due-process rights by depriving respondent of a fair hearing on its land-use applications. Respondent cross-appeals to challenge the district court's dismissal of its other claims for relief. Because we conclude that respondent did not have a property interest entitling it to due-process protection, we reverse the district court's decision that the city violated respondent's procedural due-process rights. We affirm the district court's dismissal of respondent's equal-protection and substantive due-process claims. But because the hearing before the city council was unfair, rendering the city's decision arbitrary and capricious under state law, we reverse and remand for a new hearing.

FACTS

In the fall of 2003, respondent Continental Property Group (CPG) purchased an option on property located at 343, 401, 403, and 409 Oak Grove Street, and 416 Clifton Avenue, in the Loring Hill neighborhood of Minneapolis. CPG purchased its option with the intention of developing the property. The property consisted of a surface parking lot, which served nearby office buildings, and was zoned as part of an Institutional Office Residence (OR3) district. The OR3 zoning classification restricts the height of buildings to six stories or 84 feet. Additionally, because the property is located within 1,000 feet of the ordinary high-water mark of Loring Pond, it is also subject to the standards of the Shoreland Overlay (SH) district, which imposes a height restriction of 2–1/2 stories or 35 feet.

CPG engaged an architectural firm to design the project and assist in the process of applying for needed land-use permits and variances. CPG settled on one of the architect's designs that included a slender mixed-use tower bordered by two-story townhouses fronting on the adjacent streets. Because the project design exceeded the height restrictions of the two applicable zoning districts, in July 2004, CPG applied for two conditional-use

permits (CUPs): one to increase the maximum permitted height from a maximum of 2–1/2 stories or 35 feet to 21 stories and 230 feet; and a second to allow for a multiple-family project containing 104 units. CPG simultaneously applied for two variances: one to reduce the required corner side-yard setback off Clifton Place from the required 48 feet to 16 feet for the proposed building and 4 feet for the proposed patio area; and a second to reduce the rear-yard setback off the south property line from the required 45 feet to 19 feet for the building and 8 feet for patios. CPG also requested a major site-plan review.

In August of 2004, Minneapolis Community Planning and Economic Development (CPED) staff reviewed the application and issued a 14–page report recommending that the Minneapolis Planning Commission deny the application. Later that month, acting on the recommendation of CPED, the planning commission denied CPG's application by votes of five to two on the CUPs, five to two on the variances, and six to one on the site plan.

***2** In September 2004, CPG appealed the planning commission's decision to the Minneapolis City Council. On September 15, 2004, the planning commission's decision was reviewed by the city council's zoning and planning committee. The zoning and planning committee comprised five city-council members, including Lisa Goodman. Following its receipt of testimony from CPED staff and CPG representatives, the committee recommended that CPG's application be denied. The committee's vote was unanimous—five to zero.

On September 24, by a vote of 13–0, the full city council adopted the findings and recommendation of the zoning and planning committee and upheld the planning commission's denial of CPG's requested CUPs, variances, and site-plan review.

Despite the city council's decision, CPG exercised its option to purchase the property in later September 2004 and, on November 23, submitted an application for a second proposed project on the property. That project design consisted of a seven-story, 77–foot, 74–unit building, and required CUPs for height and density as well as a site-plan review. But the project design required no variances.

On January 23, 2005, CPED staff issued a report recommending that the planning commission approve the application. But, on February 23, CPG withdrew its application, citing infeasibility due to higher-than-anticipated construction costs.

On March 27, 2007, CPG sued the City of Minneapolis alleging that the city council's decision in 2004, as well as a development moratorium it imposed in May 2005, were arbitrary and capricious and violated CPG's equal-protection rights, entitling it to relief under 42 U.S.C. § 1983 (2006). On October 10, 2008, the district court granted the city summary judgment on CPG's equal-protection claim but allowed CPG to proceed with its action under a due-process theory and under Minn.Stat. § 462.361, subd. 1 (2010), based on its claim that the city council's actions were arbitrary and capricious. The court ordered a trial to supplement the record of the city-council proceedings and for CPG to challenge the reasonableness of the city's decision and the fairness of the process afforded. The court later reinstated CPG's equal-protection claim.

Following trial, the district court found that the city violated CPG's procedural due-process rights and concluded that CPG was entitled to compensatory damages and attorney fees. The court dismissed CPG's other claims. Appeals by both parties follow.

DECISION

CPG's Due–Process Claims

The district court concluded that CPG was entitled to relief under 42 U.S.C. § 1983 because the city did not afford CPG procedural due process in its consideration of CPG's land-use application. The city argues on appeal, among other things, that

CPG is not entitled to due-process relief because it did not have a protected property interest in its CUP and variance applications. CPG argues that the district court erred by dismissing its substantive due-process claim.

***3** The United States Constitution provides that the state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. As a threshold matter to any due-process claim, "the plaintiff must identify a protected property interest to which the Fourteenth Amendment's due process protection applies." *Snaza v. City of Saint Paul,* 548 F.3d 1178, 1182 (8th Cir.2008); *see also Nexus v. Swift,* 785 N.W.2d 771, 779 (Minn.App.2010) ("The threshold requirement of any due-process claim is that the government has deprived a person of a constitutionally protected liberty or property interest; in the absence of a liberty or property interest, a right to due process does not accrue."). This prerequisite applies to both substantive and procedural due-process claims. *See Snaza,* 548 F.3d at 1182 (substantive); *Snyder v. City of Minneapolis,* 441 N.W.2d 781, 791 (Minn.1989) (procedural).

"Property interests are created and their dimension defined by existing rules or understandings that stem from an independent source, such as state law, rules or understandings that support claims of entitlement to certain benefits." *Snyder,* 441 N.W.2d at 791 (quotation omitted). "A protected property interest is a matter of state law involving a legitimate claim to entitlement as opposed to a mere subjective expectancy." *Snaza,* 548 F.3d at 1182 (quotation omitted). "A permit applicant may have a legitimate claim to entitlement if the government's discretion is constrained by a regulation or ordinance *requiring* issuance of a permit when prescribed terms and conditions have been met." *Id.* at 1183 (emphasis added).

The property at issue in this case is located in an OR3 primary zoning district as well as an SH overlay zoning district. Minneapolis, Minn., Code of Ordinances (MCO) §§ 521.10 (2009),[FN1] .30 (1999); Minneapolis Official Zoning Map Primary Plate 18 (2010), Overlay Plate 18 (2002). The Minneapolis Zoning Code provides that certain uses in the OR3 district are "permitted" while others are "conditional." MCO § 547.30(a)-(c) (2010). Permitted uses "are permitted *as of right* in the district ... provided that the use complies with all other applicable provisions of this ordinance." MCO § 547.30(b) (emphasis added). In contrast, conditional uses are allowed "provided that the use complies with all other applicable provisions of this ordinance" and the person wishing to establish the conditional use "obtain[s] a[CUP] for such use." MCO § 547.30(c).

FN1. Because the relevant ordinances have not materially changed since CPG filed its applications, we cite to the most recent versions.

Multiple-family dwellings comprising more than four units are allowed only as a "conditional use," not a "permitted use," in an OR3 district. MCO § 547.330 (1999). Therefore, a person wishing to establish a multiple-family dwelling of more than four units within the OR3 district must obtain a CUP. And a CUP is required for structures over six stories or 84 feet in the OR3 district, and over 2–1/2 stories or 35 feet in the SH overlay district. MCO §§ 547.350(a) (2010), 551.480 (2008).

***4** CPG's proposed project included a 21–story tower comprising more than four dwelling units. Because the project proposed a conditional use of the property, rather than a permitted use that CPG could build "as of right," CPG could proceed with the project only it if obtained a CUP from the city. And the city's issuance of a CUP is discretionary. *See* Minn.Stat. § 462.3595, subd. 1 (2010) ("Conditional uses *may* be approved by the governing body ... by a showing by the applicant that the standards and criteria stated in the ordinance will be satisfied." (emphasis added));

MCO § 525.300 (1999) ("A [CUP] ... allows the city to review uses, which because of their unique characteristics, *cannot be permitted as of right* in a particular zoning district, but which *may* be allowed upon showing that such use in a specified location will comply with all of the conditions and standards of this zoning ordinance." (emphasis added)); *Amoco Oil Co. v. City of Minneapolis,* 395 N.W.2d 115, 117 (Minn.App.1986) ("Conditional or special use permits are zoning devices designed to meet problems that arise when certain uses, although generally compatible with the basic use classification of a particular zone, should not be permitted to be located *as a matter of right* in a particular area of that zone." (emphasis added)); *see also* Minn.Stat. § 645.44, subd. 15 (2010) (" 'May' is permissive."); MCO § 520.40(4) (2000) ("The word 'may' is permissive."); *Bituminous Materials, Inc. v. Rice Cnty.,* 126 F.3d 1068, 1070 (8th Cir.1997) (where ordinance provided that permit " *may* be granted," grant of permit was discretionary, and applicant's interest "amount[ed] to nothing more than an abstract need or desire" (quotation omitted)).

If an applicant who meets the bare requirements in an ordinance had an automatic right to a CUP, the distinction between conditional and permitted uses would be meaningless. CPG therefore was not entitled to a CUP simply because it otherwise complied with the ordinance and filed an application. Because CPG could not obtain a CUP as of right, it did not have a protected property interest in its CUP application. Similarly, CPG did not have a protected property interest in its variance application because an applicant has no claim of entitlement to a variance. *See Krummenacher v. City of Minnetonka,* 783 N.W.2d 721, 727 (Minn.2010) (stating that a governing body has broad discretion to grant or deny a variance).

Citing *Carey v. Piphus* for the proposition that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions," CPG argues that it was not required to demonstrate a protected property interest for its due-process claims. 435 U.S. 247, 266, 98 S.Ct. 1042, 1054 (1978). But *Carey* does not support CPG's argument. *Carey* stands for the proposition that a person has a right to due process regardless of the merits of the substantive claims to be decided at the hearing; the person still must have a property interest at stake to be entitled to due process. *See id.* at 266, 98 S.Ct. at 1053 ("It is enough to invoke the procedural safeguards of the Fourteenth Amendment *that a significant property interest is at stake,* whatever the ultimate outcome of a hearing." (emphasis added) (quotation omitted)). The right to procedural due process does not guarantee process for process's sake; the right to due process guarantees process for the sake of protecting an established property interest. To assert its procedural due-process claim, CPG therefore was first required to demonstrate that a protected property interest was at stake.

***5** Citing *Northpointe Plaza v. City of Rochester,* 465 N.W.2d 686 (Minn.1991), CPG argues that it was entitled to a CUP as a matter of right despite the permissive language in the statute and ordinance. In *Northpointe Plaza,* the supreme court noted that where "the applicant for a CUP complies with the specified permit requirements, 'approval of a *permitted use* follows as a matter of right.' " 465 N.W.2d at 689 (emphasis added) (quoting *Chanhassen Estates Residents Ass'n v. City of Chanhassen,* 342 N.W.2d 335, 340 (Minn.1984)). But, here, CPG applied for a permit for a *conditional use,* which the Minneapolis ordinance expressly states is a use that "cannot be permitted as of right." MCO § 525 .300. In *Northpointe Plaza,* the parties did "not challenge the lower courts' rulings that [the applicant] had a protectable property interest in the CUP," 465 N.W.2d at 689; the court accordingly did not examine the issue closely, and the statement upon which CPG relies is dictum. Moreover, the ordinance at issue in *Northpointe Plaza* set out several specific requirements that an applicant must

meet before a CUP could be granted. *Id.* at 687. Here, in contrast, the ordinance specifically states that a CUP " *may* " be granted for uses that " *cannot be permitted as of right,* " and lists factors that the city must consider in deciding whether or not to issue the CUP. *See* MCO §§ 525.300, .340 (1999), 547.110 (2011) (emphasis added). Finally, *Northpointe Plaza* relied on *Chanhassen Estates* in which the supreme court discussed *permitted,* not conditional, uses, stating, "[T]he council's review of an application for a *permitted* use need go only to the applicant's compliance with the specific requirements, regulations and performance standards prescribed by the ordinance. Subject to such compliance, approval of a *permitted* use follows as a matter of right." *Chanhassen Estates,* 342 N.W.2d at 340 (emphasis added) (quotation omitted). The *Chanhassen Estates* court then immediately distinguished permitted uses from conditional uses, which may be denied for reasons other than failure to strictly comply with the ordinance. *Id. Northpointe Plaza* therefore does not establish a rule that an applicant has a per se property interest in a CUP application.

CPG also argues that it had a protected property interest in the form of its option to purchase the subject property. But the property interest at stake in the context of a denial of due process relative to a land-use application is the application itself, not the title to the underlying property. *See Snaza,* 548 F.3d at 1183 (stating that a plaintiff's fee title in the land did not entitle her to due process with respect to a CUP where the plaintiff "has not presented any evidence that she has been denied her fee simple title in the land"). The *Snaza* court noted that there were "over 70 principal uses for a property" in the given zoning district that were "allowed without obtaining a [CUP]." *Id.* Similarly, in this case, at the time CPG filed its application there were 19 permitted uses to which CPG could put the property "as of right" and for which a CUP would not be required, *see* MCO § 547 .30(a), (b) (2004), and there are now 25 such permitted uses, *see* MCO § 547.30(a), (b) (2010). Because the city did not deprive CPG of its interest in the property, CPG's interest in its option to purchase the property did not entitle it to due process with respect to the CUP.

***6** Because CPG did not have a protected property interest in its CUP and variance applications, we conclude that it had no constitutional right to due process in the application-review process. The district court therefore correctly dismissed CPG's substantive due-process claim, but erred by granting CPG relief on the basis that the city violated its right to procedural due process.

Statutory Judicial Review under Minn.Stat. § 462.361, subd. 1

Arguing that the city council's decision was arbitrary and capricious, CPG maintains that the district court erred by dismissing its claim for judicial review under Minn.Stat. § 462.361, subd. 1. [FN2] We review "the decision of the city council independent of the findings and conclusions of the district court." *VanLandschoot v. City of Mendota Heights,* 336 N.W.2d 503, 508 (Minn.1983). But where the district court has found that the municipal record was inadequate and allowed discovery and a trial to supplement the record, we may use the district court's record in conducting our review. *See Swanson v. City of Bloomington,* 421 N.W.2d 507, 313 (Minn.1988) (noting that the purpose of allowing a trial to supplement the municipal record is to enable "satisfactory review").

FN2. Although on appeal CPG characterizes its challenge as one to the district court's decision on its substantive due-process claim, CPG's argument and cited cases demonstrate that its challenge is to the district court's decision on its state-law claim as well. As the district court noted, CPG seems to conflate two bases of relief with similar legal tests—statutory judicial review of land-use decisions under Minn.Stat. § 462.361,

> subd. 1, and substantive due process under the federal constitution. Although both tests use the words "arbitrary and capricious," these words carry different meanings. *Compare VanLandschoot v. City of Mendota Heights,* 336 N.W.2d 503, 507–08 (Minn.1983) (discussing standard under state law), *with Northpointe Plaza,* 465 N.W.2d at 689–90 (discussing standard under federal constitution's due-process clause). The district court noted that because "[t]he Federal threshold is higher than the threshold under Minnesota law[,] ... it logically follows that if [CPG's] claim fails under Minnesota law, it must also fail under Federal law."

Minnesota law provides that a person aggrieved by a city council's land-use decision is entitled to judicial review in district court. Minn.Stat. § 462.361, subd. 1. A reviewing court must "determine whether the municipality's action ... was reasonable." *VanLandschoot,* 336 N.W.2d at 508. The decision is unreasonable if "it was arbitrary and capricious" or "the reasons assigned by the governing body do not have the slightest validity or bearing on the general welfare of the immediate area." *Id.* (quotation omitted). Generally, a decision to deny a CUP application is arbitrary if the applicant meets the standards specified by the zoning ordinance.[FN3] *Yang v. Cnty. of Carver,* 660 N.W.2d 828, 832 (Minn.App.2003) (citing *Zylka v. City of Crystal,* 283 Minn. 192, 196, 167 N.W.2d 45, 49 (1969)). But a decision is also arbitrary and capricious if the decision-maker "relied on factors it is not permitted or intended to consider." *In re Charges of Unprofessional Conduct Contained in Panel File 98–26,* 597 N.W.2d 563, 567 (Minn.1999); *see also In re Block,* 727 N.W.2d 166, 178 (Minn.App.2007) (mentioning this standard in the CUP context). Although a city council has broad discretion to deny land-use permits, we may invalidate its decision if it did not act in good faith. *VanLandschoot,* 336 N.W.2d at 508–09.

> FN3. CPG argues that "[w]hen, as in this case, a zoning ordinance expressly authorizes the proposed use by conditional use permit, the City's denial of the permit must be for reasons relating to public health, safety and general welfare," citing *C.R. Invs., Inc. v. Village of Shoreview,* 304 N.W.2d 320, 324 (Minn.1981). But the standard set forth in *C.R. Invs.* is merely the default standard that applies when the ordinance does not set forth specific issues for the city to consider. *Condor Corp. v. City of Saint Paul,* 912 F.2d 215, 221 (8th Cir.1990) (citing *Zylka v. City of Crystal,* 283 Minn. 192, 195, 167 N.W.2d 45, 49 (1969)). Here, the ordinance enumerates factors for the city's consideration. Therefore, the default "public health, safety, and general welfare" standard does not apply.

We agree with the district court that the city council's decisions to deny the CUPs and variances had some basis in the record: the record contains evidence that CPG's proposal was inconsistent with the scale and character of the neighborhood and might block views of landmarks, open spaces, or bodies of water, which were sufficient bases to deny the CUPs under MCO §§ 547.110(3), (4), 551.480(3), (4); and CPG made no showing whatsoever of the "undue hardship" necessary to support a variance under Minn.Stat. § 462.357, subd. 6(2) (2010), and *Krummenacher,* 783 N.W.2d at 727–28. But when deciding CPG's procedural due-process claim, the district court found that Councilmember Goodman, who took part in making the council's decision: "took a position in opposition and exhibited a closed mind with regard to [CPG's] proposed project prior to hearing [CPG's] appeal"; "adopted an advocacy role in opposition to [CPG's] proposed project well before she discharged her quasi-judicial duties"; and "was clearly involved in an effort not only to assist to organize and mobilize neighborhood opposition to the project, but also to sway the opinions of her

fellow council members." The court also noted that "the opinion of the council member in whose ward a project is proposed is given substantial weight" by other members of the council. The court's findings, which are supported by the record, establish that the city council relied on factors it was not intended or permitted to consider in denying CPG's applications. We therefore conclude that the city council's decision was arbitrary and capricious and that the district court erred by upholding it on review under Minn.Stat. § 462.361, subd. 1.

***7** We turn now to the appropriate remedy. In *Krummenacher,* the Minnesota Supreme Court recognized that the standard remedy for the arbitrary-and-capricious denial of a land-use permit is an order that the permit be issued. 783 N.W.2d at 732–33 (quotation omitted). "But," the court continued, "there is an exception to this general rule when the zoning authority's decision is premature and not necessarily arbitrary." *Id.* at 733 (quotation omitted). Concluding that the city council had applied the incorrect legal standard in its initial determination, the court remanded the case to the city council to allow the applicant to have her application considered under the correct legal standard. *Id.* at 732, 733. Here, like in *Krummenacher,* the city council's decision would not necessarily have been arbitrary and capricious had the council followed the correct standards and procedures in considering CPG's applications—namely, had it not allowed a biased councilmember to participate in the decision. Under *Krummenacher,* we therefore remand to the Minneapolis City Council for a new hearing and decision.

CPG's Equal–Protection Claim

CPG argues that the district court erred by dismissing its equal-protection claim. The Equal Protection Clause of the Fourteenth Amendment requires the government to "treat all similarly situated people alike." *Barstad v. Murray Cnty.,* 420 F.3d 880, 884 (8th Cir.2005). The threshold inquiry in a zoning case is whether the denied applicant was "similarly situated" to successful applicants. *Id.* The applicant must then demonstrate that there was no rational basis for differential treatment. *Id.*

CPG has failed to meet its burden on the threshold requirement that it identify "similarly situated" successful applicants. CPG's brief mentions in conclusory fashion that it was "intentionally treated differently by the City than others similarly situated," but fails to identify the applicants or explain how they were similarly situated. CPG's equal-protection claim therefore fails.

The City Council's Development Moratorium

CPG argues that the district court erred by dismissing its "claim for damages related to the development moratorium imposed selectively by the City in April 2005." In its complaint, CPG alleged:

> 14. In April 2005, Councilmember Goodman introduced an ordinance to impose a moratorium on all development in the Loring Hill neighborhood. The alleged basis for the moratorium was to allow the City to have a detailed study prepared concerning the impact of the development on neighboring buildings and the community. The City imposed the moratorium in May 2005.
>
> 15. The City acted arbitrarily and capriciously with respect to the moratorium because it discriminated against [CPG] and the City did not exercise good faith in imposing it.

The moratorium interfered with CPG's revised plan to build a seven-story structure comprising three stories of offices atop four stories of parking.

***8** On September 16, 2009, between the liability and damages phases of the trial, the district court issued its order dismissing all of CPG's claims except its procedural due-process claim. The court

stated that CPG "was denied a fair hearing on its appeal by the Zoning and Planning Committee and, subsequently, by the City Council," and the court permitted CPG to present damages evidence on that claim alone. Despite the court's limitation on the scope of damages to be tried, CPG submitted a proposed damages calculation asserting "more than $17 million damages it attributed to the moratorium and the office tower concept." And CPG also submitted a trial memorandum stating that it had additional evidence to present on the moratorium issue, which the court had "not allowed" it to present during the liability phase. The district court denied CPG's request to submit additional evidence on the moratorium issue and clarified that CPG's claims with respect to the moratorium were "dismissed with prejudice."

On appeal, CPG does not challenge the district court's dismissal of the statutory or constitutional claims that it might have had arising out of the moratorium's allegedly arbitrary and capricious nature—CPG's substantive arguments are aimed entirely at the city's denial of its CUP and variance applications, rather than the moratorium. But CPG does argue that the district court should have allowed it to present evidence of *damages* related to the moratorium, even though the court found liability only with respect to the fairness of the hearing on the CUP and variance requests. This is an evidentiary and procedural issue—CPG challenges the manner in which the district court directed that evidence be offered for trial. "[M]atters such as trial procedure [and] evidentiary rulings ... are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error." *Sauter v. Wasemiller,* 389 N.W.2d 200, 201 (Minn.1986). Because CPG did not move for a new trial, it failed to preserve this issue for appeal.

Damages

Both parties challenge the district court's damages award, which was based on CPG's 42 U.S.C. § 1983 claims that the city had violated its constitutional rights. As we have already concluded, CPG was not entitled to relief on its constitutional claims. And money damages are not appropriate under Minn.Stat. § 462.361, subd. 1, for wrongful denial of a land-use permit. *See Krummenacher,* 783 N.W.2d at 732–33 (noting that if a denial is arbitrary and capricious, "the standard remedy is that the court orders the permit to be issued"); *Carl Bolander & Sons v. City of Minneapolis,* 378 N.W.2d 826, 829 (Minn.App.1985) (stating plaintiff "has shown no Minnesota cases in which money damages were awarded for the wrongful denial of a building permit"), *review denied* (Minn. Feb. 14, 1986). CPG's available remedy in this case is a fair hearing before the city council. We conclude that CPG is not entitled to monetary damages, and we reverse the district court's damages award.

Attorney Fees

***9** The district court awarded CPG attorney fees under 42 U.S.C. § 1988(b) (2006), which authorizes fee awards to prevailing parties in section 1983 cases. Based on our conclusion that CPG is not entitled to relief on its constitutional claims, we reverse the district court's attorney-fee award.

The city argues that it is entitled to an award of attorney fees on the basis that a section 1983 defendant may be entitled to a fee award if a lawsuit is initiated or continued in bad faith and for the purpose of harassment. *See Buford v. Tremayne,* 747 F.2d 445, 448 (8th Cir.1984) (affirming fee award where plaintiff "was more interested in harassing those persons he deemed responsible than vindicating his rights in a bona fide lawsuit"); *Am. Family Life Assurance Co. v. Teasdale,* 733 F.2d 559, 569 (8th Cir.1984) (affirming fee award where plaintiff brought suit to harass and attack the integrity of defendant and offered no evidence supporting claims); *see also* Minn.Stat. § 549.211, subd. 2(1), 3 (2010) (providing that district court may sanction party who presents a claim for an "improper purpose, such as to harass"). The city

points to evidence in the record suggesting that CPG did not genuinely expect to win in court, but instead sought only to "exact [its] revenge on those who have wronged [it]" and to force Councilmember Goodman "to pay a price for this."

The district court was not persuaded that CPG manufactured this lawsuit for the purpose of harassing the city; nor are we. Although CPG did not successfully prosecute its constitutional claims, its complaints were not unfounded—we have upheld the district court's finding that CPG did not receive a fair hearing. We therefore decline to award attorney fees to the city.

Affirmed in part, reversed in part, and remanded.

Minn. App.,2011.
Continental Property Group, Inc. v. City of Minneapolis
Not Reported in N.W.2d, 2011 WL 1642510 (Minn.App.)

END OF DOCUMENT