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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1099

City of Waconia,
Respondent,

vs.

Jayson Dock, et al.,
Appellants.

Filed April 20, 2020
Affirmed
Rodenberg, Judge

Carver County District Court
File No. 10-CV-17-678

George C. Hoff, Jared D. Shepherd, Hoff Barry, P.A., Eden Prairie, Minnesota (for respondent)

Mark W. Vyvyan, Pari I. McGarraugh, Fredrickson & Byron, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

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

RODENBERG, Judge

In this appeal arising from a dispute over appellants' construction of a dock on Lake Waconia, appellants Jayson and Cristine Dock dispute the district court's grant of summary judgment in favor of respondent City of Waconia (the city) on all claims and grant of the

city's request for a permanent injunction compelling appellants to remove the dock. Appellants argue that the district court erred in determining that: (1) the city ordinance banning permanent docks is valid despite the city not having complied with Minn. Stat. § 86B.205 (2018) and Minn. Stat. § 462.357 (2018); (2) the dock is "permanent" within the meaning of the ordinance; and (3) the city is not liable on appellants' claim of abuse of legal process as a matter of law. Appellants also argue on appeal that they have a vested right to the dock, an issue not decided by the district court. We affirm.

FACTS

On July 28, 2017, the city commenced this action to enjoin appellants from constructing a permanent dock on appellants' lakeshore property and extending into Lake Waconia. Appellants counterclaimed for declaratory and injunctive relief, seeking to invalidate a city ordinance adopted by the city that prohibits the construction of permanent docks within the city. On cross-motions for summary judgment, the parties agreed that there were no genuine issues of material fact. Each argued that it was entitled to judgment as a matter of law. The district court concluded that appellants' dock is prohibited by local ordinance and dismissed appellants' counterclaims. It ordered appellants to remove the dock.

Appellants own lakeshore property on Lake Waconia. The lake is bounded by three municipalities: the city, Waconia Township, and Laketown Township.

Appellants' property is located within the Waconia Landing Addition (Waconia Landing), a residential subdivision of the city abutting the southwest portion of the lake. Each property owner within Waconia Landing is a member of the Waconia Landing

Homeowners Association (WLHA). WLHA owns outlot A, which is adjacent to appellants' property.

In 2014, appellants sued WLHA and several of its members over the placement of docks on outlot A, arguing that the docks created a safety hazard and interfered with appellants' riparian rights. The district court ultimately dismissed that lawsuit. In 2015, Carver County brought criminal charges against appellants for public nuisance relating to appellants' prior dock. Appellants were tried and acquitted of all charges in that prosecution. In 2016, appellants again sued WLHA, this time concerning the number of docks placed on the WLHA parcel. The district court dismissed the lawsuit based on the application of the doctrine of res judicata. It held that the 2014 dismissal of appellants' lawsuit barred the 2016 action. On appeal, this court affirmed the district court. *Dock v. Waconia Landing Homeowners Ass'n, Inc.*, No. A17-0184, 2017 WL 5985389 (Minn. Ct. App. Dec. 4, 2017).

During all of this litigation, appellants and WLHA each urged the city to amend the city's shoreland regulations concerning dock placement. In March 2015, the city considered appellants' proposal to amend a zoning ordinance to regulate docks in the city's Shoreland Overlay District, but declined to adopt appellants' proposal. In April 2017, the city considered WLHA's request for adoption of a zoning ordinance that would amend the existing dock-placement regulations. The city declined to adopt the proposal. Following this denial, the city council instructed staff to research the regulation of docks, and directed "Staff and [the] City Attorney to create draft dock regulation ordinance language for Council consideration."

In November 2016, appellants hired Custom Boardwalks to construct a roughly-200-foot-long dock advertised as "permanent" and extending from the shoreline of appellants' property into Lake Waconia. Because the city council had yet to adopt any regulations concerning docks, a city employee informed Custom Boardwalks that it could proceed with the construction of the dock. Likewise, the department of natural resources (DNR) area hydrologist indicated to appellants that no special permit was needed to install the proposed dock. Construction of the dock commenced on June 19, 2017, when Custom Boardwalks began placing pilings for the dock in the lake.

On July 20, 2017, the city council held an emergency meeting to consider adopting an interim ordinance imposing a moratorium on the construction, erection, or placement of permanent docks on the shoreline of all public waters within the city while the city further studied dock regulation. The city ultimately adopted interim ordinance 705, which established a moratorium on any dock construction in the city for one year while the city reviewed its options to either prohibit permanent docks, enact a more comprehensive dock-placement regulation, or leave the placement of docks unregulated.

After adopting interim ordinance 705, the city ordered appellants to immediately halt the construction of their dock. Construction on the dock was stopped shortly thereafter. The city sued appellants for injunctive relief on July 28, 2017, and moved the district court for a temporary restraining order (TRO). On September 27, 2017, the district court denied the city's request for a TRO. Although it denied the city's request for a TRO, the district court noted in its order that appellants would proceed at their peril if they continued construction of the dock with the litigation pending.

Appellants chose to proceed with construction of their dock. According to Custom Boardwalk's product documents, the dock, which was nearly finished by mid-November 2017, "Sets on Permanently Embedded Steel Pilings," "Stays in Year-Round," and has a "25 year Boardwalk Warranty." The pilings are advertised by Custom Boardwalks as "hydrologically drilled deep into the lake . . . bottom to support [the] permanent Custom Boardwalks dock frame." The dock is constructed with "three-by-twelve lumber across the top." Although Custom Boardwalks has yet to seasonally remove any such dock, it contends that it could do so. Removal would take seven to ten days, require approximately six to eight people, and cost "a lot of money." It would require "a couple [of] machines and trucks," including equipment to torch the beams and cut them from the pilings. Replacing the dock in the succeeding spring would cost a "couple hundred thousand dollars."

On October 2, 2017, the city, purporting to act under its general police powers, adopted ordinance 707, regulating docks within the city. Ordinance 707 took effect on October 12, 2017, and specifically prohibits permanent docks in public waters from riparian lots within the city. It defines a permanent dock as "any Dock that is not a Seasonal Dock and is supported by pilings, retaining wall or other materials and associated with a permanent foundation that is either resting or embedded in the lake bottom and is designed to make relocation impracticable." A seasonal dock, on the other hand, is defined as "any Dock which is so designed and constructed that it may be removed from the Public Waters on a seasonal basis."

Following the adoption of ordinance 707, and on October 13, 2017, the city attorney sent a copy of ordinance 707 and a cease-and-desist letter to counsel for appellants. Appellants' counsel responded, stating that ordinance 707 is invalid and that, because no special permit was required by the DNR, appellants were legally entitled to construct their dock.

Appellants' dock was completed on November 14, 2017, and has not been removed.

On cross motions for summary judgment, the district court dismissed appellants' claim of abuse of process, granted summary judgment in favor of the city on all claims, and granted a permanent injunction compelling appellants to remove the dock.

This appeal followed.

DECISION

At the outset, we reject appellants' argument that their abuse-of-legal-process claim against the city is viable. Appellants argue that the city's actions in adopting and enforcing ordinances 705 and 707 amount to actionable abuse of the legal process. Appellants seek money damages from the city. Appellants cite no case law in support of this argument. *See In re Estate of Grote*, 766 N.W.2d 82, 88 (Minn. App. 2009) (providing that appellate courts "decline[] to address allegations unsupported by legal analysis or citation"). And we find no legal authority that permits suits against a legislative body and for money damages in circumstances such as these.

We also reject appellants' vested-rights argument. Appellants argue on appeal that the district court "erred by awarding summary judgment when issues of fact remain" concerning their claim of entitlement to vested rights to construct the dock. The parties

explicitly agreed in district court that there was no dispute of material fact. Appellants first asserted their vested-rights argument by letter to the district court *after* briefing and argument on the cross-motions for summary judgment. Appellants' counsel admits in the posthearing letter that "[t]he [district] [c]ourt asked the parties if there were any disputed facts in the Motions, and the parties agreed that there were not."

Appellants concede in their reply brief on appeal that their vested-rights argument was not formally presented to the district court. We "must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Because the issue was not raised in the cross-motions before the district court, and because nothing in the record reflects that the district court considered or decided this issue, we decline to consider it on appeal.

Similarly, we do not consider the argument in appellants' reply brief that appellants' dock is *neither* a permanent dock *nor* a seasonal dock. This argument was never made to or considered by the district court. We therefore decline to address it on appeal. *See id.*

The district court did not err in determining that ordinance 707 is valid.

Appellants argue that the district court erred in granting summary judgment in favor of the city. They maintain that ordinance 707 is procedurally invalid for failure of the city to comply with sections 86B.205 or 462.357.

"The district court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Fletcher Prop., Inc. v. City of Minneapolis*, 931 N.W.2d 410, 417 (Minn. App.

2019) (quoting Minn. R. Civ. P. 56.01). Appellate courts review a district court's summary-judgment decision de novo and view the evidence in the light most favorable to the party against whom summary judgment was granted. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010); *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006). Likewise, "[t]his court reviews questions of statutory interpretation de novo." *Matter of J.M.M*, 890 N.W.2d 750, 753 (Minn. App. 2017); *see City of Morris v. Sax Inv., Inc.*, 749 N.W.2d 1, 5 (Minn. 2008) (providing that the application of statutes and local ordinances to undisputed facts is a legal conclusion which is reviewed de novo).

When interpreting statutes, "[w]e construe words and phrases according to their plain and ordinary meaning." *In re Khan*, 804 N.W.2d 132, 142 (Minn. App. 2011) (quotation omitted). Courts' objective in interpreting statutes is to "effectuate the intent of the legislature." *Westchester Fire Ins. Co. v. Hasbargen*, 632 N.W.2d 754, 756 (Minn. App. 2001). If the "legislative intent is clear from the statute's plain and unambiguous language," a statute will be interpreted according to its plain meaning and courts will not resort to other principles of statutory interpretation. *City of Brainerd v. Brainerd. Invs. P'ship*, 827 N.W.2d 752, 755 (Minn. 2013).

Minn. Stat. § 412.221, subd. 12 (2018), authorizes the city to regulate docks.

Appellants argue that Minn. Stat. § 86B.205 governs how a city may regulate permanent docks. Appellants assert that the city was not legally authorized to enact ordinance 707 under Minn. Stat. § 412.221, subd. 12, as the city purported to do. The city argues that Minn. Stat. § 412.221, subd. 12, governs a municipality's authority to regulate

permanent docks and that it expressly relied on that authority when it enacted ordinance 707.

Waconia is a statutory city. Minn. Stat. § 412.221 (2018) identifies the specific powers of statutory cities. Subdivision 12 of the statute provides that a city "shall have power to establish harbor and dock limits and by ordinance regulate the location, construction and use of . . . docks . . . on navigable waters and fix rates of wharfage."

Appellants contend that the language in Minn. Stat. § 86B.205 requires that the city obtain permission from the commissioner and neighboring municipalities before it may adopt an ordinance regulating docks. Minn. Stat. § 86B.205 governs the regulation of water surface use ordinances. Subdivision 2 provides that a county "may, by ordinance, regulate the surface use of bodies of water located entirely or partially within the county." As discussed below, cities may, in some circumstances, exercise section 86B.205 powers. Minn. Stat. § 86B.205, subd. 2(b), further provides that "[i]f a body of water is located within more than one [jurisdiction], a surface use ordinance is not effective until adopted by the county boards of all the counties where the body of water lies . . . or placed into effect by order of the commissioner."

Appellants maintain that sections 86B.205 and 412.221, subd. 12, are in conflict, and that "[w]hen the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail." Minn. Stat. § 645.26, subd. 4 (2018). Appellants contend that, as the more-recent enactment,

Minn. Stat. § 86B.205, subd. 5(3), governs the regulation of the "construction, installation, and maintenance of permanent and temporary docks."[1]

As discussed above, Minn. Stat. § 86B.205 applies by its express terms to county boards. But under certain circumstances, a city has authority under Minn. Stat. § 459.20 (2018) to exercise Minn. Stat. § 86B.205 powers. Those circumstances are not present here.

Under the first provision of Minn. Stat. § 459.20, the governing body of a city has, with respect to any body of water situated wholly within its boundaries, all powers available under Minn. Stat. § 86B.205. Lake Waconia is not situated wholly within the city's boundaries. Under the second provision of Minn. Stat. § 459.20, two or more cities whose contiguous boundaries wholly surround a body of water may, under Minn. Stat. § 471.59 (2018), jointly exercise various statutory powers, including those under Minn. Stat. § 86B.205. There is no joint powers agreement here. The city acted alone. As such, neither the first nor the second provision of section 459.20 authorizes the city to exercise the powers conferred by section 86B.205.

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[1] The municipal powers outlined in Minn. Stat. § 412.221 were first adopted in 1949. 1949 Minn. Laws ch. 119, § 29, at 162-67. The language concerning subdivision 12 has not been substantively amended since it was adopted in 1949. *Compare* Minn. Stat. § 412.221, subd. 12 (1949), *with* Minn. Stat. § 412.221, subd. 12 (2018). Minn. Stat. § 459.20 was adopted in 1973, and incorporated joint regulation of lakes through county surface use ordinances in 1978. 1973 Minn. Laws. ch. 702, § 24, at 1938; 1978 Minn. Laws ch. 726, § 17, at 787-88. Moreover, Minn. Stat. § 86B.205 was first adopted in 1990, and Minn. Stat. § 459.20 was amended to incorporate it that same year. 1990 Minn. Laws ch. 391, art. 9, § 10, at 724-27; 1990 Minn. Laws ch. 391, art. 8, § 46, at 714.

The final sentence of Minn. Stat. § 459.20 provides that "[r]eferences in sections 86B.205 . . . to the county board shall be construed to refer to the governing body of a home rule charter or statutory city or the board of supervisors of a town." The district court appears to have concluded based on this phrase that the city may regulate docks under section 86B.205. However, if this sentence means that *any* city council may exercise powers available to a "county board" in Minn. Stat. § 86B.205, there would be no reason for the earlier provisions in Minn. Stat. § 459.20, and it would undermine the section's distinction between lakes that are wholly contained within the city and those that are not.

We read the last sentence of section 459.20 to mean that references to the county board include the governing body of a city that is authorized to exercise the powers enumerated in Minn. Stat. § 86B.205. Because Lake Waconia is not situated wholly within the city, and there is no joint powers agreement, it is evident to us that Minn. Stat. § 459.20 does not allow the city to regulate docks under Minn. Stat. § 86B.205. Section 86B.205 has no application here.

We see no inconsistency between Minn. Stat. § 86B.205, subd. 5(3), and Minn. Stat. § 412.221, subd. 12. Minn. Stat. § 86B.205, subd. 5, has no application here, as discussed, and Minn. Stat. § 412.221, subd 12, unambiguously authorizes a statutory city "by ordinance [to] regulate the location, construction and use of . . . docks." We therefore conclude that the city properly adopted the ordinances under Minn. Stat § 412.221, subd. 12, just as it purported to do when it enacted the ordinances.

Ordinance 707 is not a zoning ordinance.

Appellants next argue that ordinance 707 is a zoning ordinance and that, as such, the city was required to provide notice and hold a public hearing before it could be validly enacted. *See* Minn. Stat. § 462.357, subd. 3 (requiring notice and a public hearing before a city may adopt a zoning ordinance). The city maintains that ordinance 707 was adopted under the city's police powers, and is not a zoning ordinance.

Minn. Stat. § 462.357, subd. 1, identifies the characteristics of a zoning ordinance. Such an ordinance "may divide the surface, above surface, and subsurface areas of [a] municipality into districts or zones of suitable numbers, shape, and area." *Id.* The statute further provides that "[t]he regulations shall be uniform for each class or kind of buildings, structures, or land and for each class or kind of use throughout such district, but the regulations in one district may differ from those in other districts." *Id.* Similarly, a zoning ordinance is generally defined as "[a] city ordinance that regulates the use to which land within various parts of the city may be put. It allocates uses to the various districts of a municipality, as by allocating residences to certain parts and businesses to other parts." *Black's Law Dictionary* 1857 (10th ed. 2014).

Based on the characteristics and definition of zoning ordinances, we conclude that ordinances 705 and 707 are not zoning ordinances. The ordinances apply generally and do not regulate activities within specific zones.

Ordinance 707 provides that it "affects *all* Docks in Public Waters that have shoreline with the City in Public Waters." (Emphasis added.) Ordinance 707 does not divide any areas of the city into "districts or zones of suitable numbers, shape, and area."

Minn. Stat. § 462.357, subd. 1. Nor does the ordinance "regulate[] the use to which land within various parts of the city may be put." *Black's Law Dictionary* 1857 (10th ed. 2014). Instead, ordinance 707 applies to the city generally, providing that "Permanent Docks in Public Waters from Riparian Lots within *the City* are prohibited."[2] (Emphasis added.)

Because ordinance 707 is not a zoning ordinance, the city was not required to provide appellants with notice and hold a public hearing under Minn. Stat. § 462.357, subd. 3, before its adoption.

The district court did not err by concluding that appellants' dock is permanent within the meaning of ordinance 707.

Appellants argue that their dock is not permanent within the meaning of ordinance 707. The city argues otherwise.

As noted, we decline to address the argument—first raised in appellants' reply brief on appeal—that their dock is *neither* permanent *nor* seasonal. But appellants did preserve the argument that their dock is not permanent, an argument that the district court expressly rejected.

Ordinance 707 defines a permanent dock as "any Dock that is not a Seasonal Dock and is supported by pilings, retaining wall or other materials and associated with a permanent foundation that is either resting or embedded in the lake bottom and is designed

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[2] Although not explicitly argued on appeal, the district court noted that "Minn. Stat. section 462.357 gives a municipality the option to regulate the use of land through a zoning ordinance; it does not require that it must." We reject this reasoning. If the city adopted an ordinance that met the characteristics of a zoning ordinance, the city would be required to comply with the procedural requirements of providing notice and a hearing. But ordinance 707 is not a zoning ordinance.

to make relocation impracticable." It defines a seasonal dock as "any Dock which is so designed and constructed that it may be removed from the Public Waters on a seasonal basis."

Appellants assert that their dock does not contain a permanent foundation that is embedded in the lake, and that removal of their dock is not impracticable because they *could* remove it. The district court rejected the argument, and we reject it as well on this record.

First, the record—which the parties agreed presented no factual dispute for resolution—demonstrates that appellant's dock is advertised as a "professionally installed permanent dock [that] stay[s] in year round eliminating the need of yearly Installation and removal." Custom Boardwalks also provides that the dock "Sets on *Permanently Embedded* Steel Pilings." (Emphasis added.) Appellant Jayson Dock testified that he has not removed the dock since it was installed and that he has no intention to remove it during winter months. We suppose that almost every human construction *could* be removed. But that does not mean that no human construction is permanent. The ordinance here defines a permanent dock as one that is not seasonal, and is supported by pilings that are embedded in the lake bottom. This dock plainly meets that portion of the definition.

Second, it is impracticable to remove appellants' dock. Appellants argue that impracticable is synonymous with impossible. In support of this argument, appellants maintain that impracticable means "[i]mpossible to do or carry out." *The American Heritage College Dictionary* 883-84 (5th ed. 2018) (defining impracticable). But Minnesota appellate caselaw indicates that impracticable and impossible are not

synonymous. *See In re Ruth Easton Fund*, 680 N.W.2d 541, 550 (Minn. App. 2004) (listing impracticable and impossible as different considerations in the context of modifying a trust); *Powers v. Siats*, 70 N.W.2d 344, 348 (Minn. 1955) (holding that, in terms of performance of a contractual duty, impracticable means "in the sense that performance would cast upon the promisor an excessive or unreasonably burdensome hardship, loss, expense or injury"). As such, appellants' argument that the dock is not impracticable simply because appellants *could* remove it falls short.

Impracticable is elsewhere defined as "[a] fact or circumstance that excuses a party from performing an act . . . because (though possible) it would cause extreme and unreasonable difficulty." *Black's Law Dictionary* 874 (10th ed. 2014). The term has also been defined as "not practicable; incapable of being put into practice with the available means: *an impracticable plan*." *The Random House Dictionary of the English Language* 962 (2nd ed. 1987). It is in this sense that the ordinance uses the term.

The undisputed record shows that installation of the dock took a crew working full time, Monday through Friday, several months to complete. Installation involved the crew drilling the pilings into the lakebed and welding the pilings to the cross-beams. Concerning the removal of the dock, the deposition testimony of Terry O'Brien of Custom Boardwalks was:

> **Respondent's Counsel:** Is it fair to say that if the dock was removed and then put back in, it would cost another couple hundred thousand dollars to install?
> **Terry O'Brien:** That same dock?
> **Respondent's Counsel:** Yeah.
> **Terry O'Brien:** Definitely, yes, more. That's a big dock.
> . . . .

> **Respondent's Counsel:** In your experience in your time with your company, has any property owner inquired about one of your docks and then inquired about using it seasonally?
> **Terry O'Brien:** What do you mean "seasonally"?
> **Respondent's Counsel:** Like, installing . . . it and then removing it every season?
> **Terry O'Brien:** Never.

O'Brien also testified that, if he were to remove appellants' dock, it would take "a week [to a] week and a half," require "a couple [of] machines and trucks[,]" and approximately eight employees to torch the beams and cut them from the pilings. The district court found the record evidence to clearly establish that removing the dock each year would be "excessively difficult to do," and observed that if it were to adopt appellants' argument, "essentially anything man-made would not be considered a permanent structure because eventually it could be removed." We agree. This dock meets the impracticable-to-remove portion of the definition of a permanent dock.

Based on the record, we see no error in the district court's conclusion that appellants' dock is a permanent dock within the meaning of ordinance 707.

In sum, the district court did not err in concluding that the city's ordinances 705 and 707 are valid legislative enactments and that appellants' dock is permanent. The district court also properly dismissed appellants' claim for money damages under an abuse-of-the-legal-process theory. Appellants failed to preserve their vested-rights argument and we therefore do not address it.

Affirmed.