STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1490

City of Shoreview,
Respondent,

vs.

Michael Morse,
Appellant.

Filed April 21, 2014
Affirmed in part and remanded
Chutich, Judge

Ramsey County District Court
File No. 62-CV-12-1687

Chad D. Lemmons, Joseph A. Kelly, Jerome P. Filla, Kelly & Lemmons, P.A., St. Paul, Minnesota (for respondent)

Michael H. Morse, Shoreview, Minnesota (pro se appellant)

Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

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

CHUTICH, Judge

Appellant Michael Morse challenges the district court's order to remove his partially built garage from his property. Morse also argues that 1) the city is equitably estopped from enforcing its building code on his property, 2) the district court's order is

unreasonable in requiring compliance with the order within 45 days, 3) the city council's decision concerning his variance application is erroneous, 4) the city attorney and city planner have conflicts of interest, and 5) his equal protection rights were violated by the city's arbitrary enforcement of the building code. Because the district court did not make findings to support its order to remove the garage, but did not err in addressing the other claims before it, we affirm in part and remand.

FACTS

In early July 2011, a City of Shoreview building official received an anonymous complaint about Morse's construction of a garage on his property. The complaint alleged that Morse had torn down his old garage and had begun building a new garage without requesting the required permits. The official checked city records and confirmed that the city had not issued any building permits to Morse. The official orally ordered Morse to stop construction on the job, and a code-enforcement officer later posted a stop-work order at the site. At the time the stop-work order was issued, the garage was over 15 feet high, and 1100 square feet and, it was located 2.3 feet from the west property line.

After the officer posted the stop-work order on Morse's garage, Morse met with the city planner. The city planner determined that Morse's garage violated Shoreview's building code and that because of its height, square footage, and setback from the property line, he needed to obtain variances. She gave him the necessary paperwork to apply for variances.

Morse applied for variances as directed, but the planning commission denied his requests. Morse appealed the planning commission's denial, but the city council upheld

the denial, giving detailed reasons in support of its decision. The city planner then sent a letter to Morse to notify him that the city council upheld the planning commission's decision and instructed him to bring his property into compliance with the building code by November 1, 2011. Morse did not comply.

On December 19, 2011, the city council held a hearing and determined that Morse's garage was a public nuisance because it violated six building-code regulations. Morse was directed to abate the nuisance by either removing the garage or bringing it into compliance with the building code.

Morse then submitted a second application for variances in which he did not change the structure's specifications. Morse submitted a third application for variances that reduced the size of the garage to 22 feet by 43.5 feet. A city ordinance required that when an applicant's variance application is substantially similar to a previously submitted application, the applicant must wait six months to file his next application. *See* Shoreview, Minn., Mun. Code § 203.010(C)(2) (2009). The third application was not accepted because it was deemed substantially similar to Morse's two previous applications.

When Morse did not comply with the city council's nuisance-abatement order, the city filed a formal complaint in district court. The city alleged that the garage is a public nuisance and claimed Morse violated building and housing codes.

On April 11, 2013, the district court held a bench trial. The city planner testified that Morse's garage violated the city's building code. She specifically testified, however, that a mere violation of the building code is not a nuisance. She agreed that existing

garages in Morse's neighborhood are larger than what the current code would permit, but nevertheless had valid building permits. She testified that the building code was amended in 2006 to limit the allowed size of detached structures. The building official testified that sometimes the city imposes penalties on those who do not first apply for required permits when building structures, but that the city usually tries "to work the issues out."

Morse testified that his current proposal is for a garage that is 957 square feet, which he testified is three square feet smaller than another garage on his block. Morse's immediate neighbor to the west testified about his own process in building an addition to his detached garage and admitted that he did not obtain a building permit from the city. In his testimony, he did not complain about any aspect of Morse's garage.

After a one-day trial, the district court ordered Morse to remove his garage by June 30, 2013, and if he failed to do so, authorized the city to do so and assess costs. The district court then ordered:

> If [Morse] can agree with [the city] on a structure in keeping with existing city codes (or a structure approved for variance), rebuilding may commence no later than June 30th, 2013. [The city] is strongly encouraged to make every reasonable effort to approve the building of a structure that not only meets code requirements but is also in keeping with [Morse's] requirements.

In its recitation of the factual history, the district court cited the city council's resolution in which the city council found Morse's garage to be a public nuisance. It also cited the three building-code violations that the city relied upon to issue its stop-work order: a setback violation, a size violation, and a height violation. The district court did

not, however, find that Morse's garage was a public nuisance or find that it violated specific building-code provisions.

In its discussion of public nuisance, the district court responded to Morse's argument that if he was allowed to complete his garage, "the nuisance would be abated," stating that "the planned project has completely violated existing building codes."[1] The district court's reasoning included a finding that, although Morse did not know he was required to obtain a building permit for demolishing and building a new garage, ignorance of the law is not an excuse. It disagreed with Morse's argument that he should be allowed to complete his garage as a solution for abating the nuisance. The district court also found no merit to Morse's equitable-estoppel defense because the city never acted wrongfully or made any promises to Morse. This appeal followed.

D E C I S I O N

As a preliminary matter, we must determine the scope of the record on appeal. The city argues that Morse improperly appended documents to his brief that were not considered below. Evidence that was not before the district court below is not properly before this court on appeal. *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977); *see* Minn. R. Civ. App. P. 110.01 (defining record on appeal). We

[1] This statement, although it mentions building-code violations, is still not a finding that the current state of the garage violates the building code. Further, this statement does not clarify whether the district court found a public nuisance based on the building-code violations or whether it found that the building-code violations existed, and it does not state that the violations were a sufficient basis upon which to order Morse to remove his garage.

therefore do not consider the documents appended to Morse's brief because they were not part of the record considered by the district court.

I. Abuse of Discretion in District Court's Order

Morse argues that the district court erred in ordering him to remove his partially constructed garage. "The standard of review in nuisance cases and others involving equitable relief is whether the trial court has abused its discretion." *City of Cloquet v. Cloquet Sand & Gravel, Inc.*, 312 Minn. 277, 279, 251 N.W.2d 642, 644 (1977). "Under an abuse-of-discretion standard, we may overrule the district court when the court's ruling is based on an erroneous view of the law." *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011). We review the district court's findings in the light most favorable to the district court's judgment and will uphold the findings unless they are clearly erroneous. Minn. R. Civ. P. 52.01; *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). When issuing injunctive relief, the district court "shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Minn. R. Civ. P. 65.04.

Municipal Building-Code Regulations

The complaint alleged five types of violations: 1) general violations of the municipal code and Minnesota Statutes governing building and fire codes; 2) violations of the municipal housing code; 3) a violation of the city's setback requirement; 4) violations of exterior design and construction requirements; and 5) violations of the city's maximum size requirements. The district court found that the building official

based its stop-work order on three building-code violations: setback, size, and height. It is undisputed that the lot has a setback requirement of five feet from the side lot. *See* Shoreview, Minn., Mun. Code § 205.082(D)(5)(b)(i) (2006). The building code permits a detached structure to be 75% of the dwelling unit foundation area or 750 square feet, whichever is smaller. *See id.* § 205.082(D)(5)(a)(ii)(a) (2006). The maximum height allowed for such a structure is either 18 feet or the height of the existing home, whichever is less. *See id.* § 205.082(D)(5)(c)(ii) (2006).

Public-Nuisance Ordinance

The complaint alleged that Morse's garage was a public nuisance based on the five violations listed above and because Morse did not obtain a building permit before beginning construction. The district court credited the city council's resolution in which it determined that Morse's garage was a public nuisance. The City of Shoreview Municipal Code provides in relevant part:

> (A) . . . A person must not act, or fail to act, in a manner that is or causes a public nuisance. For purpose[s] of this ordinance, a person that does any of the following is guilty of maintaining a public nuisance:
>
> (1) Annoys, offends, injures, or endangers the health, comfort, repose, morals, decency, peace, or safety of any considerable number of members of the public; or
>
> (2) Unlawfully interferes with, obstructs, or renders dangerous for passage a public waterway, park, square, street, alley, highway, or any other public property or right of way; or
>
> (3) Depreciates the value of the property of a considerable number of members of the public; or
>
> (4) Is declared to be a nuisance by any provision of this code, any statute, or regulation.

Shoreview, Minn., Mun. Code § 210.010 (2009). The code provides a list of conditions the city has declared to be nuisances, including "[a]ny . . . health or safety nuisance as declared by the City Council." *Id.* § 210.010(B)(22).

District Court's Findings

The district court ordered Morse to remove his garage without specifically stating the basis for why Morse must remove his garage. The district court cited the city council's resolution in which it found that Morse's garage was a public nuisance based solely on municipal building-code violations. The district court did not articulate findings to support a conclusion that Morse's garage was a public nuisance. For a structure to be a public nuisance, it must fall into one of the categories outlined by regulations that identify public nuisances, including the City of Shoreview Municipal Code or Minnesota Statutes section 609.74 (2012). "[T]he term 'nuisance' denotes an infringement or interference with the free use of property or the comfortable enjoyment of life." *Schmidt v. Vill. of Mapleview*, 293 Minn. 106, 108, 196 N.W.2d 626 628 (1972). An interference with the enjoyment of life or property must be material and substantial to be classified as a nuisance. *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. App. 2001).[2]

[2] In our close reading of the record, we are unable to find evidence that the garage poses a threat to anyone, much less a large part of the community. The city planner testified that a building code violation is not a public nuisance. And Morse's neighbor, the most likely person to be offended by Morse's garage, testified on Morse's *behalf*. And this case is distinguishable from caselaw identifying nuisances. *See, e.g.*, *Roukovina v. Island Farm Creamery Co.*, 160 Minn. 335, 339, 200 N.W. 350, 352 (1924) (loud noises resulting from a business operation at night); *Lead v. Inch*, 116 Minn. 467, 472, 134 N.W. 218, 219 (1912) (odors emanating from a stable of horses); *Citizens for a Safe Grant*, 624

If the district court did not rely on the public-nuisance ordinance in ordering Morse to remove his garage, the district court was required to provide another basis for its order. *See* Minn. R. Civ. P. 65.04. The district court cited generally the three building-code violations on which the building official relied in issuing a stop-work order, but also cited the city council's resolution in which the city council found Morse's garage to be a public nuisance. Without a finding that Morse's garage was a public nuisance or findings that support a conclusion that Morse's garage violated specific municipal codes, it is unclear why the district court determined that Morse must remove his garage. *See* Minn. R. Civ. P. 52.01. ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially . . . .").

It is also unclear whether the district court considered other equitable remedies that were available to it. If the district court based its order on Morse's garage being a public nuisance, it was limited in its discretion to fashion a remedy. A city ordinance provides that Morse "shall be personally liable" for all abatement and administrative costs in nuisance-abatement actions. *See* Shoreview, Minn., Mun. Code § 210.030(B) (2009). If the district court based its order on Morse's garage violating building codes, however, it had more discretion to fashion a remedy. *See City of N. Oaks*, 797 N.W.2d at 22, 25 (considering equitable relief in a zoning matter where the appellant's construction violated a setback requirement); *see also Beliveau v. Beliveau*, 217 Minn. 235, 245, 14 N.W.2d 360, 366 (1944) ("It is traditional and characteristic of equity that it possesses the

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N.W.2d at 804 (noise and bullets from gun club operated near residential property); *Matter v. Nelson*, 478 N.W.2d 211, 215 (Minn. App. 1991) (drainage system that caused property damage).

flexibility and expansiveness to invent new remedies or modify old ones to meet the requirements of every case and to satisfy the needs of a progressive social condition.").We conclude that the district court abused its discretion by not addressing which issue in the city's complaint it relied on in ordering Morse to remove his garage and in not "set[ting] forth the reasons for" issuing its order concerning abatement of the garage. *See* Minn. R. Civ. P. 65.04. We therefore remand to allow it to articulate findings to support its order. And to the extent that it may not have done so, we remand for the district court to exercise its discretion in fashioning an equitable remedy as it sees fit. *See In re Welfare of M.F.*, 473 N.W.2d 367, 370 (Minn. App. 1991) (concluding that a remand is appropriate when a district court addresses a discretionary matter as a matter of law). Because we remand this issue, we address Morse's other claims that may affect the proceedings below.

II. Equitable Estoppel

Morse next argues that the district court erred in ruling that the city was not equitably estopped from pursuing the abatement action. Equitable estoppel is an equitable remedy, reviewed for abuse of discretion. *City of N. Oaks*, 797 N.W.2d at 24.

> [A] party seeking to establish equitable estoppel against a government entity must establish four elements. First, there must be "wrongful conduct" on the part of an authorized government agent. Second, the party seeking equitable relief must reasonably rely on the wrongful conduct. Third, the party must incur a unique expenditure in reliance on the wrongful conduct. Finally, the balance of the equities must weigh in favor of estoppel.

Id. at 25 (citations omitted).

Morse alleges that the wrongful conduct sufficient to satisfy the first element of equitable estoppel is the city's arbitrary enforcement of the building code. The record does not contain any evidence about the approval patterns of the city, however. Further, in 2006, the city changed its building code to have more strict limitations for detached structures. The city did not act wrongfully by allowing pre-2006 structures to stand. Because no "wrongful conduct" by the city occurred, the district court properly exercised its discretion in finding that Morse's claim of equitable estoppel lacked merit.

III. Timeline of District Court's Order

Morse argues that the district court's order was unfair because it only allowed 45 days for Morse to comply with the order. He argues that, given the city's variance process, the timeline prohibited him from obtaining variances. The city ordinance requires that if an application is "substantially the same" as a previous application that was denied, the applicant must wait six months before filing it. Shoreview, Minn., Mun. Code § 203.010(C)(2). The ordinance does not preclude Morse, however, from submitting at any time an application for a variance that is substantially different than previous requests and that would more closely comply with the building code. *See id.* Morse could also apply for a building permit that conforms to the restrictions in the building code. Accordingly, the district court did not abuse its discretion in setting a 45-day timeline on its order.

IV. Application for Variances

Morse challenges the city council's determination to affirm the planning commission's decision to deny his application for variances. The district court was not

asked to consider whether the city erred in denying Morse's application for variances, and the record presented to this court is insufficient to allow us to review the question. Therefore, we will not consider this issue for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988).

V. Conflict of Duty

Morse argues that the city attorney and city planner have conflicts of interest in performing their duties. He contends that the city attorney is responsible for issuing building permits and variances, which is in conflict with pursuing this litigation. He similarly argues that the city planner's involvement in the city council vote and in this litigation is a conflict of interest. Neither of these arguments was raised to the district court. And there is not an adequate record for us to review these claims. Thus, they are not properly considered on appeal. *See id.*

VI. Arbitrary Enforcement

Morse argues that the City of Shoreview arbitrarily enforces its building code and selectively grants applications for variances.

The equal protection guarantees contained in United States and Minnesota Constitutions require that persons similarly situated be treated alike unless a rational basis exists for discriminating among them. *See State v. Russell*, 477 N.W.2d 886, 888–89 (Minn. 1991). In proving discriminatory enforcement,

> [A] defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's

> discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right.

State v. Russell, 343 N.W.2d 36, 37 (Minn. 1984) (quotation omitted). The burden is on the defendant to prove discriminatory enforcement by a clear preponderance of the evidence. *Id.* at 38.

Morse has not shown that his neighbors are similarly situated because the record does not show when his neighbors built their garages. Morse attempted to admit photographs of other garages. But the district court determined that without the date of construction, Morse could not lay proper foundation because the building code was revised in 2006 to prohibit garages larger than 75% of one's home or 750 square feet, whichever is smaller. *See* Shoreview, Minn., Mun. Code § 205.082 (D)(5)(a)(ii)(a). Morse did not present evidence of what the building code required before 2006. Because a different size limitation may have governed the construction of his neighbor's large garages, Morse has not shown that he is situated similarly to his neighbors. Further, Morse has not identified any garages in his neighborhood that violate the building code in the same manner as his garage. We conclude that Morse has not met his burden to show that the city selectively enforced the building code in violation of Morse's equal protection rights.

In conclusion, because the district court did not articulate sufficient findings to support its order that Morse must remove the garage from his property, we remand for the district court to do so. To the extent that the district court's order is based on the

violation of municipal building-code provisions, it may consider, in the exercise of its discretion, fashioning a different remedy than destruction of the garage at Morse's expense. Accordingly, we remand to the district court for further proceedings consistent with this opinion. We leave it within the district court's discretion whether to reopen the record on remand.

Affirmed in part and remanded.