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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CITY OF SAFFORD, Plaintiff/Appellee, v. LaVONNE SEALE, a single woman; # 4 COLONIAL VILLAGE, PARCEL #101-07-9, Arizona real property and residence owned by LaVonne Seale, Defendants/Appellants.	2 CA-CV 2008-0185 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CV2007-194

Honorable Jerry Landau, Judge Pro Tempore

VACATED

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V Á S Q U E Z, Judge.

¶1 In this action to abate a public nuisance, LaVonne Seale appeals from the trial court's judgment authorizing the City of Safford (the City) to demolish her home. Because we agree the City's failure to provide her notice and an opportunity to remediate any offensive or unhealthy conditions on the property violated her constitutional right to due process, we vacate the court's judgment.

Facts and Procedural Background

¶2 In August 2006, in response to complaints about an offensive odor emanating from Seale's home, the City convened a meeting with representatives of Adult Protective Services and the Safford Police Department, as well as the City's Humane Officer, Building Official, and Neighborhood Officer. They determined there was a health and safety issue with the home and that Seale required assistance. They apparently arranged to meet at Seale's home several days later. When they arrived, Seale initially refused them entry, but she eventually acquiesced after being told a police officer was in the process of obtaining an order to enter the property. Upon entering the residence, City officials found it in disarray, with cat feces and urine throughout, and extensive damage to walls, ceilings, and furniture, apparently caused by the cats. They also observed violations of the City's building code, fire code, plumbing code, mechanical code, and electrical code. Humane officers removed fifty-seven cats, which were later euthanized. Adult Protective Services removed Seale from the property, the City changed the locks, and Seale was subsequently only permitted to return to the house for a few brief visits, during which she collected her personal effects. In October 2006, the City had the house fumigated and a tent erected to cover the entire

structure. The City's Building Official performed a second inspection of the property in July 2007, during which he observed "fresh mold" and concluded the house was "uninhabitable."

¶3 In July 2007, the City filed this abatement action in the Graham County Superior Court pursuant to A.R.S. § 13-2917,[1] requesting court authorization "to enter onto the real property and into the residence to abate, enjoin, prevent, and remedy the public nuisance at issue in any manner deemed reasonable in the City's discretion." In December 2007, after a hearing, the trial court found the property to be a public nuisance and granted the City's motion for an order of abatement. However, the court further found the City "ha[d] not proven that the remedy of razing and removal of the residence [wa]s the only mechanism to remedy, remediate or remove the nuisance." The court therefore limited the City to remedial measures "up to but not including the razing and removal of the residence."

¶4 At a second hearing in May 2008, the City moved the trial court to amend the judgment to permit demolition of the house. Although the City's expert testified to remedial measures that could be taken to avoid demolition, he stated these measures were expensive and doubted they ultimately would be successful. He therefore recommended the house be demolished if Seale did not have the financial resources to pay for such remedial measures. The City also requested that the court order Seale to reimburse it for costs associated with inspecting, fumigating, and tenting the property, dating back to October 2006. The court

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[1]Under § 13-2917, a city attorney "may bring an action in superior court to abate, enjoin and prevent" a public nuisance that is "injurious to health, . . . offensive to the senses or . . . interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons." *See Armory Park Neighborhood Ass'n v. Episcopal Comty. Servs. in Ariz.*, 148 Ariz. 1, 9, 712 P.2d 914, 922 (1985).

modified its judgment to permit the razing and removal of the residence, and to award the City $33,005 in costs.[2] This appeal followed.

Discussion

¶5 Seale argues she was not afforded due process because the City failed to give her "notice of precisely what [she] . . . [needed to] do to bring the property into compliance with the law" and "precluded [her] . . . from taking action to abate the nuisance herself" before razing the property.[3] We review constitutional questions de novo. *See Citizens Telecomms. Co. of White Mountains v. Ariz. Dep't of Revenue*, 206 Ariz. 33, ¶ 21, 75 P.3d 123, 128 (App. 2003).

¶6 "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment [to the United States Constitution]." *Mathews*

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[2]Although the property was apparently demolished in October 2008, Seale's appeal is not moot because we can provide relief with respect to the costs awarded in the judgment. *See Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988) (appeal moot where action by reviewing court would have no effect on parties).

[3]We are not persuaded by the City's argument that Seale failed to raise this issue adequately at trial. In an exchange with a city official at the first hearing, she asked: "What opportunity have you, or the City, given me to tell you how I could remediate the problem in my home?" The official replied: "The opportunity actually would have to be initiated by you . . . you were the property owner, and . . . you were in violation of our City ordinances." And at the second hearing, she stated, "I was not given notice or opportunity . . . to correct any so-called problems in my home." In any event, "[w]e may review issues not raised in the trial court . . . 'where a legal principle, although not suggested by either party, should be adopted on appeal to . . . redress a wrong.'" *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991), *quoting Stokes v. Stokes*, 143 Ariz. 590, 592, 694 P.2d 1204, 1206 (App. 1984). And because we find this issue dispositive, we do not address the other arguments Seale raises on appeal.

v. Eldridge, 424 U.S. 319, 332 (1976). "'An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing *appropriate to the nature of the case*.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (emphasis added), *quoting Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *see Campbell v. Superior Court*, 111 Ariz. 71, 72, 523 P.2d 502, 503 (1974). Due process, therefore, "'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961), *quoting Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Rather, it "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

¶7 Seale contends that in her situation the City was obligated to prosecute this case "under [the] applicable city ordinances" that explicitly govern the procedure the City must follow to either compel removal of litter by a property owner or permit removal by the City.[4] She asserts the procedure outlined in the ordinances includes due process requirements of notice, right to appeal, and opportunity to remediate, and she maintains prosecution in the City Magistrate Court under that procedure is a "prerequisite to further action to abate a nuisance." The City apparently adopted the ordinances pursuant to A.R.S.

[4]Under Safford's City Code, "litter" is broadly defined to include "any rubbish, trash, . . . filth and debris which shall constitute a hazard to public health and safety and shall include all putrescible . . . solid wastes including garbage, . . . dead animals, . . . or other unsightly or unsanitary matter of any kind whatsoever." Safford City Code § 8.08.010.

§ 9-499, which requires that city ordinances provide an owner or occupant of a property that is a hazard to public health at least thirty days' written notice to abate the nuisance before the city may itself abate or remove it. *See City of Tempe v. Fleming*, 168 Ariz. 454, 457-58, 815 P.2d 1, 4-5 (App. 1991); *see also Hawthorne Sav. & Loan Ass'n. v. City of Signal Hill*, 23 Cal. Rptr. 2d 272, 278 (Cal. App. 1993) (recognizing due process right includes notice and opportunity to remediate). The City counters that Seale "cites no authority that the existence of City ordinances precludes the City from addressing the nuisance posed by [Seale's] property under existing state statutes which also apply to the issue." On this issue, we agree with the City. Seale cites no authority, and we are aware of none, to support her position that the City was required to prosecute this case in City court under the procedure outlined in City ordinances.

¶8 But, regardless of the procedure utilized by the City in this case, we agree with Seale that in the context of the City's exercise of its power to destroy her residence as a public nuisance, due process required the City to "give [her] sufficient notice, a hearing and ample opportunity to demolish the building [her]self or to do what suffices to make it safe or healthy." *Miles v. District of Columbia*, 510 F.2d 188, 192 (C.A.D.C. 1975); *see Keystone Commercial Props., Inc. v. City of Pittsburgh*, 347 A.2d 707, 710 (Pa. 1975) (purpose of notice in this context includes providing property owner with reasonable time to make repairs to eliminate dangerous condition); *see also Hislop v. Rodgers*, 54 Ariz. 101, 113, 92 P.2d 527, 533 (1939) (municipalities should exercise their power over public nuisances "reasonably and not arbitrarily"); *Horton v. Gulledge*, 177 S.E.2d 885, 892 (N.C. 1970)

("arbitrary and unreasonable" to require destruction of building without giving owner reasonable opportunity to remove threat to public health).

¶9 Here, nearly a year before filing the present action, the City entered Seale's home, had her cats removed and euthanized, fumigated and erected a tent over the property, and changed the locks. There is nothing in the record to suggest the City ever provided Seale with prior notice, a hearing, or an opportunity to remedy the nuisance apparently caused by her failure to care properly for the number of cats on the property. And at no point during this action did the City give Seale notice and an opportunity to remediate either the damage and waste left by the cats or the mold that subsequently took hold inside the building.[5] Nevertheless, the trial court authorized the City to demolish the home after apparently accepting the City's argument that remediation would cost more than the structure's market value. However, it is not the province of a court to

> decide as an economic proposition whether it would be more desirable for [a homeowner] to raze the present structure to the foundation and use the material and the cost of repair for the erection of another structure upon that foundation, or to repair and rebuild the present structure. That is a matter in which the [owner] is entitled to act upon her own choice and judgment, so long as she pays due regard to the right of the public . . . to secure proper safety and sanitary conditions. Even though it might be entirely unwise from a financial viewpoint for the owner to undertake to preserve so much of her building as is

[5]The City's complaint put Seale on notice of unspecified "public health and safety concerns arising out of an unusually large amount of felines living there, and the corresponding stench and squalor and otherwise state of disrepair of the residence and real property." But, she was never given notice either of specific conditions requiring remediation or of an opportunity to remediate these conditions herself before the City demolished her home.

> admitted to be safe, she has the right to and is acting within her rights in so doing, so long as she does not impair the lives or property of others by maintaining the structure so rebuilt.

Abraham v. City of Warren, 37 N.E.2d 390, 393 (Ohio App. 1940). And the court's judgment authorizing the demolition of the house and ordering Seale to pay for remedial measures taken by the City was, in the absence of any opportunity for Seale to take her own remedial measures, a clear denial of due process. *See Miles*, 510 F.2d at 192. We therefore vacate the judgment.

Disposition

¶10 For the reasons stated above, we vacate the trial court's judgment. Because we find Seale's claim to be meritorious, we deny the City's request for attorney fees pursuant to A.R.S. § 12-349(A). *See Paxson v. Glovitz*, 203 Ariz. 63, ¶ 38, 50 P.3d 420, 427 (App. 2002).

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge