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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1948**

Brad Vier,
Appellant,

vs.

City of Woodbury,
Respondent.

**Filed May 14, 2012
Affirmed
Klaphake, Judge**

Washington County District Court
File No. 82-CV-10-7417

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

Paul A. Merwin, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and
Cleary, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

In this declaratory judgment action involving appellant Brad Vier's outdoor wood-fired boiler (OWB), appellant challenges the district court's grant of summary judgment to respondent City of Woodbury. Appellant argues that the district court erred because (1) factual issues exist as to whether the city's ordinance specifically identifying OWBs

as nuisances was validly enacted, and (2) the factual dispute over whether appellant installed his OWB in reliance on the city's assurances that the OWB complied with city ordinances is material to whether the city can be equitably estopped from enforcing its ordinance. We conclude that the district court did not err by granting summary judgment for the city because (1) appellant's OWB caused a nuisance under the nuisance ordinance in effect when appellant installed the OWB, and the subsequently amended ordinance naming OWBs as nuisances was validly enacted, and (2) appellant did not establish the elements of equitable estoppel. We affirm.

D E C I S I O N

The district court "shall" grant summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. We review the district court's decision to grant summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *J.E.B. v. Danks*, 785 N.W.2d 741, 746 (Minn. 2010).

Appellant installed and began using an OWB on his Woodbury property in the fall of 2008. In December 2008, several adjoining property owners complained to the city that a significant amount of smoke from appellant's OWB was intruding into their homes. In January 2009, city inspectors observed "significant clouds of smoke" in the area

around appellant's home and a neighboring home "filled with smoke" from appellant's OWB. The city advised appellant that his OWB created a nuisance, a violation of Woodbury, Minn. City Ordinance (WCO) § 15-2(b)(30) (2008), which provided that "[o]dors, gases, steam, vapor, hot air, grease, smoke, or other gaseous or particulate wastes shall not be discharged upon abutting, adjacent, or surrounding properties."

The city amended its nuisance ordinance in October 2009 to provide:

- (b) The following are nuisances affecting health, safety, comfort or repose: . . .
 - (31) Installing or operating of an outdoor wood boiler. "Outdoor wood boiler" means a fuel burning device that is designed for outdoor installation or installation in structures not normally occupied by humans to heat building space and/or water via the distribution, typically through pipes, of a fluid heated in the device, typically water or a water/antifreeze mixture.

WCO § 15-2(b)(31) (2009). The district court subsequently granted summary judgment for the city in appellant's declaratory judgment action to continue operation of his OWB.

Nuisance Ordinance

Appellant argues that he should be permitted to continue operating his OWB because the city's 2009 amendment specifically naming OWBs as nuisances is unconstitutional. We disagree. Regardless of the constitutionality of the city's 2009 nuisance amendment, appellant's OWB violates the 2008 nuisance ordinance, which was in effect when he installed and began to use his OWB in fall 2008, and which controls his use of the OWB. The record establishes that appellant's OWB emitted significant amounts of smoke that infiltrated neighboring homes. This violates the nuisance

ordinance's prohibition against discharging smoke onto "abutting, adjacent, or surrounding properties." WCO § 15-2(b)(30). Thus, appellant's OWB caused a nuisance when it was erected and continues to violate the nuisance ordinance, regardless of the validity of a subsequent amendment naming OWBs as nuisances.

Moreover, we find no merit to appellant's contention that the 2009 amendment is a constitutionally impermissible exercise of legislative authority. "Legislation is constitutional so long as it serves to promote a public purpose; is not unreasonable, arbitrary, or capricious interference with a private interest; and the means chosen bear a rational relation to the public purpose sought to be served." *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 288 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). Legislation that is not based on a suspect class and does not infringe on a fundamental right "need only be rationally related to a legitimate governmental purpose in order to withstand" constitutional challenges. *Id.* A municipal ordinance is presumed to be constitutional, and the party challenging the ordinance bears the burden of establishing that the ordinance is unreasonable or that the requisite public interest is not involved. *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955). "[E]xcept in those rare cases in which the city's decision has no rational basis, it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties." *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988) (quotation omitted).

The city council amended the nuisance ordinance to expressly prohibit OWBs, pursuant to its authority under Minn. Stat. § 412.221, subd. 23 (2008), "to define

nuisances and provide for their prevention or abatement.” The city developed a substantial record and articulated clear reasons for its decision to prohibit OWBs as nuisances. To show that the nuisance ordinance was rationally related to the legitimate public purpose of protecting the air quality and public health in Woodbury, the city submitted to the district court three lengthy reports with supporting documentation finding that OWBs emit significant smoke and particulate matter in the normal course of their operation, OWB emissions pose a significant public health concern, OWB use is increasing, and OWBs are not widely regulated. This record establishes that the city categorized OWBs as nuisances based on evidence that OWBs can pose a risk to public health and air quality.

The purpose of protecting air quality and public health falls squarely within municipal authority over the health, safety, and general welfare of its citizens. *See State v. Crabtree Co.*, 218 Minn. 36, 40, 15 N.W.2d 98, 100 (1944) (observing that municipalities have wide discretion to use legislative police power to abate public nuisances). Because prohibiting OWBs as nuisances is directly relevant to the governmental objective of protecting air quality and public health, the city’s ordinance is constitutional. *See Arcadia Dev. Corp*, 552 N.W.2d at 288 (stating that legislation fails rational-basis review only when it rests on grounds that are irrelevant to the achievement of a plausible governmental objective).

Appellant argues that the manner and timing of the city’s ordinance raises a fact question as to whether the ordinance furthers a legitimate public purpose, arguing that the city council specifically targeted him by its passage of this ordinance. Appellant relies on

a statement in an April 2009 report to the city council: “One OWB was installed in the City in November 2008 without a building permit by an unlicensed contractor. Removal was required through the City’s nuisance ordinance, but the installation shows local interest in these units.” But this statement does not undermine the legitimate governmental purpose underlying the ordinance. The record reflects that the ordinance was passed as part of a comprehensive plan initiated by the city council in late 2008 to regulate alternative energy sources, including OWBs. The development of the city’s comprehensive plan lasted for more than a year and preceded the city’s January 2009 identification of appellant’s OWB as a nuisance. The evidence is insufficient to establish that appellant was targeted and that the ordinance was not enacted in good faith.

The district court also properly determined that appellant may not continue the nonconforming use. “A vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions.” *Hadachenk v. Sebastian*, 239 U.S. 394, 410, 36 S. Ct. 143, 145 (1915). Appellant may not continue a use that does not conform to an ordinance that is validly enacted pursuant to a municipality’s police power. *See id.* (holding that brickmaker whose business predated city ordinance prohibiting brickmaking in designated areas could not continue operations in a designated area). Because the ordinance identifying OWBs as prohibited nuisances was a valid exercise of statutory authority, and because appellant’s OWB violated the nuisance ordinance even before the ordinance specified OWBs as nuisances, the district court did not err by concluding that the ordinance prohibits appellant’s continuing use of an OWB.

Equitable Estoppel

Appellant also contends that the district court erred by concluding that any factual dispute over whether city employees advised appellant that his OWB would comply with city ordinances is immaterial to resolution of the case. Appellant maintains that the factual dispute is material to the question of whether the city should be estopped from prohibiting him from using his OWB because he acted in reliance on the city's advice when he installed his OWB.

Equitable estoppel is "intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights." *Brown v. Minn. Dep't of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985) (quotation omitted). A party seeking to establish equitable estoppel against a governmental entity must establish all four of the following elements: (1) "wrongful conduct" by an authorized government agent, (2) the party seeking equitable relief reasonably relied on the wrongful conduct, (3) the party incurred a unique expenditure in reliance on the wrongful conduct, and (4) the balance of equities weighs in favor of estoppel. *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011).

"Wrongful conduct" requires some degree of malfeasance or affirmative misconduct. *Id.*; *AAA Striping Servs. Co. v. Minn. Dep't of Transp.*, 681 N.W.2d 706, 720 (Minn. App. 2004). Malfeasance by a government official refers to "evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful." *Jacobsen v. Nagel*, 255 Minn. 300, 304, 96 N.W.2d 569, 573 (1959) (quotation omitted). "[S]imple

inadvertence, mistake, or imperfect conduct” does not establish “wrongful conduct” and “an erroneous government action is not necessarily ‘wrongful.’” *Sarpal*, 797 N.W.2d at 25 (quotation omitted); *see, e.g., Mesaba Aviation Div. of Halvorson of Duluth, Inc. v. Cnty. of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977) (holding erroneous tax advice made in good faith insufficient to establish equitable estoppel against government). Rather, “wrongful conduct” requires “some degree of malfeasance.” *Id.*

In support of his claim, appellant submitted an affidavit in which he states that city staff informed him “that it was in fact legal for [him] to install a wood burning stove on [his] property and [he] would not need a permit prior to installing the stove.” Appellant claimed that, after receiving this advice, he “felt confident that [he] was legally allowed to put a wood stove on [his] property and that [he] did not need to obtain a permit so [he] proceeded to purchase the stove and had it installed.” Respondent disputes this, claiming that city employees have no recollection or record of advising appellant that he could construct the OWB.

Viewing the evidence in the light most favorable to appellant, and assuming that the city so advised appellant before he installed the OWB, such advice does not rise to the level of malfeasance or illegal conduct. The record contains no evidence that the city intended to deceive appellant or induce him to install the OWB in violation of city ordinances. In the absence of evidence that would support the conclusion that the city acted culpably, any erroneous information provided by city employees before appellant installed his OWB constitutes only a “simple mistake.” Accordingly, there is insufficient

evidence to create a material fact question as to whether the city exhibited wrongful conduct.

Moreover, city ordinances regulating permitting and nuisances were publicly available. Had appellant consulted the city code before installing his OWB, he could have identified contradictions between the code and the information city employees allegedly provided. Therefore, we question whether appellant's reliance on the alleged advice of city employees was reasonable.

Because the record lacks evidence to support the first element necessary to establish equitable estoppel, the district court did not err by concluding that estoppel was not an available means of relief as a matter of law.¹ Because estoppel is was not available relief and the city's validly enacted ordinance prohibits appellant's continuing use of his OWB, the district court did not err by granting summary judgment for the city.

Affirmed.

¹ Appellant also argues that public policy favors allowing city residents to pursue the use of alternative sources of energy. But appellant identifies no error of the district court for this court to review, and the record reflects that appellant did not present this argument to the district court. Accordingly, we decline to consider appellant's public policy argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellant court generally will not consider matters not argued to and considered by the district court); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that the court of appeals is an error-correcting court).