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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1340**

John S. Titus, et al.,
Appellants,

vs.

City of Prior Lake,
Respondent.

**Filed March 5, 2012
Affirmed
Stoneburner, Judge**

Scott County District Court
File No. 70CV1025016

Theresa A. Peterson, Huemoeller & Gontarek, P.L.C., Prior Lake, Minnesota (for appellants)

Suesan Lea Pace, Benjamin J. Rolf, Nilan Johnson Lewis, P.A., Minneapolis, Minnesota;
and

John M. Baker, Monte A. Mills, Greene Espel, P.L.L.P., Minneapolis, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellants challenge the district court's judgment for respondent city in this action involving a watercourse that runs across a portion of appellants' land. Specifically,

appellants assert that the district court erred by (1) holding that their trespass action is barred by the two-year statute of limitations contained in Minn. Stat. § 541.05(2010); (2) holding that a challenged portion of the city code is not unconstitutional on its face or as applied and denying injunctive relief permitting appellants to complete a drainage project; and (3) denying their motion for a new trial based on their assertion that the district court denied them a fair trial by excluding relevant evidence. Because the district court did not err holding that appellants' trespass claims are barred by the two-year statute of limitations for improvements to real property, appellants failed to establish that the ordinance is unconstitutional or was unconstitutionally applied to them, and failed to establish that they are entitled to a new trial based on evidentiary rulings, we affirm.

FACTS

Appellants John and Bettye Titus (collectively, Titus) have lived in the Fish Point Beach neighborhood of respondent City of Prior Lake (city) for more than 38 years. From 1973 to 1981, they had an easement across property located at 15084 Fish Point Road (Johnson property) for access to Prior Lake, and John Titus maintained the then-vacant Johnson property during that time. A drainage channel is located partially on the Johnson property, providing storm water drainage from approximately 87 acres surrounding Fish Point Pond (pond) into Prior Lake. In 1981, the city approved improvements to the Johnson property to make it a suitable building lot. A retaining wall was constructed along the channel and the lot was filled behind the retaining wall. The retaining wall extends about 33 feet into the adjacent lot at 5331 Frost Point Circle S.E. (Titus property). The former owners of the Titus property then also built a retaining wall

on their side of the channel. This retaining wall connected with the wall from the Johnson property and protected the lawn behind the retaining wall on the Titus property from erosion due to draining water. Titus bought the Titus property in 1986. The Johnsons are the current owners of the Johnson property.

Beginning in 1999, the city approved several development and street-improvement projects that resulted in increased drainage into the pond, causing increased flow in the channel and erosion on the Titus property. In 2007, John Titus petitioned the city to initiate a capital-improvement project to stabilize the channel. The city council approved a plan to place a pipeline through the channel. But the city was not able to obtain easements from the adjacent property owners that were necessary for the project, making it impossible for the city to implement the project.

When that project could not be completed, city maintenance workers removed a constriction at the edge of the lake and installed riprap to control erosion in that area. At that time, John Titus understood that any improvements to the channel on the Titus property would be up to Titus.

In the summer of 2009, Titus, working with an engineer, cleared and deepened the channel and began to construct a cement retaining wall in the approximate middle of the channel to narrow the water flow in the channel and control erosion on his land. Titus planned to fill the area between the old retaining wall on the Titus property and the new retaining wall, reclaiming for lawn the land over which water had been flowing. Titus learned from the city's website that no permit is required to build a retaining wall less than four feet high, but he did not read the entire city ordinance or call the city, as

recommended by the website, to determine if any other permits were required for his project.

An upstream neighbor, concerned about the upstream effect of Titus's new wall, contacted the city. After a site visit, the city's water-resources engineer issued a notice of violation of the city's code, notifying Titus that Prior Lake, Minn. City Code § 706.300 requires a permit from the city for excavation and filling activities in the channel. Attached to the notice was a restoration plan for the impacted areas and an invitation to meet to discuss the requirements of the plan.

On October 2, 2009, Titus applied for a permit to fill 398 cubic yards over more than 2000 square feet of surface area to improve storm-water drainage from the pond. Titus asserted that this project would provide an additional 12 inches of pond capacity.

By letter dated October 9, 2009, the city denied the application. The denial letter provides a history of the city's work and plans regarding drainage from the pond to the lake and lists the deficiencies in the application in meeting the requirements of the code:

1. Preserve capacity of existing system: **The application proposes to reduce the flow capacity of system in the stage/discharge model by up to 50% and therefore fails to meet the requirement.**
2. Prevent flooding and erosion from surface flows: **The application proposes to increase critical erosive velocity from 2.9 feet per second to 4.5 feet per second (155%) and therefore fails to meet this requirement.**
3. Discourage the alteration of wetlands: **The application proposes to fill approximately 560 square feet of wetland and therefore fails to meet this requirement.**

Attached to the letter was a revised restoration order, stating that Titus "may modify and resubmit [his] excavation and filling permit application but the application must show the

movement of the fill and retaining wall to a location outside the channel and must include supporting calculations and an erosion control plan.” Titus subsequently obtained necessary permission from the Department of Natural Resources and other entities as required by the ordinance, thereby addressing the alteration-of-wetlands issue.

Titus did not restore the area, but continued to meet with city officials about his project. On December 7, 2009, the assistant city engineer sent a letter to Titus re-stating the bases of the permit denial and noting that Titus had now satisfied the third item, so that two issues remained with the proposed wall: (1) reduction of system capacity and (2) increase in flow velocity and erosive force. The letter proposed three options: (1) remove the wall and restore the channel to original configuration; (2) complete a joint application with Johnson that provides a design that meets technical requirements, provides easements to the city for operation and maintenance of the channel, and indemnifies the city for any damages resulting from the approved design; or (3) apply for a temporary permit for the partially built wall, including a survey of the wall and engineering calculations that meet technical requirements and, with Johnson, agree to be responsible for any damage resulting from the approved design, and petition the city to complete improvements in a future year. The letter requests an application by January 30, 2010, noting that the city “wishes to resolve this issue promptly.”

Titus and engineer Gregory Halling continued, unsuccessfully, to try to persuade the city that the wall does not, in reality, reduce the capacity of the channel, arguing that the city’s model for determining existing capacity is flawed. Titus did not remove the wall or restore the channel or submit a joint application with Johnson or apply for a

temporary permit. Titus and the city did not come to any agreement addressing erosion on the Titus property.

In October 2010, Titus sued the city alleging trespass and requesting injunctive relief to allow completion of the retaining wall, or, in the alternative, for a declaration that Prior Lake, Minn. City Code § 706 is unconstitutional on its face and as applied to Titus. The city answered and counterclaimed, seeking a declaration that Titus is in violation of section 706, injunctive relief requiring Titus to either restore the property or submit an application that complies with the ordinance requirements, and damages. The city moved for summary judgment on all of Titus's claims. The district court granted summary judgment dismissing the trespass claim as barred by the applicable statute of limitations. The issue of whether section 706 is unconstitutional on its face or as applied and, if so, whether Titus is entitled to injunctive relief, was tried to the district court.

Before trial, the district court granted the city's motions in limine prohibiting Titus from introducing any documents beyond the documents relating to Titus's application and denial of the application. Specifically, the district court excluded evidence relating to post-permit-denial meetings and communications related to a proposed capital-improvement project affecting the channel.

At the conclusion of the trial, the district court held that the ordinance is not unconstitutional on its face or as applied and that Titus is not entitled to injunctive relief. The district court ordered Titus to remove the retaining wall and fill. The district court denied Titus's post-trial motions, and this appeal followed.

DECISION

I. The district court did not err in granting summary judgment dismissing Titus's trespass claims as barred by the two-year statute of limitations contained in Minn. Stat. § 541.051 (2010).

In an appeal from summary judgment, this court must “review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law.” *Dahlin v. Kroening*, 796 N.W.2d 503, 504–05 (Minn. 2011). “[T]he construction and applicability of a statute of limitation or repose is a question of law subject to de novo review.” *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006).

Titus contends that the six-year statute of limitations for trespass on real property, contained in Minn. Stat. § 541.05, subd. 1(3) (2010), applies to his claim that the city trespassed by diverting storm water onto the Titus property without consent or an easement. Titus further contends that the diversion of storm water onto the Titus property constitutes a continuous trespass, such that the six-year statute has not run despite diversion of water onto the property since 1981.

The district court agreed with the city that Titus's trespass claims are subject to the two-year statute of limitations contained in Minn. Stat. § 541.051, because the claims all arise out of the construction of improvements to real property. Minn. Stat. § 541.051, subd. 1(a) (2010). Titus does not dispute that, if the statute applies to his trespass claims, those claims are barred because they were not asserted within two years after discovery of the injury, but Titus argues that his claims do not result from an improvement to real property.

An “improvement to real property . . . is defined as a permanent addition to or a betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.” *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 286–87 (Minn. 2011). Titus first argues that because the channel is an unmaintained, naturally occurring pathway for water to travel from the pond to the lake that did not add value to the Titus property, it is not an improvement to real property. But the complaint does not identify the channel as the trespass or the cause of the trespass and resulting erosion on the Titus property. Titus’s complaint identifies increased water flow in the channel caused by the city’s improvements to real property as the trespass that caused erosion. The complaint alleges that “[a]s a result of development and the construction of homes in the area surrounding the Pond and because of recent improvements by the City to storm water facilities to redirect storm water from other watersheds to the Pond, the flow of water into and through the Channel has been expanded . . . so that the current flow through the Channel substantially exceeds the original natural flow.”

The district court concluded that *Nolan and Nolan v. City of Eagan* is controlling authority in this case, and we agree. 673 N.W.2d 487, 496 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004). *Nolan*, in relevant part, involved a claim of trespass by Nolan, a commercial property owner, against a city and the state for trespass after construction of a storm-sewer system caused numerous incidents of flooding on Nolan’s property. *Id.* at 491. This court held that a storm sewer system is an improvement to real

property as contemplated by Minn. Stat. § 541.051 and that flooding caused by a storm-sewer system constitutes a defective and unsafe condition within the meaning of the statute. *Id.* at 496. We affirmed dismissal of Nolan’s nuisance and trespass claims, stating that “[c]laims of nuisance and trespass arising out of a defective condition of an improvement to real property are governed by the statute of limitations in Minn. Stat. § 541.051 rather than the six-year statute of limitations in Minn. Stat. § 541.05 (2002).” *Id.* at 496–97.

The facts of this case are strikingly similar. Titus alleges that city improvements to real property have cast damaging amounts of water onto the Titus property without permission or an easement. Plainly Titus’s trespass claims, like Nolan’s claims, arise out of improvements to real property and, like Nolan’s claims, are subject to the statute of limitations in Minn. Stat. § 541.051.

Titus also asserts that Minn. Stat. § 541.051 applies only to actions for damages and does not apply to his action for declaratory and injunctive relief. Beyond the mere assertion, Titus did not initially brief this issue, but the city responded to the assertion, citing persuasive reasoning for the application of the statute to equitable claims. Specifically, a recent opinion from the Eighth Circuit Court of Appeals concluded that Minn. Stat. § 541.051, although silent on the issue of its application to claims for equitable relief, does apply to such claims. *Minch Family LLLP v. Estate of Norby*, 652 F.3d 851, 857–58 (8th Cir. 2011) (relying, in part, on *Siewert*, 793 N.W.2d at 288 n. 5). *Siewert* is a stray voltage case. *Siewert*, 793 N.W.2d. at 276. In *Siewert*, the supreme court, in relevant part, concluded that although the ten-year statute of repose contained in

Minn. Stat. § 541.051 did not bar Siewert’s claims for injunctive relief and damages caused by negligent maintenance and inspection of an electrical delivery system, Siewert’s claims for injunctive relief based on defects in the design of the system, unrelated to the “maintenance, operation, or inspection” of the system “are barred by the statute of repose” contained in Minn. Stat. § 541.051. *Id.* at 288 n.5.

Titus correctly argues that *Siewert* did not involve a direct challenge to the application of Minn. Stat. § 541.051 to claims for injunctive relief and urges us not to follow the holding in *Minch*, which is not binding on this court. But, based on our conclusion that neither language in the statute nor any other authority precludes application of the statute to claims for equitable relief and, given the supreme court’s application of the statute to such claims, we reject Titus’s assertion that Minn. Stat. § 541.051 does not apply to claims for injunctive relief. The district court did not err by granting summary judgment to the city dismissing Titus’s trespass claims as barred by Minn. Stat. § 541.051.

II. The district court correctly concluded that Prior Lake, Minn. City Code § 706.400 is not unconstitutionally vague.

The constitutionality of an ordinance is a question of law that this court reviews de novo. *State v. Botsford*, 630 N.W.2d 11, 15 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). A municipal ordinance is presumed to be constitutional, and a challenger has the burden to prove a constitutional violation beyond a reasonable doubt. *Thul v. State*, 657 N.W.2d 611, 618 (Minn. App. 2003), *review denied* (Minn. May 28, 2003). Vague statutes are prohibited by the due process standards of definiteness in the

Minnesota Constitution and the United States Constitution. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985). An ordinance “is void due to vagueness if it defines an act in a manner that encourages arbitrary and discriminatory enforcement, or the law is so indefinite that people must guess at its meaning.” (quotation omitted) *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001). “Persons of common intelligence must not be left to guess at the meaning of the ordinance nor differ as to its application.” *City of Edina v. Dreher*, 454 N.W.2d 621, 622 (Minn. App. 1990) *review denied* (Minn. June 15, 1990). The use of general language, however, does not make a statute vague. *State v. Christie*, 506 N.W.2d 293, 301 (Minn. 1993). “An ordinance that is flexible and reasonably broad will be upheld if it is clear what the ordinance, as a whole, prohibits.” *State v. Reha*, 483 N.W.2d 688, 691 (Minn. 1992). Specific sections of the ordinance cannot be viewed in isolation, but rather, the ordinance “must be read as a whole and considered in light of both its intent and its application by the city.” *Id.* at 693. Vagueness challenges not involving the First Amendment are to be examined in light of the pertinent facts. *Christie*, 506 N.W.2d at 301.

Section 706 contains permitting and enforcement procedures for excavating and filling operations to assure that any operation is in compliance with the city’s Water Management Plan¹. Prior Lake, Minn., City Code §706. The overall purpose of this section is “to preserve all watercourses and wetlands consistent with the provisions of the . . . Water Management Plan, as revised July 16, 1981, and any subsequent revisions or

¹ Initially called the ‘Prior Lake Overall Storm Water Management Plan’ and subsequently re-named as the ‘Local Surface Water Management Plan’.

amendments thereto.” Prior Lake, Minn., City Code § 706.100. A watercourse under section 706 is defined as, “[a]ny waterway or other body of fresh or brackish water, including but not limited to bays, rivers, creeks, rivulets, lakes, ponds, holding water areas and streams. . .” Prior Lake, Minn., City Code § 706.200. Section 706 requires that “[a]ny person who shall undertake an operation in the City including mineral extraction, depositing of materials or excavation of any materials on any upland, watercourse or wetland,” must apply for a permit. Prior Lake, Minn., City Code § 706.300. An operation within a watercourse is defined as, “the removal or deposition operations or a combination of both without respect to a minimum area or volume.” § 706.200. The permit application must contain (1) the name and address of the applicant and the applicant’s right to excavate; (2) the purpose of the excavation or filling; (3) a map of the proposed site which shows the amount of material to be deposited or excavated; (4) the depths or heights of excavation or fill proposed; (5) the manner in which the material will be removed or filled; (6) estimated time for the project; (7) the public way upon which material will be delivered or removed; (8) any streets that will be obstructed during the project; and (9) an erosion control plan. § 706.400 (1)–(9). The city engineer can additionally require that an applicant comply with the Water Management Plan, that the setback of the proposed project be at least fifty feet from the 100-year storm-water elevation level, and other prerequisites. Prior Lake, Minn., City Code §§706.501–.512. Overall, section 706 prohibits any excavating or filling operations in a watercourse or wetland without a permit.

Titus first argues that “the ordinance is unconstitutionally vague because an average citizen researching permitting requirements on the City’s website would find that construction of a retaining wall less than four feet in height requires no permit.” The argument is apparently based on the fact that John Titus checked the website only for requirements for building a retaining wall and did not research requirements for the “excavating and filling” portion of his project or for projects to be completed within a watercourse. Titus’s argument that his failure to find available information on the city’s website makes the ordinance unconstitutional is so lacking in merit that no further comment is necessary.

Titus next argues that section 706.400 is unconstitutionally vague because “the ordinance relies on the ‘subjective satisfaction of the City Engineer’ without providing objective criteria.” Titus’s challenge is specifically addressed to the provision in section 706.400 stating that

It shall be [the] responsibility and the burden of the applicant to demonstrate to the satisfaction of the City Engineer that the proposed excavation and/or filling complies with the city of Prior Lake Overall Storm Water Management Plan. Said burden shall include the furnishing of a report with supporting calculations of a registered professional engineer.

Although the city engineer is the person who determines if the requirements of the application have been met, the ordinance provides specific criteria for that determination, and there is no merit to Titus’s assertion that the ordinance relies on the “subjective” satisfaction of the city engineer. The city’s letter of October 9, 2009, denying Titus’s permit application, set out in detail the deficiencies in the application. Although Titus

remedied some of the deficiencies, no new application was filed, and Titus admits that the application submitted did not meet all of the specified requirements. The city engineer determined, as required by the code, that the application did not meet the objective requirements of the code.

Titus argues that the ordinance is “also ambiguous and unworkable because it fails to allow erosion repair.” Titus does not present any legal analysis or authority for this bare assertion, which seems to be based only on the fact that his proposed solution to erosion on the Titus property has not been permitted. We decline to address allegations unsupported by legal analysis or citation. *Ganguli v. University of Minnesota*, 512 N.W.2d 918, 919 n. 1 (Minn. App. 1994).

Titus also asserts that the ordinance “is ambiguous because it refers to the ‘Prior Lake Overall Storm Water Management Plan’ which no longer exists.” Titus admits that this document was revised and is now titled “Local Surface Water Management Plan.” And the ordinance encompasses revisions to the cited plan. The extent of Titus’s argument on this assertion is that “the failure to properly identify the document upon which permit approval may be based creates confusion for any citizen attempting to obtain a permit, and prevents uniform treatment to all applicants.” Absent legal analysis or citation, we decline to address this argument further, except to note that the city’s October 9, 2009 letter, denying the permit application and inviting Titus to modify and resubmit the application, specifically identified the “Local Surface Water Management Plan,” clarifying any confusion Titus may have had about the applicable plan.

The district court did not err in concluding that the ordinance contains objective criteria, does not permit a wholly arbitrary decision, and is, therefore, not unconstitutionally vague.

III. The district court did not err in concluding that the ordinance was not unconstitutionally arbitrarily applied against Titus.

The legal basis of Titus's constitutional challenge to the ordinance as arbitrarily applied is not entirely clear. No legal argument or authority for the assertion that the ordinance was arbitrarily enforced appears in Titus's brief on appeal. Titus's reply brief cited two cases to support the assertion that the ordinance was arbitrarily applied. One is *Clear Channel Outdoor Advertising, Inc. v. City of St. Paul*, 675 N.W.2d 343, 346 (Minn. App. 2004), cited for the proposition that when this court reviews the interpretation of local zoning ordinances, the municipality's decision may be reversed if its reasons are legally insufficient or if the decision is without factual basis. Titus acknowledges that *Clear Channel* involved a declaratory judgment action challenging a city's denial of an application for certain building permits in which this court held that the city's denial of the application was arbitrary and not reasonably related to the language or purposes of its ordinances. Titus further acknowledges that the complaint in this case "presents a constitutional claim and not a zoning ordinance review claim," but argues that *Clear Channel* "is helpful in analyzing whether the ordinance here was arbitrarily enforced." We are unable to intuit from this argument the basis of Titus's constitutional challenge.

The other authority cited by Titus is *Nat'l Capital Corp. v. Village of Inver Grove Heights*, 301 Minn. 335, 337, 222 N.W.2d 550, 552 (1974), cited for the proposition that

“Where a subdivision ordinance specifies standards to which a proposed plat must conform, it is arbitrary as a matter of law to deny approval of a plat which complies in all respects with the subdivision ordinance.” Although Titus claims to have “attempted compliance with all of the City’s stated requirements,” the record plainly supports the district court’s findings that Titus did not comply in all respects with the standards required for a permit under section 706 and that the city’s reasons for denying the permit were legitimate and reasonable. Titus has not established that the ordinance was unconstitutionally applied in this case.

IV. The district court did not abuse its discretion in denying Titus’s motion for a new trial.

This court reviews “a district court’s new trial decision under an abuse of discretion standard.” *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010). “The admission of evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997). “Entitlement to a new trial on the ground of improper evidentiary rulings rests upon the complaining party’s ability to demonstrate prejudicial error.” *Id.* at 47. “In the absence of some indication that the trial court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result.” *Id.*

Titus’s new trial motion is based on the assertion that Titus was denied a fair trial by the district court’s January 14, 2011 pre-trial order stating that the “matter [would]

proceed to trial on the review of the denial of the permit, based on the record created during the application process, and any constitutional infirmities in the applicable provisions of the City Code.” This order precluded Titus from introducing evidence of communications between Titus and the city after the permit was denied, including Titus’s proposals for a capital-improvement project to resolve the drainage issues. Titus characterizes the post-permit-denial evidence as relating to “a single ongoing permit application process.” But there was no “on-going permitting process” because Titus never submitted a modified permit application, despite having been invited to do so. None of the excluded evidence is relevant to the issues in the complaint. Titus was not denied a fair trial on the issues framed by the complaint, and the district court did not abuse its discretion in denying a new trial.

Affirmed.