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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1424**

Mahmood Khan,
Relator,

vs.

City of Minneapolis,
Respondent.

**Filed June 3, 2013
Reversed and remanded
Stauber, Judge**

Minneapolis City Council

James Heiberg, Minneapolis, Minnesota (for relator)

Susan L. Segal, Minneapolis City Attorney, Lee C. Wolf, Assistant City Attorney,
Minneapolis, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Relator appeals the Minneapolis City Council's decision to demolish a house he owns, contending that the decision was arbitrary, oppressive, and unreasonable and violated his due-process rights. Because the decision was arbitrary and without proper evidence to support it, and because relator's due-process rights were violated, we reverse and remand.

FACTS

Relator Mahmood Khan owns property located at 2639 Oliver Avenue North, in Minneapolis. Relator purchased the property in 2009 and rented it until it sustained tornado damage on May 22, 2011. Thereafter, the house was boarded up and vacant. Six months later, the City of Minneapolis Inspections Division ordered the house demolished. Relator administratively appealed the order.

The city's nuisance condition process review panel (NCPR) heard relator's administrative appeal. Relator argued that with the tornado and subsequent vandalism, the house required approximately \$200,000 in uninsured repairs. The NCPR continued the appeal hearing to allow relator time to negotiate a restoration agreement with the city.

At the continued hearing, the city's department of regulatory services (DRS) employee Kellie Jones reported that the DRS had inspected the house, provided relator a list of actions requiring abatement, and was awaiting a response. Relator requested extra time to negotiate an agreement with the DRS. The NCPR again continued the hearing.

At the second continued hearing, Jones reported that relator had agreed to approximately \$143,000 in repairs and had signed a restoration agreement with the city, which included a six-month restoration timeline. Further, relator presented a \$10,000 check to the NCPR as evidence of his good intentions. The NCPR accepted the agreement and recommended that the city approve the agreement in its findings, conclusions, and recommendation.

The city council's regulatory, energy & environment committee (REE) heard the NCPR's recommendation. At the meeting, Jones noted that the DRS had received seven

community-impact statements. Four of the statements recommended demolition, and three recommended renovation. This evidence was never presented to the NCPR. The REE then requested “any history with [relator] of rehabilitation agreements involving the City.” The REE continued the hearing to obtain the information.

Jones provided the REE with the information at the continued hearing. Jones reported that relator had entered into five restoration agreements with the city and had failed to meet the established timeline on all of them. Jones noted that relator had eventually completed the work on four of the five properties, and that the fifth property was subject to pending litigation. REE committee member Samuels stated that given relator’s history and:

the logical expectation that by this point in his career he would have developed the skills and even with huge penalties the incentive to be timely to his – in his agreements with the City and his failure to do so, I’m going to, on the basis of a judgment that he will not be meeting the required – requirements in this case, make a motion to deny his – the rehab agreement.

The REE rejected the restoration agreement and issued findings in support. The REE also directed the DRS to research relator’s history with the city, including his ownership and management of properties, his history with tenants, and his impact on the community.

The Minneapolis City Council reviewed the REE’s findings and heard the REE’s recommendation of demolition at a city council meeting. The city council voted to demolish the house. The Mayor of Minneapolis signed an action condemning the property. Relator’s appeal to this court via writ of certiorari followed.

DECISION

I. Standard of review

A party may challenge a city council's decision to demolish property by writ of certiorari to this court. *City of Minneapolis v. Meldahl*, 607 N.W.2d 168, 171 (Minn. App. 2000).

Review by certiorari is limited to an inspection of the record of the inferior tribunal in which the court is necessarily confined to questions affecting . . . the regularity of . . . proceedings, and . . . 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) (quoting *State ex rel. Ging v. Bd. of Education of Duluth*, 213 Minn. 550, 571, 7 N.W.2d 544, 556 (1942), *overruled on other grounds by Foesch v. Indep. Sch. Dist. No. 646*, 300 Minn. 478, 223 N.W.2d 371 (1974)). We construe ordinances according to their plain and ordinary meaning. *Clear Channel Outdoor Adver., Inc. v. City of St. Paul*, 675 N.W.2d 343, 346 (Minn. App. 2004), *review denied* (Minn. May 18, 2004). Furthermore, “[t]he object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2012).

II. Arbitrary, oppressive, or unreasonable

Relator contends that the city relied on factors not intended by the relevant ordinance, failed to consider important facts, and made findings that conflicted with the evidence. “A decision may be deemed arbitrary and capricious only if: (1) it relied on factors not intended by the ordinance; (2) entirely failed to consider an important aspect

of the issue; [or] (3) offered an explanation that conflicts with the evidence.”

Rostamkhani v. City of St. Paul, 645 N.W.2d 479, 484 (Minn. App. 2002). Relator also asserts that the city improperly reviewed evidence outside the record.

The Minneapolis City Council has the final authority to determine whether a building is a nuisance and whether the building should be rehabilitated or demolished. Minneapolis, Minn., Code of Ordinances (MCO) § 249.45(j) (2012). “The city council shall order demolition or rehabilitation of the building . . . as it deems appropriate based upon the evidence and record of the appeal hearing.” MCO at § 249.50(b) (2012). The appeal hearing is the hearing conducted before the NCPR. *Id.* at § 249.45(b) (2012).

At the hearing, the panel shall hear all relevant evidence and argument. The panel may admit and give probative effect to evidence that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The panel shall record the hearing and keep a record of documentary evidence submitted.

MCO at § 249.45(f) (2012). “The public safety and regulatory services committee may hear arguments from the appellants, but shall take no further evidence.” MCO at § 249.45(j).¹

The NCPR had recommended that relator’s property be rehabilitated pursuant to the agreed-upon restoration agreement. The REE, however, recommended rejecting the

¹ We read the ordinance’s reference to the “public safety and regulatory services committee” as referencing the regulatory, energy & environment committee (the REE) because the Minneapolis City Council has no “public safety and regulatory services committee,” and because the REE’s purpose includes “[m]ak[ing] recommendations about condemned buildings under Chapter 249 of the Minneapolis Code of Ordinances.” Council Committee on Regulatory, Energy & Environment, http://www.minneapolismn.gov/council/committees/council_standing-committees_regulatory-energy-enviornment (last visited May 2, 2013).

NCPR's recommendation and instead proceeding with demolition. The city council accepted the REE's recommendation and approved the demolition of the house.

The fatal flaw here is procedural. "[The REE] may hear arguments from the appellants, but shall take no further evidence." MCO at § 249.45(j). The REE considered evidence of relator's past restoration agreements with the city, which the NCPR had not considered. The REE's findings state that the NCPR recommended rehabilitating the property based upon relator's "demonstrated financial capacity to effectuate the rehabilitation," but noted that the NCPR had failed to "address [relator's] history of compliance with the timelines and other attendant requirements of past restoration agreements entered into with the City on similar nuisance properties." The findings further stated that the REE reviewed "information regarding [relator's] history of compliance with restoration agreements."

The REE improperly reviewed evidence of relator's compliance with past restoration agreements. The ordinance clearly limits the REE's review to the record established at the NCPR's appeal hearing. Evidence of relator's history of compliance with past restoration agreements was never before the NCPR. The city concedes this point by finding that "[s]taff compiled the requested information in . . . a . . . report which was provided to and received by [relator] at least three days in advance of the June 4th continued hearing."

Further, the REE considered the community-impact statements DRS employee Jones provided at the REE committee meeting. The REE also used these statements as

support for recommending that the city council reject the restoration agreement. These statements were similarly not presented to the NCPR.

“A decision may be deemed arbitrary and capricious only if: (1) it relied on factors not intended by the ordinance. . . .” *Rostamkhani*, 645 N.W.2d at 484. The ordinance clearly intends that the REE not review new evidence but consider only the evidence that was before the NCPR and hear relator’s arguments. The only evidence relevant to the REE’s consideration was the NCPR’s recommendation to approve the restoration agreement, and evidence the NCPR considered in making this recommendation. That evidence was contained in the transcript and written record that the NCPR provided to the REE. The NCPR is to “record the hearing and keep a record of documentary evidence.” MCO § 249.45(f). The appropriate record for review is that created by the NCPR. The REE has no independent authority to create a record. The decision of the REE (and the city council) was therefore arbitrary and without proper evidence to support it. We reverse, and remand to the city council to make findings consistent with the record created by the NCPR. *See Khan v. Minneapolis City Council*, 792 N.W.2d 463, 467 (Minn. App. 2010).

Relator contends that under MCO, § 249.40(1)(h) (2012), the city council should only have considered “the severity and history of neglect” of the property. However, that provision of the code relates to the duties of the director of inspections in issuing an order to demolish. MCO, § 249.40(1)(h). This provision does not govern the REE or the city council and is therefore irrelevant to relator’s appeal.

III. Due process

Relator contends that the city violated his due process rights by improperly considering evidence outside the record, including evidence of his history of compliance with past restoration agreements.

Procedural due process protections restrain government action which deprives individuals of ‘liberty’ or ‘property’ interests within the meaning of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Minnesota Constitution. These protections include . . . 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) (citations omitted), *review denied* (Minn. Feb. 14, 1995). The REE considered evidence outside the record when it requested and obtained evidence of relator’s prior restoration agreements with the city and his history of compliance with these agreements. This evidence was not presented to the NCPR. The city concedes as much when it states that this evidence was prepared for the city council’s review. The city’s brief on appeal does not dispute this fact. The REE also considered evidence of community-impact statements, which also were not presented to the NCPR for review and argument.

The city violated relator’s due process rights by making a decision not based solely upon the record. *See id.* The city council’s decision is reversed and remanded for a determination based upon the record created and provided by the NCPR. *See Khan*, 792 N.W.2d at 467.

Reversed and remanded.