STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0326

County of Isanti,
Respondent,

vs.

Keith Allen Kiefer,
Appellant.

Filed August 14, 2017
Affirmed
Kirk, Judge

Isanti County District Court
File No. 30-CV-11-589

Jeffrey R. Edblad, Isanti County Attorney, Timothy C. Nelson, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

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

KIRK, Judge

Appellant-landowner challenges the district court's order on remand, arguing that the court erred by concluding that certain items stored on appellant's property were not preexisting nonconformities and that respondent-county did not commit an

unconstitutional taking. Appellant also argues that the district court abused its discretion by denying his request to reopen the record on remand. We affirm.

FACTS

The facts and procedural history of this case are set forth in detail in our previous opinion, *Cty. of Isanti v. Kiefer*, No. A15-1912, 2016 WL 4068197 (Minn. App. Aug. 1, 2016). The following facts pertain to the issues addressed by the district court on remand.

Appellant Keith Allen Kiefer has occupied approximately 53 acres of property in Isanti County since 1992 and has owned this property since at least 1996. The property is currently zoned for agriculture/residential use, but, prior to 1996, it was solely zoned for agriculture use. Since 1992, Kiefer has used one acre of the property to store a regenerator and licensed and unlicensed vehicles. In 2007, the City of Ramsey transferred additional vehicles and miscellaneous items from another property owned by Kiefer onto Kiefer's property in Isanti County.

In 2011, respondent County of Isanti initiated a civil-abatement action alleging Kiefer's violation of the county's solid-waste and zoning ordinances. In response, Kiefer filed counterclaims against the county, alleging, in part, that the county's solid-waste and zoning ordinances, as applied in this context, resulted in an unconstitutional taking of his property. Following a court trial, the district court concluded that the presence of the items, with the exception of several licensed vehicles, a wooden box, a mobile home, and a semitrailer, violated the county's solid-waste ordinance. The district court also concluded that the presence of the items, excluding the above-noted exceptions, violated the county's zoning ordinance because the outdoor storage of such items did not fall within the uses that

were currently permitted under the zoning ordinance. Lastly, the district court concluded that the county's enforcement of its ordinances did not result in an unconstitutional taking.

Kiefer appealed, and this court affirmed in part, reversed in part, and remanded to the district court. *Kiefer*, 2016 WL 4068197, at *6. Specifically, this court reversed the district court's conclusion that Kiefer's outdoor storage violated the county's solid-waste ordinance. *Id.* at *4. Although this court affirmed the district court's conclusion that Kiefer's outdoor storage is not currently permitted under the county's zoning ordinance, it remanded for the district court to determine whether such storage is a permissible preexisting nonconforming use. *Id.* at *5. Finally, this court reversed the district court's ruling on Kiefer's takings claim and remanded the claim for reconsideration. *Id.* at *6.

On remand, the district court concluded that three items—a wooden box, an unlicensed vehicle, and a regenerator—on Kiefer's property were permissible preexisting nonconformities under the county's zoning ordinance. The district court further concluded that the miscellaneous items and a different unlicensed vehicle, all of which arrived at Kiefer's property in 2007, were not permissible preexisting nonconformities under the county's zoning ordinance. Finally, the district court again concluded that Kiefer's property had not been subject to an unconstitutional taking.

Kiefer appeals.

D E C I S I O N

I. The district court did not err by concluding that certain items stored on Kiefer's property were not preexisting nonconformities.

Three general rules of construction guide a court's interpretation of an ordinance: (1) "courts generally strive to construe a term according to its plain and ordinary meaning"; (2) "zoning ordinances should be construed strictly against the [county] and in favor of the property owner"; and (3) "[a] zoning ordinance must always be considered in light of its underlying policy." *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-09 (Minn. 1980). "The interpretation and application of a[n] . . . ordinance is a question of law, which we review de novo." *Cannon v. Minneapolis Police Dep't*, 783 N.W.2d 182, 192 (Minn. App. 2010) (quotation omitted).

It has already been determined that Kiefer's outdoor storage is not a use that is currently permitted under the county's zoning ordinance. *Kiefer*, 2016 WL 4068197, at *6. Nevertheless, the county's zoning ordinance states, "All legally established non-conformities as of the date of this Ordinance may continue, but they will be managed according to applicable state statutes and other regulations of this community for the subjects of alterations and additions, repair after damage, discontinuance of use, and intensification of use." Isanti County, Minn., Zoning Ordinance § 22, subd. 1 (Dec. 29, 2014). Kiefer argues that his outdoor storage on one acre of the property is permissible under the county's zoning ordinance and the district court erred by concluding that the 2007 addition of miscellaneous items and an unlicensed vehicle constituted an unlawful expansion of his preexisting nonconforming use.

As noted in Kiefer's initial appeal, the Minnesota Supreme Court has stated:

> It is a fundamental principle of the law of real property that uses lawfully existing at the time of an adverse zoning change may continue to exist until they are removed or otherwise discontinued. [A] residential zoning ordinance may constitutionally prohibit the creation of uses which are nonconforming, but existing nonconforming uses must either be permitted to remain or be eliminated by use of eminent domain.

Hooper v. City of St. Paul, 353 N.W.2d 138, 140 (Minn. 1984) (internal citations and quotation omitted). Here, the zoning ordinance states that legally established nonconformities "will be managed according to applicable state statutes." Isanti County, Minn., Zoning Ordinance § 22, subd. 1. The applicable statute provides, "Except as otherwise provided by law, a nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an official control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion." Minn. Stat. § 394.36, subd. 4 (2016).

Kiefer claims that he has always used one acre of the property for outdoor storage, and, therefore, because his outdoor storage continues to only occupy one acre, his preexisting nonconforming use did not expand following the 2007 addition of miscellaneous items and an unlicensed vehicle. However, this argument is unconvincing in light of Minnesota's proscription against the expansion of preexisting nonconformities and appellate-court precedent. *See Freeborn Cty. v. Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (1972) (noting that zoning ordinance may prohibit the creation,

expansion, or enlargement of nonconforming uses, "but existing nonconforming uses must either be permitted to remain or be eliminated by use of eminent domain").

It is undisputed that Kiefer's outdoor storage has grown to include a greater number of items than he was storing in 1996 when the property was rezoned. Accordingly, the miscellaneous items and unlicensed vehicle that arrived at the property in 2007 amount to an expansion of Kiefer's preexisting nonconforming use. Such an expansion is impermissible under the county's zoning ordinance and Minn. Stat. § 394.36, subd. 4. However, as the district court properly noted, the items predating the county's zoning ordinance continue to constitute preexisting nonconformities and must be permitted to remain absent the county's use of eminent domain. Accordingly, the district court did not err by concluding that certain items stored on Kiefer's property, which arrived at Kiefer's property in 2007, were not preexisting nonconformities and therefore violated the county's zoning ordinance.

II. The district court did not abuse its discretion by not reopening the record on remand.

"[D]istrict courts are given broad discretion to determine how to proceed on remand, as they may act in any way not inconsistent with the remand instructions provided." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). "Appellate courts review a district court's compliance with remand instructions under the deferential abuse of discretion standard." *Id.*

Kiefer argues that the district court's refusal to reopen the record to admit additional exhibits on remand constituted an abuse of discretion. Kiefer sought to offer several

documents on remand; however, the district court denied his request after determining that such additional exhibits were unnecessary in light of the issues to be resolved.

This court's remand instructions did not require the district court to reopen the record, nor did this court indicate that the record was inadequate for resolving the remanded issues. When reopening the record is mandatory, such a direction is explicitly given. *See, e.g.*, *State v. Licari*, 659 N.W.2d 243, 255 (Minn. 2003) (remanding with instructions to reopen the record). Our previous opinion gave no such instructions. As a result, the district court did not abuse its broad discretion by determining that, "[i]n this case, reopening the record is unnecessary because the original trial record contains sufficient evidence to resolve the remaining legal and factual issues."

III. The district court did not err by concluding that the county did not commit an unconstitutional taking.

The United States and Minnesota Constitutions provide that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see* Minn. Const. art. I, § 13. A property owner has a cause of action for inverse condemnation when the government has effected a taking of private property without formally using its eminent-domain power. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 487 n.2 (Minn. 2004). "The property owner challenging the government's action has the burden of proving an unconstitutional taking or damage to the property." *Stenger v. State*, 449 N.W.2d 483, 485 (Minn. App. 1989), *review denied* (Minn. Feb. 28, 1990). "Whether a governmental entity's action constitutes a taking is a question of law that [appellate

courts] review de novo." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007).

"It is well established that the government need not directly appropriate or physically invade private property to effectuate a taking." *Id.* at 632. "In limited circumstances, government regulation of property may result in a taking." *Id.* "[A] taking may result when the government goes 'too far' in its regulation, so as to unfairly diminish the value of the individual's property, thus causing the individual to bear the burden rightly borne by the public." *Id.* (quotation omitted). Analysis of regulatory taking claims generally considers (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978); s*ee also Wensmann Realty*, 734 N.W.2d at 633-40 (considering the *Penn Central* factors).

Kiefer argues that the county's wrongful enforcement of its solid-waste and zoning ordinances resulted in a taking. Specifically, Kiefer maintains that, "[t]o avoid further *criminal* prosecution pending the outcome of the instant underlying matter, Kiefer rented and used personal property storage elsewhere. Kiefer should have been able to store his personal property on his designated one-acre of outdoor storage, but did not at his expense of $2,496."

Under the first *Penn Central* factor, the inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Wensmann Realty*, 734 N.W.2d at 634

(quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, 125 S. Ct. 2074, 2082 (2005)). Although Kiefer may have incurred expenses by storing certain items in another location, Kiefer remains able to store a number of items on the property. Moreover, there is no indication that enforcement of the zoning ordinance has reduced the property's value.

These same considerations also relate to the court's analysis under the second *Penn Central* factor. "In examining a property owner's investment-backed expectations, the existing and permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Id.* at 637 (quoting *Penn Central*, 438 U.S. at 136, 98 S. Ct. at 2646). Kiefer argues that he purchased the property "to use it for agricultural purposes, a single family home, and outdoor storage." At trial, Kiefer testified that the property's primary use has been agricultural. Although the zoning ordinance does restrict his ability to store certain items on the property, Kiefer is still able to store preexisting nonconforming items outdoors and use the property in a number of manners, including for agricultural purposes and a single family home. *See* Isanti County, Minn., Zoning Ordinance § 6, subds. 2, 3 (Dec. 29, 2014) (listing permitted and conditional uses in agriculture/residential district).

Finally, under the third *Penn Central* factor, the court must consider the character of the government action. "[T]he appropriate focus of the character inquiry should be on the *nature* rather than the merit of the governmental action." *Wensmann Realty*, 734 N.W.2d at 639 (quotation omitted). "Although the relevant considerations may vary depending on the circumstances of the case, an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls

disproportionately on relatively few property owners." *Id.* As discussed above, the county's actions were properly taken to enforce an applicable ordinance. Kiefer cites the county's failure "to present evidence to show that the County uniformly implemented county-wide the County's interpretation of its ordinances as applied to Kiefer." However, such a burden resides with Kiefer, not the county. *See Stenger*, 449 N.W.2d at 485.

Accordingly, because each of the three *Penn Central* factors weighs in favor of the county, the district court did not err by concluding that the county did not effect an unconstitutional taking.

Affirmed.