STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1471

In the Matter of Days Inn West (7851 Normandale Boulevard)
Nuisance Service Call Fee issued April 4, 2016 for
Violation of State Pool Code, MN Rules 4717.1550, subp. 1.B.(1),
adopted by reference in City Code Section 14.443 and
Nuisance Service Call Fee issued March 17, 2016
for Violation of City Code Section 21.301.06 Parking and Loading

Filed April 17, 2017
Affirmed
Connolly, Judge

Office of Administrative Hearings
OAH File No. 5-6034-33467

Andrew C. McKenney, Donohue McKenney Ltd., Maple Grove, Minnesota (for relator)

Mary D. Tietjen, James J. Thomson, Jr., Kennedy & Graven, Chartered, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Randall, 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

CONNOLLY, Judge

In this certiorari appeal, relator challenges the decision by an administrative-law judge (ALJ) to affirm two citations issued by respondent-city. Relator asserts that the citations are not supported by substantial evidence because (1) there were no nuisance calls to support the imposition of nuisance service call (NSC) fees; and (2) the underlying incidents did not rise to the level of nuisance.

FACTS

Relator Maplewood Lodging LLC, owns the Bloomington Days Inn hotel on which two disputed NSC fees were imposed in 2016. Prior to 2016, on March 17, 2015, respondent City of Bloomington issued an abatement notice to relator after identifying the property as a high-crime property pursuant to Minn. Stat. §§ 609.74-.745 (2016). On April 8, 2015, an NSC fee was issued because the property was again "identified as being a high crime property." On May 1, 2015, relator was found to be in violation of Minn. Stat. § 299F.362, subd. 4, because 23 guest sleeping rooms were found to be without functioning smoke detectors.

The first incident resulting in a disputed NSC fee occurred on March 7, 2016. A city worker made a complaint alleging that vehicles were parked on unapproved areas of the property and that the property owner needed to repair the areas damaged by the parking violations. On March 14, 2016, an environmental health specialist working for the city conducted an inspection of the property based on the complaint. During the inspection he found three vehicles parked on grass or landscaped areas on the property. On March 15,

2016 respondent issued a notice of a violation of Bloomington City Code § 21.301.06 (2016) regarding parking and loading. On March 17, 2016, relator was assessed an NSC fee pursuant to Bloomington, Minn., City Code § 12.15(e) (2016), based on the violation of the city code and at least two prior violations in 2015: failing to have smoke detectors in 23 guest rooms and being a high crime property. The staff quickly corrected the parking violation.

The second incident resulting in a disputed NSC fee occurred on March 28, 2016, and involved a violation of the state pool code, Minn. R. 4717.1550, subp. 1.B.(1) (2016) (providing that access to a public pool must be controlled by a self-latching door). When investigating a near-drowning that occurred on March 25, 2016, a city employee observed that the key card latch/lock was not latching because of a screw placed in the latch. Relator repaired the pool door by March 29, 2016. On April 4, 2016, respondent assessed relator another NSC fee.

On June 29, 2016, a hearing was held before an ALJ. Four city workers testified on behalf of respondent and the property manager, and the owner of the hotel testified on behalf of relator. The ALJ concluded that both disputed NSC fees were appropriate.

D E C I S I O N

"Generally, decisions of administrative agencies, including cities, enjoy a presumption of correctness and will be reversed only when they reflect an error of law or where the findings are arbitrary, capricious, or unsupported by substantial evidence." *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). Substantial evidence is: "(1) such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety." *Id.* at 563.

Bloomington City Code § 12.01 states:

> The purpose of this chapter . . . is to prohibit certain conduct that is harmful to the health, safety and welfare of the community and to prevent and abate nuisance conduct, events, characteristics or conditions and their deleterious effects on city neighborhoods by maximizing the means and methods by which public officers can efficiently and effectively enforce the law and by imposing and collecting [NSC] fees from the owner . . . of private property to which public officers are repeatedly called to respond to nuisance violations as set forth in Article I and II of this chapter of city code. The City Council finds that . . . public nuisance activities are injurious to the public health, safety and welfare and interfere with the quiet enjoyment of life and property and that [NSCs] unduly divert law enforcement resources from general crime prevention and law enforcement. The [NSC] fee is intended as a cost recovery mechanism for excessive law enforcement services, over and above the cost of normal law enforcement services to the public, attributable to unabated nuisance conduct, conditions or characteristics occurring, maintained or permitted to exist on the private property. It is not intended to constitute punishment separate from, or in addition to, any criminal prosecution for the conduct underlying the nuisance or [NSCs].

Bloomington, Minn., City Code § 12.01 (2016). An NSC is a

> [p]ublic officer response to a verified incident of any activity, conduct or condition occurring on private property that is likely to unreasonably interfere with the . . . safety, health, morals, welfare, comfort or repose of the residents therein or misuse city resources, including without limitation . . . [p]ublic nuisance, as listed in and defined by § 12.03 of this city code or [Minn. Stat. §§ 609.74-609.745].

Id. at § 12.01.01. A "verified incident" is "[a]n incident where there is a law enforcement response and a public officer, having completed a timely investigation, is able to find evidence of nuisance conduct, conditions or characteristics as set forth in the definition for [NSC] in . . . the city code." *Id.* A "public officer" is defined as "[A] police officer, fire marshal or inspector, animal control officer, building inspector, or *environmental health inspector* . . . each of whom, for purposes of this Article . . . shall be considered law enforcement officers." *Id.* (emphasis added). "Whoever by an act or failure to perform a legal duty intentionally . . . maintains or permits a condition which unreasonably endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public" is guilty of maintaining a public nuisance. Minn. Stat. § 609.74.

Where an abatement notice or an NSC fee was properly served, each successive NSC within the same 365-day period "shall result in an administrative citation to that party in the manner set forth in . . . this city code in the amount of $250 or more based upon the actual cost of the law enforcement response, up to $2,000 for each separate call." Bloomington, Minn. City Code at § 12.15(e).[1]

The Parking Incident

On March 7, 2016, a city employee filed a complaint regarding parking on unapproved areas. Although relator argues that the city employee was making a regular inspection, the employee did not testify, and the record is unclear as to why he was at relator's property. Nothing indicates the city employee's role or whether he had the

[1] Relator does not dispute that the disputed violations were successive violations occurring within a 365-day period.

authority to reprimand relator for the parking violation. We conclude that it is unreasonable to expect a city employee to do nothing when he observes what he knows to be a violation of a city code. Filing a report with the city is appropriate.

On March 14, 2016, an environmental health specialist with the city, who is treated as a peace officer for purposes of City Code § 12.01.01, followed up on the complaint and conducted an inspection of the property. He found that vehicles were unlawfully parked on the grass and landscaped areas.

At the hearing, the environmental health specialist testified he had safety concerns with the cars parked on the landscaped area because (1) a fire truck might not be able to get into the narrow area left by the parked cars and (2) an electrical service panel and an electrical transformer box were in the vicinity and, if hit, they could cause "fire, explosion, damage, [and] injury."

Relator argues that the underlying incident does not fall under the definition of an NSC because respondent was not responding to nuisance complaints but rather discovered the violations on its own inspections and then created fake "Citizen Complaints" to assess NSC fees. We find no mention of "Citizen Complaints" in chapter 12 of the Bloomington City Code. There is no requirement that a "verified incident" under the Bloomington City Code come from a citizen.

In this case, the verified complaint came from a city employee, and the complaint was followed by an inspection by an environmental health specialist, a peace officer under City Code § 12.01.01, who testified credibly that parking in the area was a safety issue. As a result, this incident qualifies as an NSC because it was a "[p]ublic officer response to a

verified incident of any . . . condition occurring on private property that is likely to unreasonably interfere with the . . . safety . . . of the residents therein." Bloomington, Minn., City Code § 12.01.01.[2] We conclude that the ALJ did not err in determining that a fee was appropriate.

Relator also argues that the ALJ's findings and conclusions were unreasonable and unsupported by substantial evidence because the underlying incidents did not constitute a nuisance, specifically that (1) there is no evidence that indicates how long the vehicles had been parked improperly, (2) relator removed the vehicles as soon as the complaint was brought to its attention, and (3) the vehicles were guest's vehicles and not relator's vehicles.

However, as the ALJ recognized, the city code requires only that a vehicle be parked in a prohibited area at the time of the alleged violation. The code does not require knowledge of who parked the vehicles or how quickly they were removed once relator became aware of the infraction. The complaint alleging parking violations was filed on March 7. When the environmental-health specialist arrived at the property on March 14, three cars were parked illegally. Although relator does not have control over every guest, it has a responsibility to ensure safety on the property. This includes observing the property and rectifying any potential safety hazards or code violations.

Relator also argues that the alleged parking violation does not fall under the list of specific nuisances that are listed as NSCs in the city code. The fact that the violation is not specifically listed in the list of 39 descriptions does not matter because the list of violations

[2] Relator does not contend that the parking condition did not unreasonably interfere with safety concerns.

is prefaced by, "including *without limitation*" indicating that the list of descriptions is not exhaustive. *Id.* (emphasis added).

We conclude that a reasonable person, considering the evidence in its entirety, could conclude that the ALJ's enforcement of the NSC fee for the parking violation was supported by substantial evidence.

The Pool Incident

On March 25, 2016, there was a near drowning at the pool on relator's property. In response, a Bloomington fire marshal inspected the pool and closed it because the main door was unable to latch so access to the pool was not controlled. The fire marshal filled out a "Citizen Complaint Record" identifying herself as city staff. That same day, a different city environmental-health specialist inspected the pool and noticed that access to the pool still was not controlled because a screw had been inserted into the latching mechanism so the door could be opened although the key card access was not working. The environmental-health specialist testified that this was a safety hazard for children or nonguests of the hotel who could obtain access to the pool without supervision. The violation was a concern primarily because children entering the pool without supervision could potentially drown. On April 4, 2016, respondent issued another NSC fee as a result of this violation.

As we have already concluded, there is no requirement that a "verified incident" come from a citizen. As with the parking violation, the verified complaint came from a city employee, the fire marshal, and the complaint was followed up on by an environmental-health specialist, a peace officer under City Code § 12.01.01, who testified

credibly that the nonlatching door is a safety concern for children who could enter the pool and potentially drown if access to the pool was not controlled. As a result, this incident falls under the definition of an NSC. *See* Bloomington, Minn., City Code § 12.01.01.[3]

Relator also argues that the ALJ's findings and conclusions regarding the pool incident were unreasonable and unsupported by substantial evidence and that its conduct did not constitute a nuisance because relator (1) maintained a latched pool door; (2) performed daily inspection; and (3) immediately repaired a screw to the door as soon as it became aware of the issue.

Again, as the ALJ concluded, the city code requires only a violation at the time of the inspection. How the condition came about is irrelevant, as is how quickly the violation was removed once respondent became aware of it.

We conclude that a reasonable person, considering the evidence in its entirety, could conclude that the ALJ's enforcement of the NSC fee for the pool violation was supported by substantial evidence.

Because the ALJ did not err in concluding that respondent properly assessed NSC fees for the parking and pool violations, and because substantial evidence exists in the record that the underlying incidents constituted a nuisance, we affirm the ALJ's decision.

Affirmed.

[3] Relator does not contend that the nonlatching door did not unreasonably interfere with safety concerns.