STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1375

Amos Mast, et al.,
Appellants,

vs.

County of Fillmore,
Respondent,

Minnesota Pollution Control Agency,
Respondent.

Filed June 8, 2020
Affirmed
Worke, Judge

Fillmore County District Court
File No. 23-CV-17-351

Brian N. Lipford, Law Offices of Southern Minnesota Regional Legal Services, Inc., Rochester, Minnesota; and

Charles H. Thomas, Law Offices of Southern Minnesota Regional Legal Services, Inc., St. Paul, Minnesota (for appellants)

Brett A. Corson, Fillmore County Attorney, Preston, Minnesota (for respondent Fillmore County)

Keith Ellison, Attorney General, Christina M. Brown, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Pollution Control Agency)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Rodenberg, Judge.

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

WORKE, Judge

Appellants argue that the district court erred by denying their claims for a declaratory judgment that authorities mandating the installation of subsurface sewage treatment systems (septic systems) violate their freedom of conscience under the Minnesota Constitution, Minn. Const. art. I, § 16, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5 (2018). We affirm.

FACTS

Appellants Amos Mast, Menno Mast, Ammon Swartzentruber, and Sam Miller (appellants) are all members of an Amish community in Fillmore County. In May 2015, members of the community submitted a letter to respondent Minnesota Pollution Control Agency (MPCA) stating their opposition, on religious grounds, to the requirement that they use gray-water-treatment systems to dispose of their household wastewater.

A septic system is comprised of three main components: a septic tank, a drain field, and oxygenated treatment soil. Gray water first flows out of the house and into the septic tank. The septic tank functions as a settling chamber, wherein heavy solids in the wastewater sink to the bottom of the tank and light oils, greases, and soaps float to the top. After these heavy and light elements are separated, the gray water next flows into the drain field, which is comprised of a series of perforated pipes that distribute the wastewater across the field for absorption by the oxygenated topsoil. The drain field must contain at least three feet of nonsaturated soil above the bedrock so that the oxygen in the soil can

aerobically purify the remaining contaminates in the gray water before it enters the groundwater.

The MPCA is directed to adopt rules for "the design, location, installation, use, maintenance, and closure of [septic systems]." Minn. Stat. § 115.55, subd. 3(a) (2018). The MPCA rules for individual septic systems are set forth in chapter 7080 of the Minnesota Rules. Minn. R. 7080.1050-.2550 (2019). "The proper location, design, installation, use, and maintenance of an individual [septic system] protects the public health, safety, and general welfare by the discharge of adequately treated sewage to the groundwater." Minn. R. 7080.1050.

Sewage is defined as "waste produced by toilets, bathing, laundry, or culinary operations or the floor drains associated with these sources." Minn. R. 7080.1100, subp. 73. Gray water is defined as "sewage that does not contain toilet wastes." *Id.*, subp. 37. "Sewage discharged from a dwelling . . . must be treated according to applicable requirements." Minn. R. 7080.1500, subp. 1.

Counties are required to adopt ordinances that comply with the MPCA rules. Minn. Stat. § 115.55, subd. 2(a) (2018). Respondent Fillmore County adopted the relevant MPCA rules in their entirety. Fillmore County, Minn., Sub-Surface Sewage Treatment System Ordinance (FCO) § 501 (2013).[1]

[1] The ordinance also provides specific alternative standards for members of the local Amish community, which allow for a smaller septic system based on a flat-usage measurement of 100 gallons per day. FCO § 502.

Instead of the generally statutorily prescribed septic systems,[2] appellants implemented their own experimental gray-water-treatment systems on their properties. In appellants' alternative-treatment systems, called mulch basins, the gray water flows from the house, through a pipe, and into a large earthen basin dug into the ground and is filled with wood chips. The wood-chip mulch functions in a manner similar to a septic tank, filtering out solids and grease, and providing surge capacity until the discharged gray water can be absorbed by the soil at the bottom of the basin. The oxygenated soil at the bottom of the mulch basin aerobically purifies the wastewater in a manner similar to the soil beneath a drain field in a septic system.

In April 2016, the MPCA filed administrative enforcement actions against Amish families in Fillmore County. In April 2017, appellants filed a complaint in district court, seeking a declaratory judgment that application of state and county rules generally mandating the installation of septic systems to treat gray water violates appellants' freedom of conscience under the Minnesota Constitution and RLUIPA.[3] [4]

[2] In addition to the septic systems set forth above, gray water can also be treated in what are termed type-five systems. So long as certain minimum standards are met, type-five systems allow a licensed engineer to design a system and bear the risk that it will function properly. *See* Minn. R. 7080.2400. Appellants did not propose that their alternative gray-water-treatment systems satisfied rule 7080.2400, and therefore these types of systems are not implicated on appeal.

[3] Appellants also brought a claim for asserted violations of their rights under the United States Constitution, which they later withdrew.

[4] The county filed a counterclaim seeking an order that appellants bring their properties into compliance with state and local zoning and wastewater-treatment rules, and if they fail to do so within six months, an order that their homes be rendered uninhabitable. By agreement of the parties, the bench trial was limited to appellants' declaratory-judgment claims, and the district court deferred ruling on the county's zoning-enforcement actions.

Following a bench trial, the district court determined that the general statutory mandate for septic systems substantially burdened appellants' sincerely held religious beliefs. However, the district court also concluded that respondents met their burden of establishing that septic systems—not mulch basins—are the least-restrictive means of meeting the government's compelling interest of protecting public health and the environment. The district court therefore denied appellants' request for declaratory relief. This appeal followed.

D E C I S I O N

The interpretation of the constitution is a legal issue that this court reviews de novo. *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018). This court also reviews the interpretation of a statute de novo. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). "On appeal, a [district] court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous. . . . If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (citation omitted).

Appellants assert that laws generally requiring them to install septic systems violate their freedom of conscience under the Minnesota Constitution and their rights under RLUIPA. Minnesota courts use a four-prong test to determine whether a governmental regulation impermissibly burdens the freedom of conscience: "[1] whether the objector's belief is sincerely held; [2] whether the state regulation burdens the exercise of religious beliefs; [3] whether the state interest in the regulation is overriding or compelling; and [4] whether the state regulation uses the least restrictive means." *Hill-Murray Fed'n of*

Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Claims for violations of RLUIPA are analyzed under an essentially similar four-prong test. *See Holt v. Hobbs*, 574 U.S. 352, 362, 135 S. Ct. 853, 862-63 (2015); *see also* 42 U.S.C. § 2000cc(a)(1).

The district court found that requiring appellants to install septic systems on their properties substantially burdened their sincerely held religious beliefs. Respondents did not appeal these findings. Under both the Minnesota Constitution and RLUIPA, respondents bore the burden of demonstrating the existence of a compelling state interest and that the regulation at issue is the least-restrictive means of achieving that interest. *See Holt*, 574 U.S. at 363, 135 S. Ct. at 863 (regarding RLUIPA); *State v. Hershberger*, 462 N.W.2d 393, 395 (Minn. 1990) (regarding the Minnesota Constitution).

Appellants argue that the district court erroneously identified the compelling state interest implicated by the state's regulation of household-wastewater treatment. Appellants also assert that the district court made erroneous findings of fact regarding the feasibility of their proposed alternative gray-water-treatment systems, and thus the district court's legal conclusion that the state demonstrated that statutorily mandated septic systems are the least-restrictive means of protecting public health was also incorrect.

Compelling state interest

Appellants first argue that the district court erroneously identified the compelling state interest implicated by the state's regulation of household-wastewater treatment. The district court found that "untreated or inadequately treated gray water presents substantial and serious danger to public health and risk to the environment, and that the [g]overnment

has a compelling interest in protecting against those dangers." Appellants acknowledge that they stipulated to this governmental interest, but assert that they did not stipulate that the government has a compelling interest in imposing the use of septic systems to treat gray water.

During trial, the district court sought to clarify the terms of the parties' stipulation. The district court stated that it was "not sure that [the] stipulation goes so far as to be an agreement . . . that gray water and its treatment pose significant risk to the public safety of our water." Counsel for the MPCA informed the district court that appellants did not stipulate to the fact that "gray water was an imminent threat[,]" but they admitted "that protecting Minnesota's groundwater from contamination and protecting the health of Minnesota citizens are both compelling state interests." Appellants did not object to this characterization of the stipulation.[5]

The district court's finding regarding the government's compelling interest is comprised of two separate clauses. The first clause states that untreated or improperly treated gray water is a threat to public health and the environment. This finding is supported by the record and therefore is not clearly erroneous. *See Fletcher*, 589 N.W.2d at 101. One of the MPCA's experts, Dr. Sara Heger, testified that numerous published studies indicate that there are potentially millions of bacteria and viruses present in 100

[5] The MPCA argues that this issue regarding the proper characterization of the government's compelling interest was not raised below and should be deemed forfeited on appeal in accordance with *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). However, as this on-the-record exchange shows, the district court raised the issue sua sponte and attempted to clarify the contours of the parties' agreement and where additional findings would be required. On this basis, the argument is not forfeited.

milliliters of gray water as indicated by the presence of fecal-coliform bacteria. She characterized gray water as "a contaminant source that needs to be treated[,]" and stated that surface water and groundwater need to be protected from inadequately treated gray water.

The second clause of the district court's finding recites that the government has a compelling interest in protecting against the dangers of untreated or inadequately treated gray water. Appellants stipulated that protecting Minnesota's groundwater from contamination and protecting the health of Minnesota citizens are both compelling state interests. Thus, the district court did not err in its identification of the relevant compelling governmental interest, which was consistent with the terms of the parties' stipulation and based upon a finding that was adequately supported by the record.

Least-restrictive means

Appellants next argue that the district court erred by finding that their mulch-basin system did not provide a less-restrictive means of accomplishing the government's compelling interest. Appellants assert that the district court improperly placed the burden on appellants to demonstrate that their alternative worked, failed to consider appellants' professionally designed mulch-basin system, and made findings that ignored evidence in the record which supported the feasibility of their mulch-basin system.

The burden was on respondents to show that appellants' mulch-basin system did not adequately satisfy the government's compelling interest in protecting public health and the environment. *See Hershberger*, 462 N.W.2d at 399 (stating that the state failed to prove that the white reflective tape and lanterns used by the Amish to mark their slow-moving

buggies did not adequately protect public safety). Here, the district court correctly placed the burden on respondents to demonstrate that the mulch-basin system did not adequately protect public health and the environment. The district court stated that "the burden of proof is on the [g]overnment to establish that its compelling state interest cannot be served by a 'less intrusive alternative.'"

Appellants concede that their experimental mulch basins overflowed. Minn. Stat. § 115.55, subd. 5a(b) (2018), provides that if an inspector finds that sewage discharges to the ground surface, or if sewage backs up, "then the system constitutes an imminent threat to public health or safety." However, appellants maintain that even though their experiments were not successful at preventing sewage from seeping back onto the surface,[6] the evidence at trial established that mulch basins have the potential to provide a less-restrictive alternative to the government's septic systems, and thus respondents failed to meet their burden.

Appellants assert that the district court should have considered the feasibility of their professionally designed mulch-basin system, which utilized an interconnected series of four basins, rather than their homemade experimental single-basin system. Contrary to appellants' assertion, the district court did consider their professionally designed system, finding that even though respondents asserted that they were prejudiced by the late disclosure of the professionally designed system, it was admissible because the new system

[6] Appellants point out that the same statutory provision that identifies a backed-up system as an imminent public-health threat also allows the owner up to ten months to repair, upgrade, or replace their septic system following the receipt of a notice of noncompliance. *See* Minn. Stat. § 115.55, subd. 5a(b).

"is simply an enlarged version" of the experimental system installed on appellants' properties. The record therefore demonstrates that the district court properly placed the burden on respondents to demonstrate that none of appellants' proposed alternative systems, including the professionally designed system, adequately protected public health and the environment.

The remainder of appellants' arguments pertain to their assertion that the district court should have given more credit to the evidence that supported the feasibility of mulch basins to adequately treat gray water and less credit to the evidence that demonstrated that mulch basins were not feasible in Fillmore County. However, when considering whether a district court's findings are clearly erroneous, this court does not reconcile conflicting evidence. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). Similarly, appellants argue that the district court should not have discredited the testimony of their expert witness while finding respondents' experts credible. However, "[t]he assessment of a witness' credibility is the unique function of the trier of fact." *Pelowski v. K-Mart Corp.*, 627 N.W.2d 89, 93 (Minn. 2001).

The district court's findings regarding the unfeasibility of appellants' mulch-basin system are all supported by the record, and therefore are not clearly erroneous. The district court found that Dr. Heger credibly testified that the biggest problem with appellants' proposed alternative "is finding a system that you can put in subsurfacely that has three feet of soil treatment." She added that even if a suitable location with enough separation could be found on appellants' properties, "we'd also have to think about more ingenious

ways to try to spread out the water. . . . [T]he issue is it would seal up relatively quickly across the bottom because . . . there wasn't a septic tank." If the bottom of the basin did seal, the only remedy would be "to move to another location unless you take that soil off, and then there's the risk of smearing and compacting that soil. When you do that, it may not take water as well again." This testimony goes to the general unworkability of mulch basins in Fillmore County, not just the specific failures of appellants' experimental system.

Finally, appellants assert that the acceptability of mulch basins in 20 other states, and under the Uniform Plumbing Code—the relevant portions of which have not been adopted in Minnesota—demonstrates that the district court incorrectly concluded that mulch basins do not provide a less-restrictive means of disposing of gray water in a manner conducive to protecting public health and the environment. *See Holt*, 574 U.S. at 368-69, 135 S. Ct. at 866 ("That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks."). However, the district court set forth the factual bases that support its determination not to rely on the practices of other states.

The district court distinguished the practices in California and Arizona from the situation in Fillmore County, because the climates "are so dissimilar in average temperature and precipitation to Minnesota's, that the [district court] can take little guidance from the experience of those states." Regarding the practices of more environmentally compatible states, such as Montana and Wyoming, the district court found that "little or no evidence was presented about the extent of use, regulation, and performance of mulch systems in

those states. On this record, mulch systems in Montana and Wyoming provide the [district] court no direction." The district court also found that no evidence or information regarding Wisconsin's practices, which may permit mulch systems, was offered at trial. Based on these findings, the district court did not err by declining to rely on the practices of other states as persuasive authority for the feasibility of appellants' proposed system in Fillmore County.

Because the district court's findings of fact are supported by the record, and thus are not clearly erroneous, the district court properly concluded that "even with the capacity expansion and siting improvements to which [appellants] are agreeable, [the mulch basins] would not accomplish the [g]overnment's compelling public health and environmental safety purposes." Therefore, the district court appropriately concluded that respondents met their burden of demonstrating that appellants' mulch-basin system does not provide a less-restrictive means of accomplishing the government's compelling interests of protecting public health and the environment.

Affirmed.