STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2031

Eric Ringsred,
Appellant,

Respect Starts Here,
Appellant,

State of Minnesota,
Plaintiff,

vs.

Duluth Economic Development Authority, et al.,
Respondents.

Filed August 31, 2020
Reversed and remanded
Schellhas, Judge[*]

St. Louis County District Court
File No. 69DU-CV-18-953

Miles Ringsred, Duluth, Minnesota (for appellant Eric Ringsred)

William D. Paul, Duluth, Minnesota (for appellant Respect Starts Here)

Rebecca St. George, Duluth City Attorney, Steven B. Hanke, Deputy City Attorney, Elizabeth A. Sellers, Assistant City Attorney, Duluth, Minnesota (for respondents)

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellants sued respondents under the Minnesota Environmental Rights Act (MERA), seeking to enjoin them from demolishing certain property in Duluth. The district court conducted a court trial, concluded that respondents established an affirmative defense to appellants' MERA claim, and granted judgment to respondents. Because we conclude that the district court did not apply the appropriate legal standard to respondents' affirmative defense, we reverse and remand.

FACTS

In 2006, buildings known as the Pastoret Terrace and Paul Robeson Ballroom, and the Kozy Bar (collectively "the property") in Duluth were listed on the National Register of Historic Places as contributing structures to the Duluth Commercial Historic District. Around that same time, respondent Eric Ringsred, through an entity known as Temple Corp., purchased the property under a contract for deed. In the fall of 2010, a fire damaged the property, resulting in its condemnation for human habitation.

In 2015, the State of Minnesota acquired the property in trust for St. Louis County through tax forfeiture. Respondent Duluth Economic Development Authority (DEDA) subsequently purchased the property from St. Louis County. DEDA then marketed the property for sale and issued a request for proposals (RFP) to rehabilitate the property or, alternatively, demolish it and construct new housing. After receiving three redevelopment

proposals for the property, DEDA passed a resolution that none of the proposals would create a significant number of new jobs, materially enhance the real estate tax base in the area, deconcentrate subsidized housing, contribute to the vibrancy of the neighborhood, or address the needs identified in the RFP. The resolution further provided that none of the proposals "provided a sufficient showing of sufficient resources in terms of both personnel and finances to evidence the ability to bring the [p]roposed project to successful completion and operation." DEDA therefore rejected the proposals and directed its staff to seek additional proposals.

Appellants Eric Ringsred and Respect Starts Here sued DEDA and respondent City of Duluth, alleging that respondents' actions allowed the property to deteriorate, and that their plan for demolition of the property "constitute[d] a material impairment of the Historic District, which is a protected resource within the meaning of MERA."[1] Appellants sought to enjoin DEDA or its assigns from demolishing the property and sought an order requiring DEDA to commence any and all necessary repairs to secure the property and prevent its further deterioration. Appellants also sought a declaration that DEDA's action to prepare an environmental assessment worksheet (EAW) for demolition of the property was null and void; an order that respondents must consult with The City of Duluth Heritage

[1] Appellants also alleged that DEDA failed to consult the City of Duluth's Historic Preservation Commission, in violation of the Duluth City Code, when it "committed public dollars and contracted with Wenck Associates for an EAW which proposes the demolition of the Pastoret Terrace and Paul Robeson Buildings." Appellants voluntarily dismissed this claim prior to trial.

Preservation Commission regarding any proposals, plans, or proceedings affecting the property; and an award of reasonable costs and attorney fees.

In lieu of answering appellants' complaint, respondents moved to dismiss the complaint for failing "to allege that any final public decision or action has been taken with respect to redevelopment, alteration or demolition of the property in question." The district court stayed appellants' action pending DEDA's final decision regarding disposition of the property. DEDA then issued a resolution directing DEDA staff to "apply for a demolition permit for the Pastoret Terrace and adjacent Robeson Ballroom buildings and to secure bids therefore." Following that resolution, the court lifted the stay and temporarily enjoined respondents from demolishing or making any other changes to the property. Respondents then withdrew their motion to dismiss and interposed an answer, and each party moved for summary judgment. The court denied summary judgment to both parties.

The parties stipulated to the facts, and the district court conducted a three-day court trial in April 2019. The court received 26 exhibits and heard testimony from seven witnesses: a former DEDA director, who was involved with a proposal to develop the Pastoret Terrance into low-income housing; a safety specialist; the current DEDA director; Eric Ringsred; a Duluth housing inspector; the Duluth police chief; and an architect, who had worked on the Pastoret complex for Ringsred.

The current DEDA director testified and described historic preservation as a factor in DEDA's decision to acquire the property, but not the motivating force. He explained that DEDA's RFP sought proposals ranging from the historical renovation of the property to demolition and construction of new housing and mixed-use development, but noted that

preference would be given to any historic preservation work. DEDA received three proposals in response to its RFP—two of which were for historical rehabilitation. One of the proposals for historical rehabilitation was from Pastoret, LLC, which planned to build affordable housing units. The current DEDA director testified that Pastoret, LLC's proposal was inconsistent with the housing goals articulated in the RFP, specifically Duluth's Consolidated Plan to spread out affordable housing and promote market-rate housing development in the downtown area. He also noted that Pastoret, LLC's proposal did not state that it had secured financing, either through low-income-housing tax credits or historic tax credits, or that it had a commitment of, or ability to obtain, private financing.

The current DEDA director noted that the proposal for historical rehabilitation submitted by OCH Bookstores, LLC and Hoeft Builders ("OCH/Hoeft") sought to redevelop the property into 40 market-rate housing units, and he expressed uncertainty about the marketability of the proposed units given their size. He also testified that OCH/Hoeft's proposal did not provide any specifics about financing. He believed that OCH/Hoeft were seeking public assistance for the project but, to his knowledge, had not secured any tax-credit financing. OCH/Hoeft's proposal did not indicate the availability of any private financing.

The current DEDA director testified that DEDA did not request any additional documentation from Pastoret, LLC or OCH/Hoeft regarding financing sources because the financial feasibility of the proposals did not provide enough detail to warrant further inquiries. DEDA rejected the proposals and renewed its efforts to market the property, which included reaching out to Twin Cities' developers, the Duluth Heritage Preservation

Commission, and the State Historic Preservation Office in order to find preservationists who might be interested in the property. DEDA received no additional proposals and no offers to purchase the property. The current DEDA director testified that DEDA did not have the resources to rehabilitate or operate the property, and that DEDA moved to demolish the property because no available alternatives existed to remove the blighted conditions the property posed.

At the close of trial, the parties made closing arguments and consented to the judge performing an on-site inspection. Both parties submitted posttrial briefs.

In a written order, the district court concluded that although appellants had made a prima facie case that the property is a protected resource under MERA and at risk of being destroyed, respondents had established the affirmative defense that there are no feasible and prudent alternatives to the property's demolition, and that demolition was consistent and reasonably required for the promotion of public health, safety, and welfare. The court dissolved the temporary injunction and denied appellants' requests for relief. Appellants moved for a stay and a restoration of the temporary injunction pending appeal. Appellants posted additional security, and the court granted appellants a stay.

This appeal follows.

D E C I S I O N

MERA permits "[a]ny person residing within the state . . . or any partnership, corporation, association, organization, or other entity having shareholders, members, partners or employees residing within the state" to bring "a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person,

for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." Minn. Stat. § 116B.03, subd. 1 (2018). "Person" is defined under the statute to include "any natural person, any state, municipality or other governmental or political subdivision or other public agency or instrumentality." Minn. Stat. § 116B.02, subd. 2 (2018). The statute further states that:

> In any other action maintained under section 116B.03, whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

Minn. Stat. § 116B.04(b) (2018).

The Minnesota Supreme Court has elaborated on a defendant's burden of proof in establishing an affirmative defense in a MERA action, stating:

> Section 116B.04 requires defendants who do not rebut a plaintiff's prima facie case to prove (1) that there is no feasible and prudent alternative and (2) that the conduct in issue is consistent with and reasonably required for the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources. In deciding whether defendants have established an affirmative defense under MERA, the trial court is not to engage in wide-ranging balancing of compensable against non-compensable impairments. Rather, protection of natural resources is to be

> given paramount consideration, and those resources should not be polluted or destroyed unless there are truly unusual factors present in the case or the cost of community disruption from the alternatives reaches an extraordinary magnitude.

State by Powderly v. Erickson, 285 N.W.2d 84, 88 (Minn. 1979); *see also State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 426 (Minn. 1993).

Appellants challenge both the district court's factual findings and its interpretation of the applicable legal standard in reaching its conclusion that respondents established an affirmative defense. "[C]onclusions of law in a MERA action are properly reviewable by this court without any deference to the trial court," *id.* at 420, while "the clearly erroneous standard governs the appellate court in reviewing a trial court's findings of fact." *Krmpotich v. City of Duluth*, 483 N.W.2d 55, 56 (Minn. 1992).

The district court concluded that respondents established an affirmative defense because there are no "feasible and prudent alternatives to demolition." The court noted DEDA's rejection of the Pastoret, LLC and OCH/Hoeft proposals for their failure to demonstrate their financial viability as prudent, and characterized DEDA's concern regarding the proposals' financing as "not merely an economic consideration" because inadequate funding created a risk that the rehabilitation of the property would not be completed and it would again fall into a neglected state. The court further noted that DEDA's other cited reasons for rejecting the proposals, namely "that the housing mix in both proposals was not what was sought in the RFP . . . , there was low job creation, there did not appear to be any commercial development in the mix, and there was an inadequate increase to the tax base," were valid. The court concluded that because neither of the

proposals presented a feasible and prudent alternative, and because no one else had stepped forward to purchase the property or redevelop it, the only options were to leave the property in its dilapidated state or demolish it. The court characterized the lack of any viable proposal to rehabilitate the property as "truly unusual factors" and determined that DEDA had met the standard established in *Archabal*.

We agree with appellants that the district court erred with regard to the applicable governing legal standard to determine whether a defendant has established an affirmative defense to a MERA claim. MERA clearly states that "[e]conomic considerations alone shall not constitute a defense." Minn. Stat. § 116B.04(b). Yet, all of the considerations discussed by the court as justification for DEDA's rejection of the Pastoret, LLC and OCH/Hoeft proposals are economic in nature. While the court described DEDA's concern about the proposals' financing as "not merely an economic consideration" because potential funding shortfalls could prevent any rehabilitation of the property from being completed and create a scenario where the property continued in its neglected state, the possibility of such a development does not transform economic considerations into non-economic considerations. The court therefore erred in concluding that respondents established that there are no prudent and feasible alternatives to the property's demolition, and that the absence of any such alternatives presented "truly unusual factors."

Because the district court did not apply the correct legal standard to respondents' affirmative defense, we need not consider the remaining issues that appellants raise in their brief. We reverse and remand the case to the district court for further consideration of respondents' affirmative defense under section 116B.04 and the supreme court's

jurisprudence. On remand, the district court shall restore the temporary injunction against respondents' demolition of the property during the pendency of this action and shall require respondents to perform all maintenance and repairs necessary to prevent the property's further deterioration.

Reversed and remanded.