STATE OF MINNESOTA
IN COURT OF APPEALS
A10-249

Tim Harmsen, et al.,
Appellants,

vs.

City of Minneapolis,
Respondent.

Filed August 24, 2010
Affirmed
Willis, Judge[*]

Hennepin County District Court
File No. 27-CV-09-16117

Erik F. Hansen, Patrick Burns & Associates, Minneapolis, Minnesota (for appellants)

Susan L. Segal, Minneapolis City Attorney, Erik E. Nilsson, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Willis, Judge.

[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellants challenge the grant of summary judgment to respondent city, arguing that (1) genuine issues of material fact should have precluded summary judgment; (2) the city is not entitled to discretionary immunity for its decision to revoke a building permit issued to appellants; and (3) the district court abused its discretion by denying their request for a finding of equitable estoppel. We affirm.

FACTS

Appellants Tim and Karen Harmsen own many rental properties in the Marcy-Holmes neighborhood of Minneapolis near the University of Minnesota. The Harmsens purchased a single-family home at 1120-8th Street S.E., intending to tear it down and replace it with a rental duplex. Stanley Masoner, the Harmsens' contractor, filed applications for a demolition permit and a building permit.

Molly McCartney, a senior city planner for respondent city of Minneapolis, approved the applications. McCartney described the approval process in her deposition. Complicated land-use issues require public hearings, but a city planner approves or denies construction permits for one-to-four unit dwellings in an administrative plan review. A permit to demolish an existing structure and a permit to build a replacement structure are usually issued concurrently. A demolition permit is issued if the structure does not meet the criteria for historic preservation. A building permit is issued after a review to verify compliance with zoning regulations, which include requirements for the site plan, the zoning classification, and exterior and interior features of the proposed

building. If the proposed plan complies with zoning requirements, a building permit is issued.

McCartney reviewed the Harmsens' demolition-permit application and determined that the home did not qualify for historic preservation. McCartney reviewed their building-permit application using a checklist that awarded points for inclusion of various interior and exterior details. Applying this point system, the Harmsens' application for a building permit scored 18 out of a possible 24 points; a passing score is 15 points.

McCartney stated in her deposition that she was under the impression that the home to be demolished was a duplex; in fact, the home was a single-family dwelling. Lot size is not an issue if the former structure and the proposed structure are both duplexes, but zoning regulations require a lot size of at least 10,000 square feet in order to build a new duplex. McCartney testified that she assumed that the old structure was a duplex but did not verify this by checking city records; she therefore approved the site plan, although the lot was only 6,600 square feet. She stated that the Harmsens had not misled her as to the type of dwelling on the lot at the time of the application.

McCartney approved a demolition permit and a building permit on May 8, 2008. After this, neighbors and neighborhood groups started to investigate the construction activity and contacted the city between May 13 and May 22, 2008. On May 26, 2008, the home was demolished, and a foundation for the duplex was poured. On May 29, 2008, the city mailed a letter to Masoner denying the application for a building permit. Although the envelope was postmarked May 29, 2008, the letter was dated May 8, 2008. On May 30, 2008, the city posted a stop-work order at the construction site.

The Harmsens sought a variance to the lot-size requirement. McCartney recommended approval of the variance, and the planning commission agreed, but the Minneapolis Board of Adjustment denied the application for a variance. The Harmsens appealed the denial to the Minneapolis City Council, which affirmed the denial of the variance.

The Harmsens filed suit against the city, asking for a declaratory judgment that the building permit was valid. The Harmsens asserted that they were entitled to a declaratory judgment because the city was negligent in issuing the permit and further claimed that the city should be equitably estopped from denying the permit. The city moved for summary judgment. The district court granted judgment in favor of the city, concluding that the city was immune from claims of negligence because of the doctrine of discretionary immunity and further concluding that the Harmsens failed to provide significant probative evidence in support of their claim of equitable estoppel. This appeal follows.

D E C I S I O N

Summary judgment must be granted when, based on the entire record before the district court, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from a grant of summary judgment, the reviewing court determines de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Centers, Inc. v. Faegre & Benson, L.L.P*, 644 N.W.2d 72, 76-77 (Minn. 2002). The reviewing court also views the evidence in the light most favorable to the party against whom summary judgment was granted. *Id.*

I. The district court did not err by granting summary judgment based on the city's claim of discretionary immunity.

The Harmsens alleged in their complaint that the city was negligent in its issuance of the permits. The district court concluded that the city was statutorily immune from liability for negligence.

A municipality is immune from liability for a claim "based on the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6 (2008). The city claimed, and the district court agreed, that issuance of building permits is a discretionary function. This court reviews the application of immunity de novo, as a question of law. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006). Because it is an exception to the general rule of governmental liability, we narrowly construe the discretionary-immunity exception. *Cairl v. State*, 323 N.W.2d 20, 23 (Minn. 1982).

A municipality has statutory immunity for discretionary functions, which include planning-level decisions involving weighing of social, political, or economic factors as part of the planning process. *Schroeder*, 708 N.W.2d at 504. By contrast, a municipality is not immune from liability for its ministerial or operational actions; these involve the "day-to-day operations of government, the application of scientific and technical skills, or the exercise of professional judgment." *Id.*

Generally, the issuance of a building permit is a discretionary function. *Anderson v. City of Minneapolis*, 287 Minn. 287, 288, 178 N.W.2d 215, 217 (1970) ("The act of an employee of the city in issuing the building permit in a doubtful case involved an

exercise of discretion in the sense that the city's employee had to make a judgment as to whether plans submitted in support of the application for the permit constituted a permissible use of the property in the area involved."); *see also Yeh v. County of Cass*, 696 N.W.2d 115, 133 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005); *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 638-39 (Minn. App. 2002), *review denied* (Minn. July 16, 2002); *Vrieze v. New Century Homes, Inc.*, 542 N.W.2d 62, 66 (Minn. App. 1996) (discussing enforcement of conditions included in issued building permits).

An exception to this rule is found in *Snyder v. City of Minneapolis*, in which the supreme court established a "narrow" exception: city employees do not have the discretion to approve permits in clear violation of the law, and an applicant cannot reasonably be charged with knowledge of violation if the city maintains an unwritten policy contrary to published law. 441 N.W.2d 781, 787 (Minn. 1989). The Harmsens urge this court to deny the city discretionary immunity based on *Snyder*.

First, the Harmsens assert that the city's administrative-review procedure for issuing building permits requires a city planner to do nothing more than check off items on a list. The Harmsens argue that this is an operational task performed according to clearly delineated guidelines, and such tasks are not afforded immunity. We have reviewed the application checklist and city planner McCartney's deposition testimony describing the permit process and conclude that the city planner responsible is required to make a number of discretionary decisions during the permit process. Thus the building-permit process is more than an operational or ministerial task, and the city is protected by statutory discretionary immunity.

Second, the Harmsens' contractor averred that the city had unwritten guidelines for approving certain permits that allowed for a margin of error on lot sizes, but he offered no evidence of such a policy. "[T]he party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Masoner's mere statement that the city "has apparent unwritten guidelines" is insufficient to raise a genuine issue of material fact.

Further, this court has twice rejected a *Snyder* analysis, stating that the relevant ordinances and codes in both instances were written and available to applicants. *Yeh*, 696 N.W.2d at 132-33; *Mohler*, 643 N.W.2d at 638. Here, Minneapolis Code of Ordinances § 546.410 (2008) requires a lot size of at least 10,000 square feet for two-family dwellings built after 1995. An applicant for a building permit is "charged with the knowledge of the laws regulating the granting of the permit." *Anderson*, 287 Minn. at 289, 178 N.W.2d at 217. The record shows that the Harmsens are experienced landlords, who own many properties in the same area of Minneapolis, and their contractor, Masoner, is also well acquainted with the building code. We conclude that there is no reason to apply the limited *Snyder* exception and that the district court did not err when it determined that the city was entitled to discretionary immunity.

II. The district court did not abuse its discretion by granting summary judgment on the Harmsens' request for a finding of equitable estoppel.

The Harmsens claim that the district court erred by granting summary judgment on their claim that the city should be equitably estopped from denying them a building permit because they relied in good faith on the city's initial issuance of a permit.

A claim of equitable estoppel may be brought against a government entity when "a property owner, (1) relying in good faith (2) upon some act or omission of the government, (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired." *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980) (quotation omitted). Although this doctrine superficially applies to the current situation, it has been further modified to include a requirement of wrongful conduct or malfeasance on the part of the governmental entity. *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006). "Affirmative misconduct, rather than simple inadvertence, mistake, or imperfect conduct is required for estoppel to be applied against the government." *AAA Striping Serv. Co. v. Minnesota Dep't of Transp.*, 681 N.W.2d 706, 720 (Minn. App. 2004) (quotation omitted). The doctrine of equitable estoppel is applied sparingly against a governmental entity and only to remedy a serious injustice. *Id.* Finally, even when the result is harsh, a "municipality cannot be estopped from correctly enforcing the ordinance even if the property owner relied to his detriment on prior city action." *Mohler*, 643 N.W.2d at 638.

The Harmsens' sole claim of malfeasance is based on the date of the letter rescinding the permits. They argue that the city deliberately held the letter from May 8 until May 29, rather than promptly notifying the Harmsens of its intent to rescind the permits. The Harmsens compare their circumstances with those in *Snyder*, in which the decision to rescind permits was made 12 days before the rescission letter was sent. 441 N.W.2d at 784. In *Snyder*, however, the date of the rescission letter had been visibly

altered, and a file copy affirmatively showed the true date of issue, which followed a discussion with a rival property owner. Here, McCartney testified that she learned of the concerns regarding the building permit raised by a neighborhood group shortly before the letter was sent on May 29. And other evidence in the record, including copies of e-mails, shows that the city was notified of neighborhood concerns shortly before May 29. Standing alone, the date of the letter is not sufficient to demonstrate malfeasance or to raise a genuine issue of material fact that would preclude summary judgment.

Affirmed.