2014 WL 8392644 (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.0310.
April 25, 2014.

Brief of Amicus Curiae Aging Services of Minnesota

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***1 I. STATEMENT OF INTEREST.**

Pursuant to Minn. R. Civ. App. P. 129.01, Aging Services of Minnesota ("Aging Services") [1] respectfully submits this brief of *amicus curiae* in the matter listed above, supporting RDNT, LLC ("RDNT") in seeking reversal of the court of appeals decision.

Aging Services is a statewide, not-for-profit corporation and Minnesota's largest association of providers of housing, health care and community services for the **elderly** and disabled. Its membership encompasses over 1,000 organizations statewide, including Martin Luther Care Center and Meadow Woods Assisted Living, which are located on the property at issue in this case, and Ebenezer Management Services, which operates those facilities.

Aging Services' mission is to create the future of older adult services through excellence and innovation. Together with more than 50,000 caregivers, Aging Services members serve 63,000 older adults every day in all of the places they call home, including home care and services, independent senior housing, assisted living communities and skilled nursing facilities (together, "senior care services"). Aging Services members are diverse but share a common focus on person-directed living, missions of service to their communities and choice in older adult services.

***2** Aging Services' interest is to show that the issues arising in this case affect more than a single property owner and a single neighborhood. Given striking demographic trends and the changing nature of senior care services, providers throughout Minnesota must be allowed to update and expand their services to meet the needs and preferences of those in their communities who are growing old, without unreasonable restrictions. Because its member organizations own and operate care settings throughout the state, Aging Services is well-positioned to advise the Court on how the Court of Appeals decision restricts the ability of senior care services providers to meet the growing and changing needs of Minnesota's aging population.

II. THE LANDSCAPE OF SENIOR CARE SERVICES IS CHANGING.

The rapid aging of the population is creating seismic shifts in the demographics of Minnesota and the nation, and is inspriring continual innovation among providers and policy makers seeking to provide the best possible services to the senior population.

This combination of factors must be understood in order to view this case in the appropriate context, and this section of the brief provides information to illustrate the changes underway. [2]

A. Minnesota's Population is Aging Dramatically.

While Minnesota's older population (over age 65) had relatively slow growth over the past 25 years compared to the growth in the overall state's population, that growth has rapidly accelerated since 2010. In 2011, the first wave of baby boomers (those born ***3** between 1946 and 1964) began to turn 65, and for the next 30 years this cohort will profoundly affect the business of senior care.

The Minnesota State Demographer projects that between 2005 and 2035, the number of Minnesotans over the age of 65 will more than double, from 600,000 to 1.3 million. See Figure 1. By 2020, there will be more people 65 years or older than school-aged children in Minnesota. Minn. Dep't of Human Servs., Status of Long-Term Services and Supports, (October 2013), at 9 ("2013 DHS Report"). [3]

Figure 1. Minnesota Population Change by Decade (with Projections)

***4** Even more striking, the demographer projects that the number of Minnesotans over 85 will increase 150% percent in the next 30 years, jumping from approximately 107,000 in 2010 to 275,000 in 2040. [4] This tremendous growth in the over-85 population is significant because, as people live longer, their need for senior care services increases. While today's **elderly** are generally healthier than their peers from just a generation ago, the prevalence of chronic illness and rates of disability rise significantly among people age 85 and older. According to a 2007 study, about 50 percent of this group has a disability (meaning any difficulty with the activities of daily living (such as eating, bathing, and dressing) or the instrumental activities of daily living (such as housekeeping, using the telephone, and managing money), compared with only 10 percent of the population ages 65 to 74. Among the population age 65 and older, 69 percent will develop disabilities before they die, and 35 percent will eventually enter a nursing home. Richard W. Johnson, et al., *Meeting the Long-Term Care Needs of the Baby Boomers: How Changing Families Will Affect Paid Helpers and Institutions*, The Urban Institute, (May 2007), at 1.

The aging of the baby boom population, along with advances in medical technology leading to longer lives, will lead inevitably to a substantial increase in the demand for senior care services throughout Minnesota in the years ahead.

***5 B. The Market Is Responding to Changing Needs and Preferences of Seniors.**

Just as Minnesota's population is very different than it once was, the nature of senior care services has changed significantly from prior decades. Where nursing homes once provided the vast majority of senior care, today a broad continuum of care and care settings exists to meet the physical, spiritual, emotional and social needs of aging persons. Senior care providers are required to not only meet the preferences expressed by older adults and their caregivers, but to also respond to state policies aimed at decreasing reliance on institutional care and increasing the availability of home and community-based services.

1. Use of Nursing Homes Has Steeply Declined.

For many years, seniors needing services and supports have preferred to receive them in non-institutional settings. As DHS observed in 2006:

> Most older persons today want to stay in their own homes and apartments as long as possible, either with no help, with help from family or with hired help.... [O]ne of the greatest expressed concerns of older Minnesotans is that they might one day have to live in a nursing home. Fully 67% of persons aged 65 and older voiced this as a major concern for their future.

Minn. Dep't of Human Servs., Status of Long-Term Care in Minnesota 2005: A Report to the Minnesota Legislature, (June 2006), at 4, ("2006 DHS Report") citing Minnesota Board on Aging 2005 Survey of Older Minnesotans.

The market shift away from institutional care is seen most dramatically in the steep decline in the rate at which Minnesota seniors use nursing home beds. Nursing home utilization rate is stated as the percentage of people within an age group who are in a nursing home on a given day, and the rate for older people in Minnesota has been ***6** declining steadily. In 1984, the utilization rate for persons aged over 65 was 8.4%, and by 2011, it had declined to 3.7% - a 56% reduction. The utilization rate for people older than 85 declined even more dramatically: from 36.4% in 1984 to 14.1% in 2011, a 61% reduction. 2013 DHS Report, at 39.

The number of nursing homes and licensed nursing home beds has fallen as well. In 1987 Minnesota had 468 licensed facilities, with 48,307 beds (the historical peak) in active service. As of September 30, 2012, there were just 392 facilities with a total of 31,996 beds. 2013 DHS Report, at 37-38. Since 2000, a total of 67 nursing homes have closed, including 45 since 2003 and 13 between 2009 and 2014. This decline reflects the ever-growing preference of seniors - and the state - for non-institutional care.

2. Number of Housing with Services and Assisted Living Options Has Sharply Increased.

The reduced utilization of nursing home services has been accompanied by explosive growth in housing with services and assisted living options offered to Minnesota seniors, with a significant increase in both the number and variety of residential care settings and service packages available to meet the current and future long-term care needs of Minnesotans.

Today, there are nearly twice as many housing with services units serving the **elderly** in Minnesota (62,278) as nursing home beds (29,521). The vast majority of housing with services establishments cater to seniors, but not all do so. In this brief, the term "housing with services" (or "HWS") establishment refers to a senior housing provider (which may be an apartment building, for example, or a corporate adult foster ***7** care provider) that offers or provides one or more regularly scheduled health-related services or two or more regularly scheduled supportive services, as defined by statute. See Minn. Stat. §§ 144D.01 (2012). A senior housing provider that offers these types of services must register each year with the Minnesota Department of Health ("MDH") and operate in compliance with Minnesota Statutes Chapter 144D, including requirements pertaining to resident contracts, required information disclosures, and staff training. See Minn. Stat. §§ 144D.04, 144D.065, 144D.08. These buildings must comply with applicable housing and safety codes, *see*, *e.g.*, Minn. R. Ch. 7511 (Fire Code), part 7511.0202, as well as Minnesota laws pertaining to landlords and tenants. See Minn. Stat. § 504B.001 (defining "landlord" and "residential building"). Residents of HWS establishments usually pay a fixed monthly fee that includes the rent and a package of services. The combination of an apartment-type living unit with services available as needed is attractive to both older persons and their families, promising independence and privacy combined with supports and services as needed. See DHS 2006 Report, at 15.

75% of the **elderly** HWS units in Minnesota are designated as "Assisted Living," which refers to a coordinated package of services that may only be provided to residents of registered HWS establishments. Minnesota's assisted living law requires that operators offer a minimum set of services, including:

- at least two meals per day,
- housekeeping and laundry available at least once a week,
- help in arranging transportation and social services,
- socialization opportunities, such as group activities,

***8** ● assistance with medications provided by a licensed home care agency,

● assistance with at least three activities of daily living (bathing, dressing, grooming, eating, transferring, continence care, and toileting), provided by a licensed home care agency,

● a system to check on residents daily, and

● a system that enables residents to request help with needs round-the-clock and staff that can respond to these requests (staff must be able to contact a Registered Nurse round-the-clock, seven days a week).

Minn. Stat. § 144G.03, Subd. 2. Many Assisted Living programs offer services beyond these minimum requirements, including specialized memory care or dementia care services.

3. The Role of Nursing Homes and Assisted Living Has Changed.

As the overall capacity of nursing homes has declined, the role of nursing homes has evolved. Due in part to the shortening length of certain hospital stays, "subacute" or "transistional" care is becoming more common in nursing homes. Subacute care is a treatment program designed for people who, because of illness, injury or disease, require care that is more medical, high-tech or short-term rehabilitative in nature than regular nursing home services. The growth of this service can be seen in nursing home admissions and length-of-stay data. Despite the closure of facilities and delicensing of beds, the number of annual admissions to nursing homes (the total number of people who have entered a nursing home to receive care) continues to increase. From 2005 to 2012, the number of annual admissions rose from approximately 50,000 to approximately 64,000, but length of stays is now much shorter. Minn. Dep't of Human Servs., 2012 Long-Term Services and Supports: Nursing Facilities, (October 2013), at 38. And, ***9** according to calcuations from the Minnesota Department of Health, the median length-of-stay in a nursing home decreased from 65.5 days to 27.5 days from 2000 to 2009, and from 2002 to 2008, the percent of residents staying less than thirty days rose from 43% to 52%, while the percentage staying over a year dropped from 24% to 14.5%.

Meanwhile, HWS and assisted living providers are caring for individuals who once would have received care in nursing homes, due in part to state policy that prefers serving less disabled seniors in non-institutional settings. As DHS has written:

> In order to reduce our reliance on nursing homes, we need to examine the way we use nursing homes, especially for older people with fewer needs who could be maintained in the community if proper support services were available; and in order to reduce our reliance on nursing homes, we need home and community care options that can support more disabled frail **elderly** in their homes or apartments.

2006 DHS Report, at 35.

Finally, two changes in senior care service delivery models are worthy of mention. The first is to create the infrastructure and programs needed to support seniors in their desire to "age in place." For some seniors, this means bringing services into a single-family home or independent living apartment. For others, it means moving into an HWS unit and incrementally adding services, including assisted living if appropriate, while remaining in the same residence. Many seniors choose campuses where a full continuum of care is offered to individuals to meet their variety of needs. Within such a campus, seniors can move across the aging services spectrum, from HWS to assisted living, or assisted living to nursing home, or from a hospital to a transitional care unit ("TCU") and ***10** then into assisted living. This provides seniors with continuity and stability and allows them to remain in a familiar setting.

A second is that nursing homes and assisted living facilities are responding to strong consumer-driven movements for more customized care. As DHS described it, Minnesotans "are expecting and demanding more choice and control over their long-

term care. This trend is expected to accelerate as baby boomers, the first real 'consumer' generation, grow old and need care. The beginnings of this trend are already evident in the changing market for long-term care services and supports." 2006 DHS Report, at 4. Senior care consumers do and increasingly will demand different sizes, settings, features, individualized service packages, and amenities.

These changes in the service models and philosophy of senior care providers are referred to in a variety of ways, including "long-term care reform," "culture change," and "person-directed" care. And whatever the description, they are now an established market requirement.

C. State Policy Is Driving Change.

The market shift away from institutional care has also been encouraged by an express state policy, adopted formally in 2001 [5], to reduce the proportion of long-term care provided in nursing homes or other institutional facilities and to increase the proportion of care that is provided to older persons in their own homes or apartments, ***11** including housing with services and assisted living settings. *See* 2006 DHS Report, at 9. This "rebalancing" policy, can be seen, for example, in the strategic plan of the Minnesota Department of Human Services, Continuing Care division, which states that the Department will "administer an array of home and community-based service options so that community-based care is the expectation, and foster communities for a lifetime where older people and people with disabilities are contributors to their communities and where communities provide them with supports and services they need." Minn. Dep't of Human Servs, Continuing Care Administration 2011-2015 Strategic Plan, available at http:// www.dhs.state.mn.us/main/groups/disabilities/documents/pub/dhs16_172066.pdf.

As another recent example, in January 2013, Governor Mark Dayton established an Olmstead Sub-Cabinet to develop and implement a comprehensive Minnesota Olmstead Plan. "Olmstead" refers to the 1999 U.S. Supreme Court decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S. Ct. 2176 (1999), in which the Court ruled that the Americans with Disabilities Act (ADA) require states to provide services to people with disabilities in the "most integrated settings" appropriate to their needs. In November 2013, the Sub-Cabinet released a plan with many recommendations and actions steps relating to employment, housing, supports and services, lifelong learning and education, healthcare and healthy living, transportation, and community engagement. See Putting the Promise of Olmstead into Practice: Minnesota's 2013 *Olmstead* Plan, (November 1, 2013).

The goal of rebalancing - as well as the changing preferences of consumers highlighted above - is also reflected in an increased utilization of home and community- ***12** based services within publicly funded programs and the shift of state spending to community alternatives. In 2007, almost 58 percent of older adults receiving medical-assistance funded long-term services and supports received home and community-based services. By 2011, the overall percent increased to 64.3 percent. That report shows that, as a percentage of total dollars spent, State spending on home and community-based services was just 8% in 1995, had climbed to 37% in 2010, and is projected to reach 42% by 2015. DHS 2013 Report, at 13 (citing DHS webpage at http:// www.dhs.state.mn.us/main/groups/disabilities/documents/pub/dhs16_173446 .pdf). From 2002 to 2012, **Elderly** Waiver and Alternative Care program expenditures increased as a percentage of all **elderly** long-term care spending from 18.9% to 32.4%, and is projected to reach 36.7% by 2016.

III. ARGUMENT.

A. Providers Must Be Allowed to Evolve.

Senior care providers must be allowed to expand and adapt their services without unreasonable land use restrictions. As shown above, huge numbers of people are seeking this care; consumers are insisting on new models and standards of care; and policy makers are driving change to update and improve the services offered to clients of public programs.

The Martin Luther Care Campus ("Campus") is a microcosm of the changing landscape described above. From the time of its initial creation, the Campus has worked to expand and update its services to meet the needs of a growing and changing group of seniors. In 1958, the Lutheran Good Samaritan Society Home for the Aged sought ***13** permission from the Village of Bloomington to build a 120 bed "rest home." Appellant's Appendix ("AA") at AA1-2. Over the years, the Village (now City) became one of the largest suburbs in the Twin Cities; houses and a school were built around the "Home for the Aged;" the rest home became a nursing home; and the facility evolved to meet the needs of its residents and the demands of the marketplace. The number of nursing home beds expanded and contracted as demand waxed and waned. In 1987, the Meadow Woods Assisted Living building was added, one of the first of its kind in Minnesota. AA10. And in 2008, the nursing home was redesigned and modernized to meet the changing standard of care. AA29.

RDNT's 2011 CUP application - the one at issue here - sought only to expand its existing use in order to meet the changing need and demand for assisted living services described above. As stated in the narrative project summary that RDNT submitted with its CUP application:

> The addition will provide 67 new catered living units, allowing seniors the ability to retain a level of independence in a non-institutional setting while optimal care and assistance are just steps away.... These units are necessary to meet the evolving market expectations of those moving into assisted living, including kitchen areas to supplement the on-site meals that are provided to residents. Without these additional units, the Campus will be challenged to remain competitive in the market place.

AA190.

While the legal sufficiency and factual soundness of a municipality's land use decisions are important to all property owners, it is especially important for senior care providers, who must continually update and expand their services or risk falling into obsolescence. In denying the CUP, the City of Bloomington ("City") ignored provisions ***14** of its own Comprehensive Plan, without addressing the fact that its population is rapidly aging and will require services at the current standard of care.

B. It is Improper to Allow a City to Rely on General Statements from a Comprehensive Plan to Deny a CUP.

A city's land use decisions are entitled to deference and will be upheld unless the record shows the decision was arbitrary, capricious, or unreasonable. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 389 (Minn. 2003). Denials of permits receive less deference than approvals. *Big Lake Ass'n v. Saint Louis County Planning Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009). Courts must construe the language of a zoning ordinance according to its plain and ordinary meaning. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). But if the words used are subject to various interpretations that are more or less restrictive in scope, the court should "give weight to the interpretation that, while still within the confines of the term[inology], is least restrictive upon the rights of the property owner." *Id.* at 608-09. The court also must consider the language in light of its underlying policy. *Id.* at 609.

In the present case, the City denied RDNT's request to expand the existing use of its property, not because the expansion would require rezoning, or a variance, or conflicted with any other City ordinances, but because the City concluded the expansion would conflict with general statements found in its Comprehensive Plan. Specifically, the City denied the CUP, in part, because the Plan expresses the goal of "preserving the character of low density neighborhoods." Appellant's Addendum ("AAD") p. 52.

Such a broad statement is not a valid ground for rejecting a CUP application, ***15** especially since the provisions cited do not relate to the campus property, which is guided "quasi-public" land. Considering the elevated importance afforded to the rights of all property owners, it is not reasonable for a city to convert vague policy pronouncements in a comprehensive plan into specific land use regulations and a basis for denying a CUP.

To allow this decision to stand would mean municipalities could use such general statements to conceal arbitrary and capricious decision making. A comprehensive plan is only a guide to the use of land, and not an ordinance or rule that regulates and controls such uses. In fact, the Comprehensive Plan describes itself as "a compilation of the City's goals and strategies" with "recommendations on actions needed to reach future goals," and a "guide to decision making... for more detailed planning efforts." AAD80. To ensure consistent decision making, land use decisions should be based on zoning ordinances, which contain more specific language and are enacted through a process in which city leaders and the public are debating and setting the terms and conditions of actual regulations. "To be effective any restriction on land use must be clearly expressed." *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984).

The problem with allowing a city to pick and choose language out of a Comprehensive Plan is highlighted by the fact that the City's denial of the CUP conflicts with language found elsewhere in the Plan. In Table 1.2, which lists the city's "Top 10 Ranked Goals," goal number six is "Enhance support for members of the community as they age." AAD80. Notably, preserving the character of low density neighborhoods does not even appear on this list. A few pages later, the Plan lists elements of its "Land ***16** Use Planning Intent," which includes "Meet the needs of residents for convenient services and amenities in an ever evolving marketplace" and "Adjust to an aging population." AAD82. In the Executive Summary of the Housing Element section, the city states that "Bloomington will work to preserve and provide housing that meets market demands and allows residents to remain in the community at all stages of their lives." AAD105. It was not reasonable for the City to emphasize selected portions of the Plan while ignoring contrary provisions - particularly provisions that are of extreme importance to the City's future, given its rapidly aging population. At a minimum, these conflicting provisions must be construed together, as they relate to the same subject matter and to each other. *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits in City of Mounds View*, 664 N.W.2d 1, 8 (Minn. 2003). The City ignored this obligation and only relied on the sections that supported its decision to deny the CUP. This is the very definition of arbitrary and capricious decision making.

In addition, to reach its decision, the City took an unreasonably narrow view of the neighborhood in question. The neighborhood where the campus is located is not exclusively residential - rather, it is a border area where a residential neighborhood abuts a quasi-public area that includes a school, a church, and parkland, in addition to the Campus. Since the land was first developed, these uses have co-existed, together with the water and conservation areas to the south and west, which makes up the neighborhood as a whole. As RDNT described in its narrative project summary, "[t]he Care Campus has been part of the fabric of this neighborhood for over 50 years as it has developed and expanded." AA55-56.

***17** Finally, even if the "preserving the character" of the low-density neighborhood in question was a concern, to the City's finding that the size of the expansion would result in "a level of development inconsistent with the scale and character of the surrounding low density, single-family neighborhood, which contains structures one-fifth or less the size of the proposed new addition" was not reasonable. AAD52.

It is illogical to compare an assisted living building to a single family home, and then find that the former, solely by virtue of its comparatively larger size, will "negatively impact the neighborhoods [sic] health, safety and welfare." *Id.* As the district court noted, RDNT is not seeking to take further land or replace existing single family housing; only seeking to add to the quasi-public complex already existing. There is no alternative proposal for single family residential development of the land; thus the expansion should not be judged only by the standards relating to single family housing. AAD31. This is especially so since, as noted, the neighborhood is not exclusively low-density residential in nature. To compare the proposed use only to the single family homes to the north of the campus "creates a misleading impression that the development is inconsistent with the neighborhood." *Id.* AAD31.

IV. CONCLUSION.

This case is very important because cities all across Minnesota have been and will be grappling with the same questions as Bloomington - namely, meeting the needs of seniors and property owners who wish to serve seniors, in balance with other land uses. To meet the goal of providing seniors with the right care and support, in the right place and at the right time, property

owners must have the ability to adapt their existing land ***18** uses. With strong market forces at their doors, including a changing standard of care, senior care providers must evolve or risk becoming obsolete. If the Court of Appeals' opinion is allowed to stand, municipalities across the state will be empowered to deny requests for the simple expansion (or construction) of the care settings needed to meet the needs of older adults, by relying on isolated provisions from their comprehensive plans. It will invite future arbitrary decisions in other communities by allowing any general statement in a plan to be used as a basis for denial, and the result will be vague and unpredictable regulation.

For the reasons above, Aging Services respectfully asserts that this Court should reverse the court of appeals decision.

Footnotes

1 Pursuant to Minn. R. Civ. App. P. 129.03, Aging Services certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than Aging Services made a monetary contribution to the preparation or submission of this brief.

2 In the regular course of business, Aging Services requests and receive statistical and otherta from various govermenal entities, including the Minnesotapartmt of Health. It gathers d compiles that ata or the use of its members. Although the iformaion comesfrom he government, it is not necessarily published in a form that can be accessed by the general public. Unless otherwise indicated, the facts and figures in this Section II come from those sources.

3 Every two years, the Minnesota Department of Human Services (“DHS”) issues a report to the Minnesota Legislature summarizing the status of long-term services and supports for seniors. As required by statute, this report includes demographic trends; estimates of the need for long-term services and supports; summary of statewide trends in the availability of long-term services and supports, including access to the least restrictive and most integrated services and settings; and recommendations regarding the goals for the future of long-term services and supports. See Minn. Stat. § 144A.351 (2012).

4 The Minnesota State Demographic Center, part of the Department of Administration, is the main provider of demographic data and analysisor the state. Its population projections and other ta are available at http:// www.demography.state.mn.us/.

5 In 2001 the Minnesota Legislature enacted a comprehensive set of historic long-term care reform provisions prepared by the state's long-term care task force, which included the State, groups such as Aging Services of Minnesota, and consumer advocates. Several key provisions were enacted to reduce reliance on the institutional model and expand the availability of home and community-based options for older persons.

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