**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-286**

City of Worthington,
Appellant,

vs.

New Vision Cooperative, et al.,
Respondents,

Ruby Development W, LLC, et al.,
Defendants.

**Filed December 29, 2009**
**Affirmed**
**Minge, Judge**

Nobles County District Court
File No. 53-CV-08-372

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Bruce N. Kness, 1020 Fifth Avenue, Worthington, MN 56187 (for respondents)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

**MINGE**, Judge

Appellant City of Worthington challenges the district court's determination that its municipal ordinance does not authorize recovery of the cost of abating a public nuisance from a former landowner in a proceeding commenced after the sale of the property. We affirm.

## FACTS

The subject of this nuisance proceeding is property with a grain-storage facility at 706 Tenth Avenue in Worthington. That facility was erected almost a century ago and has been unused since 2003. Beginning in 2002 and continuing into 2007, the city received complaints of major disrepair and refuse around the facility. Respondent New Vision Cooperative, the owner at that time, negotiated with the city in an attempt to resolve the complaints and develop the property. The negotiations were unsuccessful.

In July 2007, New Vision deeded the property to Ruby Development W, LLC, paying Ruby $50,000 to accept the property. Ruby has experience in refurbishing and demolishing buildings, and took the property with knowledge of the complaints and the ongoing negotiations.

Worthington is a home-rule city with a charter and has adopted an ordinance setting forth a procedure for declaring and abating nuisances. Worthington, Minn., Code of Ordinances (WCO) §§ 92.01-.08 (2006). In August 2007, the city commenced the ordinance-established procedure to declare the property a public nuisance. It gave New Vision and Ruby notices and opportunities to appear at hearings. New Vision no longer

owned the property and did not attend. In September 2007, the city council declared the property a public nuisance. The resolution stated that since 2002 the property had been in the condition giving rise to the nuisance. Pursuant to that finding, the city ordered both New Vision and Ruby to submit plans for abating the nuisance.

In January 2008, the city filed suit seeking an order compelling the defendants to submit a plan for abatement. Both the city and New Vision filed motions for summary judgment. The facts were not in dispute. New Vision's motion asserted that it could not be held civilly responsible under the ordinance for abatement of a nuisance on property it no longer owned.

The district court granted summary judgment to New Vision and dismissed the action against New Vision.[1] The city appeals.

**D E C I S I O N**

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Minn. R. Civ. P. 56.03. If the district court has granted summary judgment based on the application of an ordinance to undisputed facts, the result is a legal conclusion that the court of appeals reviews de novo. *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006).

**I.**

A threshold question is the claim by New Vision that the city lacks a basis for challenging summary judgment because the record consists of material in and

[1] The district court also granted summary judgment to the city in its claim against Ruby and ordered Ruby to produce a plan for abatement. Ruby does not appeal.

accompanying an affidavit by the city attorney and that such an affidavit by an attorney of record is not admissible as evidence. The pleadings and memoranda indicate that New Vision did not previously protest the admissibility of this city attorney affidavit. Because reviewing courts generally do not consider evidentiary arguments not presented to the district court, we consider this question waived. *Thiele v. Stich*, 435 N.W.2d 580, 582 (Minn. 1988). Regardless, we note that the material facts are not in dispute.

**II.**

The critical issue is whether the Worthington ordinance provides for this nuisance-abatement proceeding against New Vision as a prior owner of property.

A city with a "home rule charter" may craft its own legislation regarding local activities. *See* Minn. Const. art. XII, § 4 (allowing cities to adopt home rule charters). "The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld." *State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958). Unless municipal enactments contravene state public policy, those made pursuant to the city charter prevail over state statutes regarding the same subject matter. *Id.* "Thus, where the city elects to proceed under its charter, state law does not automatically apply unless the charter so states or the state legislature has expressly or impliedly made the charter subject to state law." *Gadey v. City of Minneapolis*, 517 N.W.2d 344, 348 (Minn. App. 1994). Cities may not violate their own enactments. *Eagan Econ. Dev. Auth. v. U-Haul Co.*, 765 N.W.2d 403, 407 (Minn. App. 2009) (citing 5 *McQuillin Mun. Corp*s. § 15.12), *review granted* (Minn. Aug. 26, 2009).

Here, the Worthington City Council, acting pursuant to its charter authority, adopted a nuisance ordinance. *See* WCO §§ 92.01-.08 (2006) (below). The relevant provisions of the ordinance are as follows:

> § 92.01 Public Nuisances Defined.
>
> (A) Whoever by his or her act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:
>
> (1) Maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort or repose of any considerable number of members of the public;. . . [or]
>
> . . . .
>
> (3) Is guilty of any other act or omission declared by law or this chapter to be a public nuisance.
>
> (B) Any person, organization or entity that makes or causes any public nuisance, as defined above, to exist shall be deemed to be the author of the nuisance. Moreover, any person who has possession or control of any private property or premises, whether he or she is the owner of the property or not, where any nuisance exists or is found, shall be deemed the author of the nuisance. Moreover, any person who is the owner of the private property or premises, or an agent for the owner of private property or premises, who, having received prior notice of the existence of such nuisance, shall fail to remove the thing or things or abate the condition described in such notice, shall be deemed the author of the nuisance. Each and every day during which a nuisance continues shall be deemed a separate offense and shall be prosecutable and punishable as a separate offense.
>
> . . . .
>
> § 92.06 Abatement[2]

[2] Section 92.06 was amended on September 10, 2007—the same day the city council declared the Ruby property a public nuisance. *See* WCO § 92.06 (2009). In considering whether the city council followed its own ordinance in the process of holding New Vision liable for the costs of abatement, the district court applied the preamendment version of

. . . .

> (B) Procedure.
>
> (1) Notice of public nuisance. Whenever the officer charged with enforcement determines that a public nuisance is being maintained or exists on premises in the city, the officer shall notify the owner of record or occupant of the premises in the city, the officer shall notify the owner of record or occupant of the premises of such fact, in writing, and order that such nuisance be terminated or abated.
>
> > (a) The notice of violation shall specify the steps to be taken to abate the nuisance, and the time within which the nuisance is to be abated.
> >
> > (b) If the nuisance is not abated within the time specified in the notice of violation, the enforcing officer shall report that fact forthwith to the Council.
>
> (2) Injunctive relief. Thereafter, the Council may, after notice to the owner or occupant and an opportunity to be heard, determine that the condition identified in the notice of violation is a nuisance, and further order that, if the nuisance is not abated within the time prescribed by the Council, the city may seek injunctive relief.

. . . .

§ 92.07 Recovery of cost.

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the ordinance. The parties have not challenged this use of the preamendment ordinance, and we use the same preamendment version on review. Regardless, the Worthington code provided that amendments are effective "after the due publication thereof, unless otherwise expressly provided." WCO § 10.14 (2006). The city's online version of ordinances do not give an effective date or publication date, and we decline to assume an immediate publication date that would make the new ordinance applicable to this proceeding. Furthermore, in comparing the former and new ordinances, it does not appear that the city's procedure was based on the new ordinance. Nor does it appear that, if reviewed under the amended version, the result in this action would be different.

> (A) *Personal liability*. The owner of premises on which a nuisance has been abated by the city shall be personally liable for the cost to the city of the abatement, including administrative costs. As soon as the work has been completed and the cost determined, the City Clerk or other official designated by the Council shall prepare a bill for the cost and mail it to the owner.
>
> . . . .
>
> § 92.08 Private cause of action.
>
> Any person who has been damaged by a violation of any provision of this chapter shall have a private civil cause of action against the violator which many [sic] be brought in State District Court in the manner provided by law.

(Emphasis in original but footnote added.)

We first note that the ordinance does not explicitly refer to past or former owners. Although section 92.01(B) identifies anyone who "makes or causes any public nuisance" as an "author" of the nuisance, that section only establishes that such responsible parties are guilty of a misdemeanor. Subsequent sections of the ordinance use present-tense language in describing the obligation to abate a nuisance. WCO §§ 92.06, .07. The "abatement" section nowhere mentions the "author of the nuisance," and in fact explicitly applies abatement and injunction procedures to the owners or occupier. WCO § 92.06(B). Most notably, the "recovery of costs" section that describes the city's declared remedy in this case only states that "the owner of premises on which a nuisance has been abated by the city shall be personally liable for the cost to the city of the abatement." WCO § 92.07. Nothing in the ordinance suggests that in a civil proceeding the ordinance is designed to impose the cost of abatement on or compel abatement by former property owners. We also note that the section of the ordinance regarding a private cause of action

for public nuisance authorizes damages against the "violator" rather than the owner. WCO § 92.08. This, coupled with the explicit references to *ownership* in the abatement provisions, indicates that, while the risk of misdemeanor citations and liability for private actions for damages arguably extends to all those responsible for nuisance conditions, ordinance-based civil liability for city-abatement procedures are limited to current property owners.

Because we conclude that the Worthington city ordinance only authorizes civil actions for public-nuisance abatement and cost recovery against current property owners, the city cannot require abatement by or recover the cost of abatement from New Vision. As a result, we affirm the district court's dismissal of New Vision.[3]

**Affirmed**.

Dated:

[3] On appeal, the parties based their arguments on interpretations of our state laws and the common law concerning public nuisance. Minnesota case law provides that private-nuisance liability extends to a prior owner. *See Sloggy v. Dillworth*, 38 Minn. 179, 182, 36 N.W. 451, 452 (1888). The Restatement supports the proposition that nuisance liability can extend past sale for a reasonable period of time. Restatement (Second) of Torts § 840(A) (1979). Minnesota courts have not addressed whether that principle could extend to public nuisances, but the issue has been considered in other states. *Compare New York v. Ole Olsen*, 317 N.Y.S.2d 538, 540 (N.Y. Sup. 1971) *with City of Toledo v. Beazer Materials, Inc.*, 833 F. Supp. 646, 658 (N.D. Ohio 1993) *and Independence County v. Pfizer, Inc.*, 534 F. Supp. 2d 882, 890 (E.D. Ark. 2008). Because the Worthington ordinance limits abatement-cost recovery to the current owner, we do not further address this issue.