



NO. A10-187

STATE OF MINNESOTA

In Court of Appeals

MAHMOOD KHAN,

Relator,

vs.

MINNEAPOLIS CITY COUNCIL,

Respondent

RELATOR'S BRIEF

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ISSUES

- I. Did the Minneapolis City Council afford Relator adequate due process before ordering the demolition of his property.
 - a. The Minneapolis City Council ordered the demolition of Relator's property without providing him adequate due process.

Village of Zumbrota v. Johnson, 161 N.W.2d 626 (Minn. 1968)
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- II. Was the decision of the Minneapolis City Council to demolish Relator's property arbitrary, oppressive, unreasonable, under an erroneous theory of law, or without any evidence to support it?
 - a. The Minneapolis City Council ordered the demolition of Relator's property in violation of the City's ordinance, based on impermissible considerations, and without evidence to justify it.

Dietz v. Dodge County, 487 N.W.2d 237 (Minn.1992)
Minneapolis Ordinance Ch. 249

STATEMENT OF THE CASE AND FACTS

a. Statement of the Case

Relator Mahmood Khan appeals by writ of certiorari the order of the Minneapolis City Council, dated December 4, 2009, to demolish his property at 2222 – 4th St. North, Minneapolis. (Relator’s Appendix (“A-App.”), 71.) The proceedings before the City Council and its subcommittees are set forth in detail in the Facts section below.

b. Facts

On June 25, 2008, Relator Mahmood Khan purchased a duplex at 2222 – 4th Street North, Minneapolis (“Property”). (9-25-08 Tr., 2.) The Property was built in 1900. (Id.) Each unit of the Property has four rooms of which one is a bedroom and one a bathroom. (Id.) Prior to Mr. Khan purchasing the Property, the City of Minneapolis (“City”) had condemned it on July 17, 2007. (Id..)

On July 23, 2008, the City issued an order to demolish the Property. (A-App., 8.) The City did not include the order to demolish in the record, nor did it send the order to Mr. Khan, the property owner of record. (A-App., 7.)

On September 25, 2008, the City conducted a meeting of the Nuisance Condition Process Review Committee (“Nuisance Review Committee”) to hear Mr. Khan’s appeal of the demolition order. (9-25-08 Tr.; A-App., 8.) The Nuisance Review Committee consisted of Burt Osborne, Chair; Patrick Todd, City Assessor; Bryan Tyner, Fire Marshal; and Elfic Porte, Community Planning and Economic Development. (9-25-08 Tr.)

At the Nuisance Review Committee meeting, Brian Young of the City's Department of Regulatory Services ("Department") stated that the City had 27 open housing repair orders on the Property, most of which were as the result of an inspection in April 2008. (9-25-08 Tr., 2.) At that time, the problems with the Property were a moldy basement, holes in the walls, water damage to the ceilings, trashed kitchens and bathrooms, missing copper, and a substandard roof. (Id.) The City estimated the restoration cost at \$129,843-\$234,372; Mr. Khan estimated it at \$100,000. (Id.) Mr. Young also stated that the Department had received three neighborhood impact statements, all stating that "the house has a negative impact on the neighborhood, does not fit the housing needs of the neighborhood and should be demolished." (9-25-08 Tr., 3.) Mr. Young did not identify the authors of the impact statements, and they were not included in the documentation provided to the Nuisance Committee. (A-App., 8-18.) After giving an unsworn statement that lasted only a page and a half of the transcript, Mr. Young stated, "The staff's recommendation is demolition. Thank you." (9-25-08 Tr., 3) The Nuisance Review Committee asked no questions of Mr. Young. (Id.)

The Department provided the Nuisance Review Committee sparse documentation to supports its recommendation: several photographs, property tax information, and a landscaping plan for the Property. (A-App., 10-18.)

When Mr. Khan spoke to the Nuisance Review Committee, he informed them that he had purchased the Property on June 25 from a bank and was not aware of any order to raze it. (9-25-08 Tr., 3.) Mr. Khan only discovered that there was an order to raze the Property when he went to the City to get a permit to fix up the Property. (Id. at 3-4.) Mr. Khan

requested that the Nuisance Review Committee give him a chance to repair the Property and informed it that he had the experience and resources to do so. (Id. at 4-5.) Mr. Khan further stated that he had already made a proposal to the City to rehabilitate the Property. (Id. at 5-6.)

The Department's Wayne Murphy responded to Mr. Khan's statements by informing the Nuisance Review Committee that the Department would need to see bids from licensed contractors and discuss a timeframe for the restoration. (9-25-08 Tr., 6.) Mr. Khan replied that he was willing to take these next steps. (Id.) Based on these statements, Nuisance Review Committee Chair Osborne expressed optimism that a restoration agreement would be entered into by the parties. (Id. at 7.) The only other question from the Nuisance Review Committee was whether Mr. Khan owned other properties in a similar state. (Id.) Mr. Khan replied that he did not. (Id.)

The Nuisance Review Committee meeting was then opened to members of the public to speak. Habib Moghul spoke first and stated that Mr. Khan was capable and should have a chance to rehabilitate the Property. (9-25-08 Tr., 8.) Next, Melvin Snoddy spoke and confirmed Mr. Moghul's view of Mr. Khan. (Id.)

Nuisance Review Committee Chair Osborne then closed the hearing and moved to "uphold the Director's Determination that the building currently constitutes a nuisance and should be demolished." (9-25-08 Tr., 9.) The motion was seconded. (Id.) Before putting the motion to a vote, Chair Osborne stated

It is my sincere hope that staff does work with Mr. Khan diligently to try to get a restoration agreement in place that's workable and realistic. Mr. Khan seems like he's a very serious owner and wants to save the structure, so the Panel would appreciate that.

(Id.) The Nuisance Review Committee voted 3-1 to raze the Property, with Fire Marshal Tyner voting against demolition. (Id. at 10.)

Following the September 25 hearing, the Nuisance Review Committee issued a written order upholding the Director of Inspections' Order to Raze. (A-App., 19-24.) The Nuisance Committee adopted verbatim the Department's recommendation to demolish, including typographical errors. (A-App., 8-9, 19-24.) As for Mr. Khan's proposal to rehabilitate the Property, the Nuisance Review Committee concluded that the Property was not worth rehabilitating, neighbors wanted it demolished, and Mr. Khan had been "unable to meet with staff to discuss a restoration agreement." (A-App., 22-24.)

On October 29, 2008, the City's Department of Regulatory Affairs requested that the Public Safety & Regulatory Services Committee of the Minneapolis City Council ("Committee") "adopt findings of the Nuisance Condition Process Review Panel to uphold the Director's Order and demolish" the Property. (A-App., 5.) The Committee postponed the matter and directed Department staff to meet with Mr. Khan to discuss a restoration plan. (A-App., 3.)

At a meeting of the Committee on December 17, 2008, the Committee considered whether to enter into a restoration agreement with Mr. Khan for the rehabilitation of the Property. (12-17-08 Tr., 1-2.) Prior to this December 17 meeting, Mr. Khan had signed a restoration agreement with the City, which included his proposal for bringing the Property into code compliance, and had fulfilled the City's bonding requirements. (Id. at 4, 6.)

Council Member Hofstede first questioned whether there was a management plan for the maintenance of the exterior of the Property, as well as Mr. Khan's other rental properties

throughout the City. (12-17-08 Tr., 2-3.) Tom Deegan of the City's Department of Regulatory Services responded, "I am familiar with Mr. Khan and a number of his other properties that we've been involved with [] over the last number of years. I'm not familiar with a specific [maintenance] company that he enlists on a regular basis." (Id. at 3.) The City's counsel cautioned that maintenance requirements went beyond the scope of Chapter 249 of the Minneapolis Code of Ordinances. (Id. at 3-4.) The Committee then voted to stay the demolition of the Property 30 days, pending reaching an agreement with Mr. Khan on a management plan for the exterior of the Property. (Id. at 4-7.) The management plan was to include tasks such as "snow removal, grass cutting, [and] keeping the perennials up to date." (Id. at 6.)

On January 9, 2009, the Minneapolis City Council approved the Committee's recommendations to stay the order for demolition, to authorize City officials to enter into a restoration agreement with Mr. Khan, and to require Mr. Khan to provide management and landscaping plans within 30 days. (A-App. 29.)

On February 3, 2009, the City entered into a restoration agreement with Mr. Khan for the Property ("Restoration Agreement"). (A-App., 50-52.) The Restoration Agreement declared the Property to be "reasonable" under Chapter 249 of the Minneapolis Code of Ordinances. (A-App., 50.) Under the Restoration Agreement, Mr. Khan had to "make all repairs, improvements, and alterations necessary to bring the property into compliance with all current City of Minneapolis Code requirements" by August 9, 2009. (A-App., 50.) If Mr. Khan failed to do so, the City would raze the Property. (Id.) To obtain the Restoration Agreement, Mr. Khan had to submit a maintenance and landscaping plan. (A-App., 55.)

This matter came back before a Committee meeting on October 7, 2009. At that time, the Department's Tom Deegan stated to the Committee that Mr. Khan had failed to satisfy the conditions of the Restoration Agreement by August 9, 2009, and that the City had cancelled the Restoration Agreement. (10-7-09 Tr., 2.) Mr. Deegan showed photos of the Property to the Committee to document the claimed deficiencies. (10-7-09 Tr., 3; A-App., 56-63.) Mr. Deegan's stated criticisms of the Property were as follows:

Mr. K[han] has not restored the property to almost new and, in fact, has elected to install mismatched windows, used carpeting and at least two different styles of colors of siding. In addition, interior walls have been poorly finished, including badly taped sheet rock, sprayed dry wall compound to cover imperfections and poorly installed trim boards... he has not installed any of the required plants or landscaping plans as he proposed.

(10-7-09 Tr., 3.) Mr. Deegan concluded by stating that the Property was "still considered an unabated nuisance [] under Chapter 249" and that based on the above alleged defects in Mr. Khan's attempts to rehabilitate the Property, the Department was recommending that the City demolish the Property. (Id. at 3-4.)

Mr. Khan responded to Mr. Deegan's criticisms by pointing out that he had "installed new furnaces, new stove... new appliances, new duct work, new carpet," and new windows. (10-7-09 Tr., 4; A-App., 56-63.) Mr. Khan stated that 90 to 95 percent of the required work on the Property had been completed. (Id.) The landscaping had not been completed because there were still work vehicles moving to and from the Property. (10-7-09 Tr., 4-5.) Because Mr. Khan was so close to completion of the rehabilitation, he requested that the Committee afford him another month in which to complete the repairs. (Id. at 5.) At that point, the Committee closed the public hearing on the question of the demolition of the Property. (Id. at 6.)

Councilmember Schiff began the non-public portion of the hearing by stating,

[T]hank goodness we have an appeal, because I can't imagine demolishing a house that's been 90% rehabbed. I'm gonna move to deny the request to repeal and direct staff to finish working with the property owner to get the permits needed to complete the rehab.

(10-7-09 Tr., 6.) Councilmember Hofstede countered with a motion that the staff's recommendation of demolition be accepted. (Id.)

The Committee then directed the Department staff to give more detail about the condition of the Property. (10-7-09 Tr., 6.) Mr. Deegan admitted that 90% of the rehabilitation had been completed. (Id. at 7.) Mr. Deegan also pointed out that the Vacant Building Registration fee that had been held in abeyance by the Restoration Agreement was being appealed by Mr. Khan. (Id.)

Department staff member Brian Young testified further about alleged problems with the Property. (10-7-09 Tr., 7.) Mr. Young complained that there were a "mix match variety of windows that were installed" and that Mr. Khan had used "different styles of siding." (Id. at 7-8.) Mr. Young further testified that "the cabinets in the kitchen are used cabinets, and the doors on the lower half do not match the upper half, and the whole property is that kind of way." (Id. at 8.)

Next, the Committee discussed at length whether there was a bond or other type of security in place to secure completion of the rehabilitation. (10-7-09 Tr., 8-11.) Mr. Deegan took that opportunity to twice point out again that Mr. Khan was appealing the Vacant Building Registration fee the City had imposed on the Property. (Id. at 8-9.) During this discussion, Councilmember Ostrow stated that he was "not crazy about" demolishing a

nearly completed rehabilitation and that “it seems like there may be some alternative to get this done right, as opposed to demolition.” (Id. at 10-11.)

Councilmember Hofstede had other ideas. She stated that there were two issues: delay, including the number of times the matter had been before the Committee, and the quality of Mr. Khan’s work. (10-7-09 Tr., 15.) In response, Mr. Deegan admitted that if Mr. Khan’s work was “in line with the requirements under the Building Code, which often times don’t deal with aesthetics,” the Department could not address such aesthetic concerns. (Id. at 15-16.)

Councilmember Samuels then spoke, creating a new record and impugning generally the competency of Mr. Khan:

[T]his is probably the most devastated part of the City by foreclosures, and there are blocks in this area with one house or two houses that are still occupied. Sometimes one. Everything else is boarded up. This part of the City suffered from a combination of a kind of hemmed in by an industrial facility and the freeway wall, and also by Wafanas, the infamous Wafanas, where 1100 plus 911 calls were made in one year on that convenience store. So, the houses in and around this area have been severely challenged and the few folks who are still there are kind of under siege. And, so, the only way this area can be restored is if we have really responsible management and property maintenance and upgrading of properties. It has to be highly responsible, and, so, I’m looking for indicators of responsibility, and I’m not seeing it in the way this property is being rehabbed in terms of timeliness and in terms of quality... I saw Mr. K[han] in Home Depot a few months ago, and he told me he had just bought 15 properties and was working on them all simultaneously. So, clearly Mr. K[han] is biting off a lot and not able to chew, and the result is things are not being done in a timely way, and he has a lot of properties with a lot of things to swap out and change out and is evidently doing that... [W]e have a property that has windows, that has cabinets; they don’t match. It has siding; they don’t match. But they have ’em and now we’re gonna tear the whole thing down because of that... I gotta tell you that if one is able to buy up as many properties as one can and then with limited resources, given the kind of over investment that’s made, we now have to compromise everything to accommodate that, then we are

creating a really bad precedent situation in a highly blighted area that needs higher level of maintenance and responsibility.

So, we're talking now about an owner who probably owns four dozen properties, or close to that, in the City and is not able to keep up with even getting it ready for rental, and Mr. K[han] owns a property three doors up, four doors up from me that he bought. It's still empty, and we call it the poop house, and I'll let you figure out what that means. So, we've had, you know, people in there saying they're working on it, and then a woman screaming that she's being raped at night, and you know, all these things. We're calling Mr. Kahn in the middle of the night. You know, so, I'm highly skeptical of this owner's capacity to meet the requirements of the City for behavior and standards of various kinds. So, I'm inclined to say no, we just say keep your recommendation.

* * *

I'm going to ask my colleagues to support [the staff] recommendation, because this is a Frankenstein building. We're not talking about something that's half restored with quality, and I really believe that unless we do a couple of these, nobody's gonna believe us.

(10-7-09 Tr., 16-19.) (Emphasis supplied.) One of Council member Samuel's sources for his information concerning the Property was a "blog exchange." (Id. at 20.) This "blog exchange" is not part of the record.

Alarmed by Councilmember Samuels' statements, Assistant City Attorney Fussy cautioned,

I'm going to have to caution the Committee that the duty of the Committee is to make its decision based solely upon the record that's been put in front of it by the staff and the parties involved and that reference to outside sources of information would be inappropriate, and I would strongly caution the Committee not to consider outside sources of information on this.

(10-7-09 Tr., 20.)

Councilmember Ostrow commented that he had heard nothing to indicate that it was not financially feasible to rehabilitate the Property. (10-7-09 Tr., 21.)

Councilmember Schiff went further:

You know, I think we should seek remedies that may require either that this property owner pay more than they had anticipated paying in order to get the new permits out again. They forfeit their deposit and learn a lesson as they move forward, but I don't believe that we should pursue demolition on this property as a lesson to somebody or as a warning to an industry. I think there are enough financial penalties with the money that he's put on the line already at this property that will make this a very costly mistake for him to have not complied with the deadlines, and we should craft new language to seek compliance. But simply the photos that I have in front of me do not show me a property that is worthy of demolishing, and I think we have to focus on the quality of the structure as it exists today, not on things like a deadline to decide what should happen to the property in the future. We should be working with these property owners. He may be over extended. He may be out of his field of expertise. The quality of work may not meet the Ikea kitchens that we aspire to have, but certainly we have to take these on a case by case situation and base this on the merits, and I just won't be voting to demolish this out of anger or disappointment of this property owner but only looking at the property in its current condition, and I don't think this is ready for the wrecking ball. I think it's close to being rehabbed.

(10-7-09 Tr., at 22–23.) Councilmember Ostrow moved that the matter be sent “forward without recommendation” to allow additional time for an agreement to be reached between Mr. Khan and the City. (10-7-09 Tr., 24-25.) The motion passed unanimously. (Id. at 27.)

On November 18, 2009, this matter again came before a meeting of the Committee. Grant Wilson of the Department informed the Committee that the Department had performed a code compliance inspection on the Property on November 3, 2009, and that it had made available the results of that inspection to Mr. Khan on November 13, 2009. (11-18-09 Tr., 2.) In fact, the City had informed Mr. Khan on September 4, 2009 that it was going to conduct an inspection of the Property to identify code violations, but waited nearly two months to do so. (A-App., 49.) Mr. Wilson claimed that there was extensive work left to be completed on the Property and recommended “that this item be continued for one

more cycle so that [the Department] can meet with [Mr. Khan], go over the new code compliance requirements and come back with a second recommendation on December 9.” (11-18-09 Tr., 2-3.) The Department needed additional time to accomplish these tasks. (Id. at 5-6.) Indeed, the notice to Mr. Khan from the Inspections Division of the City stated that Mr. Khan had until May 12, 2010 to complete the identified repairs and that after the due date, a reinspection would be performed. (A-App., 77-83.)

Mr. Wilson then detailed problems with the Property that the Department claimed to have identified in its November 3 inspection. (11-18-09 Tr., 3-5.) The Department was raising many of the claimed problems because Mr. Khan had begun converting the Property from a duplex to a single-family home. (Id. at 4-5.)

Councilmember Samuels moved to recommend that the Property be demolished. (11-18-09 Tr., 8.) Councilmember Schiff opposed the motion:

I think as a matter of fair, due process rushing to demolish the property at this time without having met with him to discuss what work remains to be completed would really be a rush in this case and would violate his due process, and I think it would be just bad form for the Council to do that. So, I think at the very least we should meet with him and ask staff to take the time to do that and give him some fair time. How many times have you tried to meet with him, and what have been the efforts so far?

Wilson: Well, the code compliance orders were just given to him last week, and so we have not had a chance to meet with him with the other properties we’re dealing with right now. We haven’t had a chance to meet with him.

(Id. at 9.) (See also 11-18-09 Tr., 11; “I just think it’s a due process right now that we give him more than a week to meet with our staff so he knows how much work is left to be done.”)

As for Councilmember Johnson, her primary concern appeared to be the City’s expense in dealing with Mr. Khan. (11-18-09 Tr., 9-10.) She stated,

I would suggest to you that the time that our staff has spent on this particular property, we will never recoup the dollars that we've spent on this, and that is the problem that we're dealing with in this kind of an effort, and I personally don't see us on the same team, let me just make that very clear.

(11-18-09 Tr., 25.)

Councilmember Samuels' motion to recommend demolition was voted on and passed. (11-18-09 Tr., 13.) After the Committee had approved the motion, the Assistant City Attorney advised that the meeting should be opened to hear from Mr. Khan. (Id.) The Committee then moved and passed a motion to reconsider Councilmember Samuels' motion. (Id.)

Mr. Khan informed the Committee that the claim that the carpet was used was false; it was new carpet. (11-18-09 Tr., 14.) Similarly, the siding was new. (Id. at 18.)

The Department had provided Mr. Khan with a copy of the compliance inspection report and given him notice of the Committee meeting just two days before the meeting. (11-18-09, Tr. 15) (See also A-App., 77; notice for Mr. Khan sent to wrong address.) In terms of the background of the neighborhood, Mr. Khan stated that there were eight or more vacant or boarded up houses on the block, three vacant lots, and only four occupied homes. (11-18-09 Tr., 15-16.) Mr. Khan assured the Committee that he would fix up the Property, but that he had not had adequate time to do so, having just received the compliance inspection report. (Id. at 16-17.) In addition, Mr. Khan had stopped work on the Property as of October 15, 2009, based on the Department's instruction to cease work because new orders were coming. (Id. at 17, 22.)

After Mr. Khan had spoken, Councilmember Hofstede brought a motion to adopt the staff recommendation that the Department be allowed additional time to review with Mr.

Khan the results of the November 3 code compliance review. (11-18-09 Tr., 25.)

Councilmember Ostrow responded by making a substitute motion that the matter be returned to the Nuisance Review Committee for evaluation of the feasibility of rehabilitation of the Property. (Id. at 26-27, 30.) Councilmember Ostrow did not believe that it was the role of the Committee to hear new evidence concerning the Property. (Id. at 26.)

Councilmember Ostrow described the reasoning behind his motion as follows:

[M]y concern is that in almost all these cases the recommendation is to demolish when it gets to us. The question always... ends up being is the rehabilitation plan sufficient to abate the nuisance, and I guess I'm just, I'm uncomfortable with that process being just a conversation between our staff and this.. individual or any other individual without waving some record. It seems to me that we need some record of what the findings of the Nuisance Panel and what our findings would be as to whether or not this individual is capable of abating the nuisance. That's what our... authority is based upon is that we can abate the nuisance, and so my concern is that we have to have a formal process for that, quite frankly, I think to protect ourselves legally in terms of process. That's why I'm thinking this is the better approach.

(11-18-09 Tr., 31.) Councilmember Ostrow's motion was then defeated. (Id. at 32.)

In an odd twist, Councilmember Samuels then directed a vote by the Committee "to move the staff recommendation to rescind the Council action to stay the Order." (11-18-09 Tr., 32.) The Committee Clerk and Councilmember Schiff expressed confusion about this motion, as the staff recommendation had been to continue the matter until the next Committee meeting. (Id. at 33-35.) On the spot, Department staff member Wilson then modified the recommendation for a continuance to a recommendation "to uphold the Nuisance Condition Panel decision and deny the appeal and demolish the building." (Id. at 35.) The Committee approved this recommendation and apparently added the condition

that the Department attempt to negotiate another rehabilitation agreement with the City. (Id. at 34.) The Department stated that it planned to allow Mr. Khan another 90 days to complete the repair work and to have him post a \$50,000 performance bond. (Id.) The added requirement that the Department negotiate another rehabilitation agreement with Mr. Khan does not appear in the official record of the Committee's actions. (A-App., 70.)

On December 4, 2009, the Minneapolis City Council approved the Committee's recommendation to rescind the Council action staying the order for demolition and to authorize the demolition of the Property. (12-4-09 Tr., 2, 9.) The City Council voted on the matter with virtually no discussion – only the statement by Councilmember Hofstede that the Committee had been dealing with Mr. Khan for almost a year and that he had been unable to complete the restoration agreement. (Id. at 3, 4.) No information concerning negotiations for a new restoration agreement was included in the record. (12-4-09 Tr.; A-App., 71, 76.)

IV. ARGUMENT

a. Standard of Review

On a certiorari appeal from a quasi-judicial decision, the appellate court reviews “the regularity of [the City’s] proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.”

Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn.1992) (citation omitted). A quasi-judicial decision will be upheld if the agency “furnished any legal and substantial basis for the action taken.” *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App.1996)

(citation omitted). In cases involving nuisance abatement, “notice and opportunity to be heard which are the essence of due process of law should be provided freely and unequivocally.” *Village of Zumbrota v. Johnson*, 161 N.W.2d 626, 630 (Minn. 1968). Here, the City’s decision to raze Mr. Khan’s property lacked due process and was arbitrary, oppressive, unreasonable, unsupported by the evidence, and under an erroneous theory of law. It should therefore be reversed.

b. The City Did Not Afford Mr. Khan Adequate Due Process

The Minnesota Constitution provides that “[n]o person shall be ... deprived of life, liberty, or property without due process of law.” Minn. Const. art. I, § 7. The destruction of property by a governmental entity without due process of law constitutes a taking. *City of Minneapolis v. Meldahl*, 607 N.W.2d 168, 172 (Minn. App.2000). The Minnesota Supreme Court has held,

(a) Statutory proceedings to abate a nuisance in exercise of the police power of the state are to be executed prudently to avoid unnecessary curtailment of the rights of owners of private property.

(b) In the absence of an emergency situation, the notice and opportunity to be heard which are the essence of due process of law should be provided freely and unequivocally because of the fact that a judgment adverse to the owner results in loss without compensation.

Village of Zumbrota, 161 N.W.2d at 630. When the government’s notice fails “to specify precisely what [a citizen] was expected to do in order to comply” with the government’s requirements, the notice lacks due process. *Id.* Finally, procedural due process protections also include “the right to an impartial decisionmaker, and the right to a reasonable decision based solely on the record.” *Humenansky v. Minn. Bd. of Med. Examiners*, 525 N.W.2d 559, 565 (Minn. App. 1994) (citation omitted). Here, the City

denied Mr. Khan adequate due process when it (1) abruptly cut off administrative proceedings with him; (2) ordered the demolition of the Property without notice, an adequate record, or any meaningful opportunity for Mr. Khan to be heard concerning the merits of the November 3, 2009 code compliance inspection and a subsequent restoration agreement; and (3) relied on improper factors outside the record. Its decision thus lacked due process and must be reversed.

1. The City Did Not Provide Adequate Notice and an Opportunity to Be Heard Concerning the November 3 Inspection, a New Restoration Agreement and the Recommendation to Demolish

The Committee decided to recommend demolition of the Property on November 18, 2009, based primarily on the results of a November 3, 2009 code compliance inspection. (11-18-09 Tr., 2.) The City informed Mr. Khan of the results of the inspection and of the November 18 meeting just two days before the Committee meeting. (Id. at 15). Moreover, the City did not provide any written notice to Mr. Khan of the specific issue to be addressed at the November 18 meeting, nor its recommendation on the matter. To begin, therefore, notice was inadequate and not “freely” given for the November 18 meeting, in violation of the rule of *Village of Zumbrota*, 161 N.W.2d at 630.

But the notice gets worse. At the outset of the meeting, the City’s representative from the Department, Grant Wilson, stated that there was extensive work left to be completed on the Property and recommended “that this item be continued for one more cycle so that [the Department] can meet with [Mr. Khan], go over the new code compliance requirements and come back with a second recommendation on December 9.” (11-18-09 Tr., 2-3.) The Department simply needed additional time to accomplish these tasks. (Id. at

5-6.) Indeed, the compliance notice to Mr. Khan from the Inspections Division of the City stated that Mr. Khan had until May 12, 2010 to complete the identified repairs and that after the due date, a reinspection would be performed. (A-App., 77-83.) In addition, the notice contained numerous references to performing tasks in a “professional manner,” a standard vague enough that additional explanation from the Department was required. (Id.) Finally, Mr. Khan had stopped work on the Property as of October 15, 2009, based on the Department’s instruction to cease work because new orders were coming. (11-18-09 Tr., 17, 22.) Thus, from all appearances, the City was going to review with Mr. Khan the lengthy code compliance report and give him additional time to restore the Property after doing so.

Instead, the November 18 Committee meeting took an unexpected turn. Out of the blue, Councilmember Samuels moved to recommend that the Property be demolished. (11-18-09 Tr., 8.) This motion passed. (Id. at 13.) After passing the motion, the Committee realized that it had not given Mr. Khan the opportunity to be heard on the motion and decided to reconsider the motion. (Id.) Providing an opportunity to be heard after a motion has been decided does not afford a meaningful “opportunity to be heard” and thus violates basic notions of due process. *Village of Zumbrota*, 161 N.W.2d at 630.

The Committee meeting took another unexpected twist when Councilmember Samuels directed a vote by the Committee “to move the staff recommendation to rescind the Council action to stay the Order.” (11-18-09 Tr., 32.) Of course, no such recommendation had been made by the staff. Recognizing this, the Committee Clerk and Councilmember Schiff expressed confusion about this motion, as the staff recommendation had been to continue the matter until the next Committee meeting. (Id.)

at 33-35.) Not missing a beat, however, Department staff member Wilson on the spot modified the recommendation from a continuance to a recommendation “to uphold the Nuisance Condition Panel decision and deny the appeal and demolish the building.” (Id. at 35.) Mr. Khan’s fate was sealed. In the course of a single, brief Committee meeting and without any notice, the Department had abandoned its own recommendation to allow Mr. Khan time to “go over the new code compliance requirements.” (11-18-09 Tr., 2-3.) Such a rush to judgment is the opposite of notice given “freely and unequivocally” and the opportunity to be heard and should be rejected by this Court as a dangerous and unconstitutional precedent. *Village of Zumbrota*, 161 N.W.2d at 630.

The absence of notice and an opportunity to be heard were not lost on Councilmembers Schiff and Ostrow. Councilmember Schiff stated,

I think as a matter of fair, due process rushing to demolish the property at this time without having met with him to discuss what work remains to be completed would really be a rush in this case and would violate his due process, and I think it would be just bad form for the Council to do that. So, I think at the very least we should meet with him and ask staff to take the time to do that and give him some fair time. How many times have you tried to meet with him, and what have been the efforts so far?

Wilson: Well, the code compliance orders were just given to him last week, and so we have not had a chance to meet with him with the other properties we’re dealing with right now. We haven’t had a chance to meet with him.

(11-18-09 Tr., 9.) (Emphasis supplied.) (See also 11-18-09 Tr., 11; “I just think it’s a due process right now that we give him more than a week to meet with our staff so he knows how much work is left to be done.”) This failure to meet with Mr. Khan in order “to specify precisely what [Mr. Khan] was expected to do in order to comply” with the alleged code

compliance violations also deprived Mr. Khan of his right to due process. *Village of Zumbrota*, 161 N.W.2d at 630.

Councilmember Ostrow echoed similar concerns:

[M]y concern is that in almost all these cases the recommendation is to demolish when it gets to us. The question always... ends up being is the rehabilitation plan sufficient to abate the nuisance, and I guess I'm just, I'm uncomfortable with that process being just a conversation between our staff and this.. individual or any other individual without having some record. It seems to me that we need some record of what the findings of the Nuisance Panel and what our findings would be as to whether or not this individual is capable of abating the nuisance. That's what our... authority is based upon is that we can abate the nuisance, and so my concern is that we have to have a formal process for that, quite frankly, I think to protect ourselves legally in terms of process. That's why I'm thinking this is the better approach.

(11-18-09 Tr., 31.)

Councilmember Ostrow was correct. To afford Mr. Khan adequate due process, the matter should have been remanded to the Nuisance Review Committee. By the Fall of 2009, over a year had passed since the Director's initial Order to Demolish, and Mr. Khan had made 90% of the repairs to the Property. (10-7-09 Tr. 4, 7; A-App., 56-63.) He had "installed new furnaces, new stove... new appliances, new duct work, new carpet," and new windows. (10-7-09 Tr., 4; A-App., 56-63.) The photos alone document a significant change in the condition of the Property. (A-App., 56-63.) Upon hearing this evidence, Councilmember Schiff exclaimed, "thank goodness we have an appeal, because I can't imagine demolishing a house that's been 90% rehabbed." (10-7-09 Tr., 6.) The Director's July 23, 2008 Order to Demolish was thus outdated and based on a vastly different condition of the Property. Chapter 249.50 of the Minneapolis Code of Ordinances limited the City Council to considering only the "evidence and record of the

appeal hearing.” Under the ordinance and due process considerations, Mr. Khan should have been permitted the opportunity to be heard on these changed conditions at the level of the Nuisance Review Committee.

The November 18 Committee meeting took yet another turn when, while approving the motion to demolish the Property, the Committee added to the motion the condition that the Department attempt to negotiate another rehabilitation agreement with Mr. Khan. (11-18-09 Tr., 34.) The Department stated that it planned to allow Mr. Khan another 90 days to complete the repair work and to have him post a \$50,000 performance bond. (Id.) The added requirement that the Department negotiate another rehabilitation agreement with Mr. Khan does not appear in the official record of the Committee’s actions, however. (A-App., 70.)

On December 4, 2009, the Minneapolis City Council approved a recommendation from the Committee to rescind the stay of demolition and approve demolition of the Property. (A-App., 71.) In the space of two weeks, the additional condition to the Committee’s recommendation that the Department attempt to negotiate another rehabilitation agreement with Mr. Khan had simply disappeared. There is no further mention anywhere in the record of the City reviewing the results of the November 3, 2009 code compliance inspection with Mr. Khan or of any attempts by the City to negotiate a new rehabilitation agreement with him for the Property. Instead, the City rushed to judgment and ordered demolition of the Property without giving Mr. Khan fair notice of and an opportunity to be heard on the results of the November 3 Code Compliance and without following through on negotiating a new rehabilitation

agreement. This absence of notice and an opportunity to be heard were anything but the “freely and unequivocally” given due process required by *Village of Zumbrota*, 161 N.W.2d at 630.

2. The Order to Demolish Was Based on Improper Factors outside the Record

Due Process guarantees a citizen “the right to an impartial decisionmaker, and the right to a reasonable decision based solely on the record.” *Humenansky*, 525 N.W.2d at 565 (citation omitted). Indeed, Chapter 249.50 of the Minneapolis Code limits the City Council to considering only the “evidence and record of the appeal hearing.” In this case, the City cast aside these restraints and reached outside the Nuisance Review Committee record to consider factors beyond the scope of Chapter 249.40 of the Minneapolis Code.

Chapter 249.40 of the Minneapolis Code identifies the following factors for the City to consider when deciding to demolish or restore a property:

- a. The need for neighborhood housing;
- b. The historic value of the building;
- c. The impact on the neighborhood and the ability of the neighborhood to attract future residents;
- d. The capacity of the neighborhood to use the property;
- e. The zoning and comprehensive plan classifications for the property use;
- f. The market potential for the property;
- g. The estimated cost of rehabilitation;
- h. The severity and the history of neglect;
- i. The availability of funds for rehabilitation to the owner;
- j. The structural condition of the building.

In ordering demolition, the City relied on Mr. Khan’s alleged reputation with respect to other properties and the City’s cost in sending out inspectors to the Property. These factors go beyond the scope of Chapter 249.40 and were not part of the Nuisance Review Committee record.

First, Councilmember Johnson showed that she was primarily concerned with inspection costs:

I would suggest to you that the time that our staff has spent on this particular property, we will never recoup the dollars that we've spent on this, and that is the problem that we're dealing with in this kind of an effort, and I personally don't see us on the same team, let me just make that very clear.

(11-18-09 Tr., 25; see also 9-10.) (Emphasis supplied.)

Councilmember Samuels went further:

I saw Mr. K[han] in Home Depot a few months ago, and he told me he had just bought 15 properties and was working on them all simultaneously. So, clearly Mr. K[han] is biting off a lot and not able to chew, and the result is things are not being done in a timely way, and he has a lot of properties with a lot of things to swap out and change out and is evidently doing that... [W]e have a property that has windows, that has cabinets; they don't match. It has siding; they don't match. But they have'em and now we're gonna tear the whole thing down because of that... I gotta tell you that if one is able to buy up as many properties as one can and then with limited resources, given the kind of over investment that's made, we now have to compromise everything to accommodate that, then we are creating a really bad precedent situation in a highly blighted area that needs higher level of maintenance and responsibility.

So, we're talking now about an owner who probably owns four dozen properties, or close to that, in the City and is not able to keep up with even getting it ready for rental, and Mr. K[han] owns a property three doors up, four doors up from me that he bought. It's still empty, and we call it the poop house, and I'll let you figure out what that means. So, we've had, you know, people in there saying they're working on it, and then a woman screaming that she's being raped at night, and you know, all these things. We're calling Mr. Kahn in the middle of the night. You know, so, I'm highly skeptical of this owner's capacity to meet the requirements of the City for behavior and standards of various kinds. So, I'm inclined to say no, we just say keep your recommendation.

* * *

I'm going to ask my colleagues to support [the staff] recommendation, because this is a Frankenstein building. We're not talking about something

that's half restored with quality, and I really believe that unless we do a couple of these, nobody's gonna believe us.

(10-7-09 Tr., 16-19.) (Emphasis supplied.) One of Council member Samuel's sources for his information concerning the Property was a "blog exchange." (Id. at 20.) This "blog exchange" is not part of the record.

Councilmember Samuels' reliance on allegations outside the Nuisance Review Committee record deprived Mr. Khan of "the right to a reasonable decision based solely on the record" and violated the limitation of Chapter 249.50 of the Minneapolis Code that the matter be decided on the Nuisance Review Committee record. *Humenansky*, 525 N.W.2d at 565 (citation omitted). His fabricated record contained references to a rape, a "poop house," a "Frankenstein building," fifteen other properties owned by Mr. Khan, forty-eight other properties owned by Mr. Khan, and a meeting at Home Depot. Unfortunately for Councilmember Samuels, none of this information is contained in the record of the Nuisance Review Committee, and under Chapter 249.40-50, should never have been considered by the Committee.

Furthermore, when he said, "unless we do a couple of these, nobody's gonna believe us," Councilmember Samuels showed an intent to make an example out of Mr. Khan. Such considerations go beyond the bounds of Chapter 249 and the record, and require that the City's order be reversed on the grounds that it is "arbitrary, oppressive, unreasonable... under an erroneous theory of law, [and] without any evidence to support it." *Dietz*, 487 N.W.2d at 239.

c. The Nuisance Committee Abdicated Its Duty under the Ordinance

The City denied Mr. Khan a fair hearing from the outset when the Nuisance Review Committee disregarded unrefuted evidence and refused to overturn the Director's Order to Demolish. Under Chapter 249.45 of the Minneapolis Code, the Nuisance Review Committee had the authority to overturn the Director's Order to Demolish the Property and should have done so on the ground that restoration was the proper remedy for the nuisance condition. Chapter 249.40 allowed the Director to order rehabilitation of the Property based on a series of factors. Rather than provide an independent analysis of these factors, the Nuisance Review Committee adopted verbatim the Department's recommendation to demolish, including typographical errors. (A-App., 8-9, 19-24.) Worse yet, the claimed evidence justifying demolition versus rehabilitation was paltry: the Nuisance Committee relied on alleged "community impact statements" that do not even appear in the record, an alleged finding that the Property was not worth rehabilitating, and the fact that Mr. Khan had been "unable to meet with staff to discuss a restoration agreement."¹ (A-App., 22- 24.) As for the finding that the Property was not worth rehabilitating, Councilmember Ostrow stated that he had heard nothing to indicate that it was not financially feasible to rehabilitate the Property.² (10-7-09 Tr., 21.) In sum, there was no competent evidence supporting demolition over rehabilitation.

Where, as here, a governmental body abdicates its fact-finding role and becomes a "rubber stamp," "serious due process problems" are implicated. *N.L.R.B. v. Consolidated*

¹ The City did not even serve Mr. Khan with the Director's Order to Demolish. (A-App., 9)

² Councilmember Ostrow also pointed out that the Nuisance Review Committee had made no findings concerning whether Mr. Khan was "capable of abating the nuisance." (11-18-09 Tr., 31; Councilmember Ostrow.)

Liberty, Inc. 672 F.2d 788, 790 (9th Cir. 1982); see also *Ford v. I.C.E.*, 294 F.Supp.2d 655, 662 (M.D.Pa. 2003) (“[D]ue process is offended when the Board acts as a rubber-stamp or provides no indication that it conducted a particularized consideration of the petitioner's case.”); and *Biddle v. City of Fort Wayne*, 591 F.Supp. 72, 85 (Ind. 1984) (“where the Board merely ‘rubber-stamped’ the City's findings and conclusions, [it] did not provide...an ‘opportunity to be heard at a meaningful time and in a meaningful manner.’”). Because the Nuisance Review Committee made no independent analysis of the facts and acted as nothing more than a “rubber stamp,” its decision was “arbitrary, oppressive, unreasonable... under an erroneous theory of law, [and] without any evidence to support it,” warranting reversal here. *Dietz*, 487 N.W.2d at 239.

Had the Nuisance Committee actually considered the evidence offered by Mr. Khan, it would have found as follows:

- a. The Director issued the Order to Demolish shortly after Mr. Khan purchased the Property; Mr. Khan was not the party responsible for letting the Property lapse into a dilapidated state. (A-App., 8) Mr. Khan only discovered that there was an order to raze the Property when he went to the City to get a permit to fix up the Property. (9-25-08 Tr., 3-4);
- b. Mr. Khan had the experience and resources to rehabilitate the Property. (9-25-08 Tr., 4-5);
- c. Mr. Khan had made a proposal to the City to rehabilitate the Property. (Id. at 5-6); and

- d. The representative of the Department had no objection to Mr. Khan's proposal, only responding that the Department would need to see bids from licensed contractors and discuss a timeframe for the restoration. (Id. at 6.)

Even Nuisance Review Committee Chair Osborne recognized that rehabilitation was the proper remedy, as evidenced by his expression of optimism that a restoration agreement would be entered into by the parties:

It is my sincere hope that staff does work with Mr. Khan diligently to try to get a restoration agreement in place that's workable and realistic. Mr. Khan seems like he's a very serious owner and wants to save the structure, so the Panel would appreciate that.

(9-25-08 Tr. 10; see also p. 7.) After making such a statement, that Chair Osborne then moved to uphold the Director's Order to Demolish showed that he believed the Nuisance Committee's role to be nothing more than a "rubber stamp" for the Director's orders.

Consolidated Liberty, Inc. 672 F.2d at 790.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the order of the Minneapolis City Council to demolish the Property and direct the City Council to provide Mr. Khan adequate due process in resolving the remaining claimed code violations at the Property.

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