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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1621**

Vernice Wessman, et al.,
Appellants,

vs.

City of Mankato,
Respondent.

**Filed June 20, 2011
Affirmed
Connolly, Judge**

Blue Earth County District Court
File No. 07-CV-07-3327

Rebecca L. Wessman, Mankato, Minnesota (for appellants)

James J. Mongé, III, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Toussaint, Presiding Judge; Klaphake, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellants, property owners, challenge the summary judgment granted to
respondent city, arguing that: (1) appellants' interest in their building permit had vested;
(2) the termination of the building permit violated appellants' substantive due-process

rights and was compensable under 42 U.S.C. § 1983; (3) the termination of the building permit was a temporary taking and compensable under 42 U.S.C. § 1983; and (4) the district court erred in concluding that respondent could bill appellants for water service to their property. Because respondent was entitled to judgment as a matter of law, we affirm.

FACTS

On October 12, 2005, Mankato Building and Development Permit 05-1278 was issued to appellants Vernice, Rebecca, and Daniel Wessman to move a house onto real property they own in Mankato and to add an addition and a basement to the house.¹ Appellants paid a fee of \$594.55 for the permit.

Mankato City Code (MCC) § 12.03 provides:

1.000: When a building permit is issued for the construction of a new structure or for the exterior alteration of an existing structure, all exterior work authorized by the building permit shall be completed within eighteen (18) months of the date the building permit was issued, and all exterior surfaces of the building addressed by the building permit shall comply with the Uniform Building Code and Uniform Housing Code as adopted in this Chapter.

2.000: The Building Official may grant an extension, not to exceed 12 months, to the time limit contained in Subdivision 1; provided the Building Official's findings for the extension are related to a unique circumstance and the activities authorized by the building permit have been engaged in a timely manner. A unique circumstance may include, but is not limited to, product shortages, inclement weather, labor disputes, project complexity and size, governmental actions, and financial difficulties.

Appellants' permit expired on April 12, 2007.

¹ Vernice, 89, is the mother of Rebecca and of Daniel.

On June 25, 2007, Rebecca Wessman, as general contractor, applied for “continuation of permit by extension without extraction of additional permit fee.” On July 9, 2007, the Mankato Building and Development Services Coordinator replied to her application.

[Y]our request for an extension of building permit #05-1278 (issued on 10-12-05) which expired on 04-12-07 has been reviewed and denied because your request was made after the permit had expired and notice of such expiration had been brought to your attention.

You will require a new building permit for the continuation of work . . . subject to the following time frames and conditions for completion of this project as noted below. The new building permit is being issued with this letter along with corrections to your original construction documents and the documents submitted with your new building permit application.

1. All of the exterior items . . . to make the structure presentable and weather tight shall be completed by September 30, 2007.
2. The sod shall be installed by September 30, 2007.
3. Natural settlement is not acceptable. The driveway shall be completed by September 30, 2007 to city design requirements.
4. Interior alterations and repairs shall be performed under the 18-month provisions for your new building permit and subject to the 180-day limit requirement. . .
5. Compliance with the corrections noted on the original construction documents and the new documents.

. . . .

Please note the completion date of September 30, 2007 for items #1, #2, and #3. Failure to complete these items in the allotted time will result in the issuance of a citation and the City of Mankato filing a motion for summary enforcement of the order to the County District court.

On July 25, 2007, a document with the property's address saying "**STOP WORK AT THIS SITE AS PER CITY OF MANKATO**" was posted on the property. After "Reason," the document said "Old building permit expired—you need a new building permit to continue work." After "Conditions Required to Resume," it said, "Pay for new building permit and post new building permit card in front window. Comply with letter dated July 9, 2007."

On July 26, 2007, Rebecca Wessman wrote a letter explaining her noncompliance with the July 9 letter and concluding "If a permit extension is issued which takes into consideration the factors I have detailed in this letter, I will consent and pay the additional cost as quoted to me." Mankato declined to alter its requirements, and appellants brought this action, arguing that MCC § 12.03 was preempted by the State Building Code, Minn. Stat. §§ 16B.59-.76 (2006) (now recodified as Minn. Stat. §§ 326B.101-.16) (2010)). Appellants moved for summary judgment, which was denied. The denial was reversed by *Wessman v. City of Mankato*, No. A08-0273, 2008 WL 5058608 (Minn. App. Dec. 2, 2008) (holding that the State Building Code does preempt MCC § 12.03). When *Wessman* was released, Mankato ceased enforcing MCC § 12.03 and appellants' Stop Work order.

Appellants then filed an amended complaint, seeking monetary damages because (1) the State Building Code preempted MCC § 12.03; (2) the Stop Work order interfered with their vested right; (3) Mankato had committed a taking that was compensable under 42 U.S.C. § 1983 ; and (4) Mankato had wrongfully billed appellants for water service. Appellants also sought to enjoin enforcement of the Stop Work order; a declaration that

(1) the Stop Work order was null and void, (2) appellants' building permit was valid, and (3) MCC § 12.03 was invalid; and a writ of mandamus ordering Mankato to begin condemnation proceedings.

The legislature subsequently enacted Minn. Stat. § 326B.121, subd. 1a, providing that, as of August 1, 2010:

A municipality may by ordinance adopt an official control that requires exterior work authorized by a building permit issued in accordance with the State Building Code, to be completed within a specified number of days following issuance of the building permit. The local regulation may not require completion of exterior work earlier than 180 days following the issuance of the permit.

Both parties moved for summary judgment. Following a hearing, the district court denied all of appellants' claims except for granting a declaration that Mankato could not bill appellants for water while the Stop Work order was in effect. Appellants now challenge the summary judgment, arguing that (1) they had a vested interest in their building permit, (2) the termination of the building permit violated appellants substantive due process rights and was compensable under 42 U.S.C. § 1983;² (3) the termination of the building permit was a temporary taking and was compensable under 42 U.S.C.

² Mankato objects that appellants did not actually plead a substantive due process claim. The district court agreed that their pleading was "disjointed at best", but concluded that Count II (Interference with vested property interest in building permit), Count III (Arbitrary, Discriminatory, and Capricious Action); and Count VII (Violation of 42 U.S.C. § 1983, Fifth Amendment and Fourteenth Amendment) provided Mankato with "adequate notice of [appellants'] potential claim based on substantive due process."

§ 1983, and (4) the district court erred in concluding that Mankato could bill appellants for water contingent on their building permit.³

DECISION

Appellants do not allege that any genuine issues of material fact preclude summary judgment; they challenge only the district court’s legal conclusions. “When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review de novo.” *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006).

1. Vested Interest

The district court noted that, “the parties agree that [appellants] have a protectable property interest in the building permit.” Appellants assert that the issue was not whether they had a protectable property interest but whether that interest had vested, giving them “the constitutional right to build to completion.” Mankato argues that the vested rights doctrine, whereby the government may not interfere with property or improvements to property in which the owners’ rights have vested, is inapplicable here.

³ The district court concluded that the newly effective Minn. Stat. § 326B.121, subd. 1a, “effectively eliminate[ed] the conflict [between MCC § 12.03 and the State Building Code] and assumedly reinstitut[ed] the ordinance [i.e., MCC § 12.03]” and declined to enjoin enforcement of MCC § 12.03. Appellants argue that law of the case precludes this conclusion, but do not explain why. (The only case they cite, *Lange v. Nelson-Ryan Flight Serv., Inc.*, 259 Minn. 460, 108 N.W.2d 428 (1961), is irrelevant.) This court declines to address allegations unsupported by legal analysis or citation. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994). Therefore, appellants have waived this argument.

Both parties rely on *Yeh v. County of Cass*, 696 N.W.2d 115 (Minn. App. 2005) *review denied* (Minn. Aug. 16, 2005). In *Yeh*, a resort developer’s building permits were revoked and the number of docks he was allowed to install was reduced after substantial completion of the buildings and installation of the docks. *Id.* at 131. The developer argued that he had a vested right to keep the buildings and the docks. *Id.*

The vested rights doctrine in Minnesota developed to deal with state control over private development through the use of zoning provisions and building permits. And, in a vested rights analysis, the court asks whether a developer has progressed sufficiently with [its] construction to acquire a vested right to complete it. A right is vested when: [i]t has arisen upon a contract . . . authorized by statute and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it.

. . . .
. . . [T]he doctrine of vested rights exists to protect developers from changes in zoning laws aimed at frustrating development.

Id. at 131-32 (citations omitted). The doctrine was found not to apply because, although the developer had been granted approval to expand a resort, he was actually developing a new residential neighborhood. *Id.* at 132; *see also Halla Nursery, Inc. v. City of Chanhassen*, 781 N.W.2d 880, 885, 887 (Minn. 2010) (holding that doctrine is applied “to determine whether a landowner who substantially completed a project in reliance on a permitted use for the land acquired a vested right to continue that use despite that use being subsequently prohibited by a change in law” and concluding that the doctrine does not apply when a project is completed in reliance on an erroneously issued permit).

Appellants argue that a corollary to the *Halla* holding that the doctrine does *not* apply to a substantially completed project when the permit for the project was

erroneously issued is that the doctrine *does* apply to a substantially completed project when the permit is not erroneously issued. This argument is logically flawed: “If the permit was erroneously issued, then the doctrine does not apply” does not equate to “The permit was not erroneously issued, so the doctrine does apply.” Other factors may influence the doctrine’s application.

Appellants do not allege a change in zoning laws, but they argue that Mankato illegally terminated their vested property right by requiring completion of exterior work and landscaping by a fixed date. But the requirement for exterior work and landscaping to be completed within 18 months of the issuing of a building permit, even if it were the equivalent of a zoning law, was not a change made after appellants obtained their permit: it was already in effect.

Even if appellants had a vested right conferred by their building permit, the argument based upon that right fails.

2. Substantive due process

Appellants argue that, because MCC § 12.03 was later invalidated by *Wessman*, Mankato’s enforcement of MCC § 12.03 by requiring them to complete exterior work and landscaping by a particular date was a violation of their right to substantive due process.⁴ To establish a claim of violation of due process under 42 U.S.C. § 1983, a party must show a deprivation of a protectable property interest and that the deprivation results from an abuse of governmental power that rises to the level of a constitutional violation.

⁴ We infer that appellants argued this from the district court’s opinion. Their argument on appeal is solely a discussion of cases from other jurisdictions.

Northpointe Plaza v. City of Rochester, 465 N.W.2d 686, 689 (Minn. 1991). “Whether government action is arbitrary or capricious within the meaning of the Constitution turns on whether it is so ‘egregious’ and ‘irrational’ that the action exceeds standards of inadvertence and mere errors of law.” *Id.* (citation omitted).

But “the theory of substantive due process is properly reserved for truly egregious and extraordinary cases, and violations of state law, in and of themselves, are not actionable under 42 U.S.C. § 1983.” *Northpointe*, 465 N.W.2d at 690 (quotations omitted). Mankato’s enforcement of MCC § 12.03 before it was held to be preempted by the State Building Code was not the “truly egregious and extraordinary” case in which violation of state law would be actionable under 42 U.S.C. § 1983.

Mankato did not violate appellants’ substantive due-process rights, and the district court did not err in concluding that appellants are not entitled to substantive due-process damages under 42 U.S.C. § 1983.

3. Taking

Appellants claim that Mankato’s acts (terminating their building permit, stopping work through the appeal process of *Wessman*, and causing work to be slowed down because appellants’ funds were diverted to litigation expenses) were a temporary taking that violated U.S.C. 42 § 1983. The alleged taking of appellants’ property was partial as well as temporary.

Anything less than a complete taking of property requires the balancing test set forth in *Penn Central* [*Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978)]. This test requires the court to consider: (1) the 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 government regulation. In deciding whether a particular governmental action has effected a taking, [the Supreme Court] focuses * * * on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Johnson v. City of Minneapolis, 667 N.W.2d 109, 114-15 (Minn. 2003) (citations omitted). “[T]he primary focus of the [*Penn Central*] inquiry is on the severity of the burden that government imposes upon private property rights.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 633 (Minn. 2007) (quotation omitted).

Wensmann construes *Penn Central*, first concluding that economic impact is determined by whether the government’s act leaves any reasonable, economically viable use of the property; it need not be the most profitable use of the property. *Wensmann*, 734 N.W.2d at 635. Appellants have not been denied the opportunity to build on their property; they were unwilling to pay for a second permit after their first permit expired. They argue that they were responsible for real estate taxes and carrying costs for the property while the stop work order was in effect, but they would have had this liability in any event. Mankato’s act was temporary and left appellants a reasonable, economically viable use of their property.

A landowner’s primary expectation regarding property is ascertained by looking at the existing and permitted uses when the property was acquired. *Id.* at 637-38. Appellants stated that they planned to use the property as a residence for Vernice

Wessman. When construction is completed, they may obtain a certificate of occupancy and make this use of it, thus realizing a benefit from their investment.⁵

Courts determine the character of the governmental action by asking whether the burden of the regulation has a general application or falls disproportionately on a few property owners. *Id.* at 639-40. All property owners in Mankato are subject to the regulation to which appellants objected. It was enacted to foster the orderly development of real property, and since August 1, 2010, it has been explicitly permitted by state law.

Appellants are not entitled to damages under 42 U.S.C. § 1983 for Mankato's taking of their property.

4. Water Bill

MCC § 3.23, labeled "Water During Construction," became effective in June 2006. It provides:

A tap may be granted and installed to supply water for construction by special approval from [Mankato]. At the time of the contractor or property owner obtaining the building permit, the water billing account will be established. The billing will be in the name of the person obtaining the building permit. Until the water meter is installed, contractor or property owner will be billed for the cost of service for both the water and wastewater.

Mankato's director of finance testified that an account for appellants' property was initiated in June 2008.

⁵ Appellants also argue that their cost has doubled because of litigation expenses, but appellants chose to let their first permit expire, to decline to pay for a second permit, and to bring this action against Mankato while construction was in progress.

Appellants argue that, because no water was used at the property, it was unjust and unreasonable to charge for service, and that MCC § 3.23 is invalid under Mankato's City Charter § 10.03, subp. 2 (providing that Mankato may fix rates and charges for utilities, "but such rates and charges shall be just and reasonable"). The district court concluded that Mankato was entitled to charge appellants the service fee, but not when the stop work order was in effect, and that the charges made during that period, i.e., from the opening of the account in June 2008 to the release of *Wessman* on December 2, 2008, should be waived. Mankato does not challenge this conclusion.

Appellants claim the district court "did not determine whether [Mankato's] charter would preclude billing monthly fees for a water account prior to the actual beginning of water usage by meter installation or flat rate contract." But the district court explicitly found that Mankato had the right to charge the water service fee during construction: "[T]he Court is of the opinion that [Mankato] has the right to charge a service fee and [appellants] have not proven otherwise."

Appellants have not shown that their interest in their building had vested, that they are entitled to compensation under 42 U.S.C. § 1983 for either a deprivation of substantive due process or a taking, or that Mankato was not entitled to bill them for water service when the stop work order was not in effect.

Affirmed.