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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1366**

Larry Naber,
Appellant,

vs.

City of Minneapolis,
Respondent.

**Filed May 29, 2012
Reversed
Stauber, Judge**

Hennepin County District Court
File No. 27CV1026565

Patrick J. Kelly, Patrick J. Kelly Attorney at Law, P.A., St. Paul, Minnesota (for appellant)

Susan L. Segal, Minneapolis City Attorney, Amanda Trelstad, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from the district court's affirmance of the city's determination that appellant's property is subject to the city's vacant building registration (VBR) fee, appellant argues that (1) the district court erred by concluding that his property qualified

for the VBR program in 2009 because it was “vacant” under the relevant city ordinance and (2) the city’s VBR program deprives appellant of his property without compensation. Because we conclude that the district court erred by determining that appellant’s property qualified for the VBR program in 2009 due to being unoccupied for over 365 days and incurring three orders to correct nuisance conditions, we reverse.

FACTS

Appellant Larry Naber is the owner of a home located at 1332 Russell Avenue North in Minneapolis. Naber and his family lived in the home for several years, but moved out in approximately 1996. Naber allowed a friend to stay in the home for a period of time, but the home has been unoccupied since at least 2008. Subsequent to 1996, respondent City of Minneapolis (the city) recorded various housing code violations at the property, all of which were timely remedied.

In November 2001, the city sent a letter to Naber directing him to apply for the city’s VBR program, pursuant to Minneapolis, Minn., Code of Ordinances (MCO) § 249.80(a) (2010). At the time, the annual registration fee for the VBR program was \$400. Naber completed a VBR application and paid the fee. From 2001 until 2008, Naber’s property remained in the VBR program, and he paid the annual fee. During that time, the city again recorded various minor violations at the property, all of which were timely remedied. In 2009, the city recorded three minor violations: brush/branches, tall grass/weeds, and an inoperable vehicle. All three violations were remedied.

In September 2009, the city sent Naber a VBR renewal invoice, which required him to pay an annual registration fee of \$6,360.¹ The invoice stated that if the fee was not paid, it would be assessed to the property taxes. Naber did not pay the fee, and the city sent him a notice of intent to assess the unpaid fee. Naber challenged the assessment.

After a hearing, an administrative hearing officer ordered the assessment to be levied in full. A few months later, the Minneapolis City Council adopted a levy of \$6,360 for the property at issue in this case. Naber appealed the assessment to the district court, pursuant to Minn. Stat. § 429.081 (2010). At the district court hearing, lead housing inspector Farrokh Azmoudeh testified for the city and Naber testified on his own behalf.

The district court denied Naber's appeal and confirmed the special assessment. The district court determined that the property at issue "qualified for the VBR program in 2009 because it was unoccupied for over one year during which orders to abate nuisance conditions were issued." Specifically, the district court found that the property received three nuisance violations in 2009 for grass cutting, branch removal, and an inoperable vehicle on the property. The district court further found that Naber did not take steps to remove the property from the VBR program by appealing the designation or entering into a restoration agreement and obtaining a waiver of the fee. The district court rejected Naber's challenge to the amount of the VBR fee, finding that "[w]hile the VBR fee may

¹ In 2008, when the annual VBR fee was \$2,000, the city analyzed the VBR program to determine if the current fee was sufficient to cover the program's costs. The city concluded that the fee was inadequate because "the true cost is over \$6,000." As a result, the city raised the annual VBR fee to \$6,000. *See* MCO §§ 249.80(j)(1), 91.70 (2010). Due to annual increases, the fee for levy year 2010 was \$6,360. *See id.*

not be specifically related to the cost of monitoring this particular Property, it is rationally related to the total costs incurred by the City to regulate and monitor all of the vacant properties in the City.”

Finally, the district court rejected Naber’s challenge to the constitutionality of the VBR program, concluding that it “does not deprive Naber of all reasonable uses of his Property.” The district court noted that Naber can “use the Property for his desired use of storing personal property so long as he keeps the Property secured, and free of maintenance violations and nuisance conditions” and that he could remove the property from the VBR program by entering into an agreement with the city to rehabilitate the property. The district court entered judgment against Naber. This appeal follows.

D E C I S I O N

This court gives great deference to a district court’s findings of fact, and will not disturb those findings unless they are clearly erroneous. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). This court reviews issues of law de novo. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007).

I.

The city has enacted an ordinance that regulates vacant buildings, based on its stated policy “to enhance the livability and preserve the tax base and property values of buildings within the city” and “to assure that buildings which are capable of rehabilitation are promptly rehabilitated.” MCO § 249.10 (2010). The city ordinance requires a property owner to register a building within five days of the building becoming vacant. MCO § 249.80(a). The ordinance defines “vacant building” as a building that is:

- (1) Condemned; or
- (2) Unoccupied and unsecured for five (5) days or more;
or
- (3) Unoccupied and secured by means other than those normally used in the design of the building for thirty (30) days or more; or
- (4) Unoccupied and has multiple housing maintenance, fire or building code violations existing for thirty (30) days or more; or
- (5) Unoccupied for a period of time over three hundred sixty-five (365) days and during which time an order has been issued to correct a nuisance condition pursuant to section 227.90; or
- (6) A vacant commercial or residential building or structure, which is unable to receive a certificate of occupancy due to expired permits, or demonstrated work stoppage of one hundred eighty (180) days or more as determined by the building official.

Id.

The city requires the owner of a vacant building to pay an annual fee, which “is imposed to recover all costs incurred by the city for monitoring and regulating vacant buildings, including nuisance abatement, enforcement and administrative costs.” *Id.* (j)(1) (2010). The city may waive or suspend the fee if the owner enters into a written restoration agreement with the city. *Id.* If an owner does not pay the annual fee, it is “levied and collected as a special assessment against the property.” *Id.* (j)(3) (2010).

A. Burden of proof

As an initial matter, Naber and the city dispute which party has the burden of proof. Naber argues that the city has the burden to demonstrate that his property was eligible for the VBR program in 2009. In contrast, the city argues that Naber, as the

petitioner, has the burden of proof to demonstrate that the special assessment was invalid. The city relies on *In re Superior Street in Duluth*, 172 Minn. 554, 560, 216 N.W. 318, 320 (1927), which states that “where an assessment is expressly authorized by law and is regularly made, we start with the foundation that it is prima facie valid, and the burden rests upon the objector to show its invalidity.”

At the evidentiary hearing, the district court stated that the city has the burden of proof because the matter “relies on the City substantiating that it is a vacant building.” We conclude that the district court did not err by determining that the city has the burden of proof. This case is distinguishable from *In re Superior Street* because Naber primarily challenges the city’s determination that his property qualified for the VBR program in 2009 because nuisance conditions were present on the property, not the validity of the assessment. Thus, we conclude that the city had the burden of proof to demonstrate that Naber’s property was eligible for the VBR program in 2009. While we recognize the necessity of a city trying to fight urban blight, we are obliged to follow the law and, here, the city failed to satisfy its burden of proof.

B. Eligibility for the VBR program in 2009

Naber argues that the district court erred when it concluded that his property qualified for the VBR program in 2009 because it was unoccupied for over 365 days and during that time the city issued three orders to correct nuisance conditions. Naber does not dispute that the home had been vacant for over 365 days, but he contends that the three alleged violations that the city recorded were not nuisance conditions. The applicable city ordinance provides:

No owner, agent or occupant of any privately owned lands or premises shall place upon, or permit upon the owner's premises any noxious weeds . . . , dirt or rubbish, or any swill, offal, garbage (except in authorized containers), ashes, barnyard litter, manure, yard cleanings, dead animals, inoperable vehicle as defined in the Zoning Code, or any other foul or unhealthy material, or any other condition on said premises, in such a manner as to constitute a nuisance. Except as part of a managed natural landscape as defined in this section, any weeds or grass growing upon any lot or parcel of land in the city to a greater height than eight (8) inches or which have gone or are about to go to seed are hereby declared to be a nuisance condition and dangerous to the health, safety and good order of the city. . . . Fallen trees, fallen tree limbs, dead trees, dead tree limbs, which in the opinion of the director of inspections constitute a health, safety or fire hazard, are declared to be a nuisance condition.

MCO § 227.90(a) (2010). The city's zoning code defines an "inoperable vehicle" as one that is abandoned, not functional, mechanically defective, or lacks a current license plate or registration. MCO § 520.160 (2010).

Naber first argues that the violation for tall grass was not a nuisance condition. He contends that the district court did not make a finding that the grass was eight inches tall or that it was about to go, or had gone, to seed, and that there is no evidence in the record to support such a finding. We agree. The district court did not find that the condition of the grass fit the definition of a nuisance condition set forth in MCO § 227.90(a), but instead stated that "while there is no ruler showing the exact height of the grass, it *could* be eight inches long or going to seed." (Emphasis added.) In addition, there is no evidence in the record to support a finding that the grass was eight inches tall or about to go to seed. The record includes a photograph of the grass taken by the housing inspector at the time he recorded the violation, but the photograph does not indicate the height of

the grass. The city's lead housing inspector, Azmoudeh, was the only witness for the city to testify at the evidentiary hearing, and he testified that another housing inspector took the photograph. There was no further evidence about the height or condition of the grass. We conclude that the district court's finding that the grass was a nuisance condition is not supported by the record.

Naber next argues that the violation for fallen branches was not a nuisance condition. He contends that the existence of the branch in the yard was not a nuisance, and the district court did not make a finding that the branch was a health, safety, or fire hazard. He further argues that the city's photograph reveals that the branch was small, not dangerous, and located in the backyard. In response, the city argues that the housing inspector recorded the violation for the fallen branch because he made a determination, in his professional opinion, that the limb was a health, safety, or fire hazard.

Here, the district court did not make a finding that the branch was a health, safety, or fire hazard, and there is no evidence in the record to support such a finding. The city's only witness did not testify about the branch, and the photograph that was admitted into evidence shows only a small branch in the backyard. While we agree with the city that some deference is accorded the city housing inspectors who record housing code violations, the branch at issue here was nominal and there is no evidence in the record that it was a health, safety, or fire hazard. We conclude that the district court's finding that the fallen branch was a nuisance condition was clearly erroneous.

Finally, Naber argues that the violation for an inoperable vehicle on the property was not a nuisance condition. Naber does not dispute that there was a vehicle parked on

the property without current license plates or registration. But he contends that the district court did not find that the vehicle was on the property in such a way as to constitute a nuisance, and that there is no evidence in the record to support such a finding. Naber argues that the vehicle was parked in a designated, although unpaved, parking pad in the property's backyard in a manner similar to that of the neighborhood.

In response, the city argues that, according to the ordinance's plain language, an inoperable vehicle on the property is itself a nuisance. We disagree. The sentence of the ordinance that includes "inoperable vehicle[s]" lists several conditions that are separated by commas. *See* MCO § 227.90(a). At the end of the sentence, following a comma, is the clause, "in such a manner as to constitute a nuisance." *See id.* The ordinance's plain language indicates that the final clause applies to the entire sentence. Thus, according to the statute's plain language, an inoperable vehicle is only a nuisance if it is placed on the property "in such a manner as to constitute a nuisance." *See id.*

Here, as Naber argues, the district court did not find that the vehicle on Naber's property was on the property "in such a way as to constitute a nuisance." In addition, the district court admitted into evidence photographs that show the vehicle parked on the property, but the city did not provide any testimony about the vehicle. There is nothing in the record to indicate that the mere presence of the vehicle in the designated parking pad in the property's backyard constituted a nuisance. Thus, the record does not support a finding that the vehicle was a nuisance, and we conclude that the district court's finding that the inoperable vehicle was a nuisance condition was clearly erroneous.

Naber further argues that the property was not “vacant” under the city ordinance because it did not have multiple housing maintenance, fire, or building-code violations existing for 30 days or more. *See* MCO § 249.80(a)(4). He contends that he corrected all violations within 30 days. But we need not address this argument because the district court did not find that the property was vacant pursuant to MCO § 249.80(a)(4). *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating an appellate court generally will not consider matters not argued to and considered by the district court).

Accordingly, we conclude that the district court clearly erred by finding that the three housing code violations the city recorded in 2009 were nuisance conditions and, thus, the district court erred when it concluded that Naber’s property qualified for the VBR program in 2009.

C. Due process

Naber contends that he was denied due process of law because the city’s housing inspector testified at the hearing about several conditions that he observed at the property without providing Naber with notice of the conditions. A city must use caution in abating or removing a nuisance in order to protect the rights of property owners. *Village of Zumbrota v. Johnson*, 280 Minn. 390, 395–96, 161 N.W.2d 626, 630 (1968). A property owner must “freely and unequivocally” receive “notice and opportunity to be heard which are the essence of due process of law.” *Id.*

Here, a housing inspector for the city testified that he had recently observed several violations at the property, but that the city had not yet notified Naber about the violations. But we do not consider Naber’s argument because the district court did not

conclude that the property qualified for the VBR program based on these recent violations. *See Thiele*, 425 N.W.2d at 582.

D. VBR renewal invoice

Naber also contends that the September 2009 VBR program renewal invoice that the city sent to him did not comply with the city's ordinance. He does not contest the district court's finding that the city sent a VBR renewal invoice to Naber, but he argues that the invoice itself did not give him notice of his right to appeal the VBR designation. But we decline to decide this issue because it was not argued to and determined by the district court. *See Thiele*, 425 N.W.2d at 582.

II.

Finally, Naber argues that the VBR ordinance constitutes an unconstitutional taking pursuant to the United States and Minnesota Constitutions. *See* U.S. Const. amend. V (stating that "private property [shall not] be taken for public use, without just compensation"); Minn. Const. art. I, § 13 ("Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."). But we need not reach this issue because we conclude that the district court erred when it determined that Naber's property qualified for the VBR program in 2009.²

Reversed.

² For the same reason, we do not reach the issue of whether the VBR program's \$6,360 annual registration fee is reasonable.