STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0007

A & M Property Services, LLC,
Appellant,

vs.

City of Minneapolis,
Respondent,

Amy Fauble,
Defendant.

Filed December 3, 2012
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-10-19843

Kenneth R. Hertz, Columbia Heights, Minnesota (for appellant)

Susan L. Segal, Minneapolis City Attorney, Lee Curtis Wolf, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Peterson, Judge; and Huspeni, Judge.*

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

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

PETERSON, Judge

In this condemnation dispute, appellant-property-owner argues that respondent city (1) did not provide appellant due process of law; (2) lacked sufficient knowledge of the condition of a chimney to know whether its condition justified condemnation; and (3) failed to follow its own procedures when it mailed notice of its intent to condemn. We affirm.

FACTS

Appellant A & M Property Services LLC, owns a single-family residence in respondent City of Minneapolis. After receiving a complaint stating that the chimney on the house was falling apart and could potentially fall and cause property damage or personal injury, the Minneapolis Inspections Division inspected the property, found the chimney in disrepair, and, on November 20, 2008, issued a written order to appellant to "[r]epair or replace the chimney . . . in a professional manner" by December 5, 2008. On December 15, 2008, Minneapolis Housing Inspector Joy Parizek conducted a re-inspection of the property, found that the chimney had not been repaired, and, on January 3, 2009, issued a $200 administrative citation for the failure to comply with the repair order.[1]

[1] The judgment from which this appeal is taken and respondent's brief refer to a second administrative citation for failure to repair the chimney issued in February 2009. Both the district court and respondent cite to exhibit 106, but exhibit 106 is a group of photographs of the chimney, and we found no February 2009 citation for failure to repair the chimney in the record.

In January 2009, appellant submitted a rental-license application for the property to the city. The application listed appellant as the property's owner, with a Coon Rapids address, and Mary Durkop as the person responsible for maintenance and management of the property, with an address on Third Street in Minneapolis.

On March 9, 2009, a rental-licensing inspection of the property was conducted, and the chimney was found to still be in disrepair. Housing-inspector Parizek testified at trial: "The chimney had become a hazardous situation. It had deteriorated significantly and was posing a danger to the occupants of the building and surrounding properties." On March 10, 2009, Parizek posted a notice of intent to condemn. The notice stated that the property had been "declared unfit for human habitation and dangerous to life and health" due to the hazardous chimney. The notice stated that the dangerous condition must be abated by March 20, 2009, or the building would be condemned. Parizek sent a letter of intent to condemn to appellant at the Coon Rapids address. Parizek testified that she also left a voicemail message for Aaron Durkop, appellant's chief manager, notifying him of the posting due to the chimney's status.

Between March 17 and 20, 2009, Aaron Durkop tried to contact Parizek and her supervisor by phone. On March 20 and 24, 2009, Parizek and her supervisor spoke with Aaron Durkop by phone regarding the need to complete repairs to the chimney. They discussed possible options, including tuck-pointing and moving the chimney. Aaron Durkop stated that he was going to take down the chimney completely and reconstruct it, and Parizek advised him that he should immediately begin applying for the permits needed to complete the work. On March 26, 2009, Parizek placarded the property with a

notice of condemnation. The notice stated that the property must be vacated by April 1, 2009. A notice of condemnation was sent to appellant at the Coon Rapids address.

Appellant brought this action against respondent alleging that respondent had "failed to provide appropriate notice to [appellant] that repairs needed to be done to the property"; that respondent's actions "of 1) condemning the property, 2) requiring additional fees be paid [respondent] and 3) requiring additional work to the property beyond what is required to be done on the notice of violation" resulted in a taking and inverse condemnation of the property; and that respondent failed to comply with statutory requirements for issuing and enforcing repair orders.

Following a trial to the court, the district court determined that respondent followed the procedures set forth in its ordinances when issuing repair orders and an administrative citation, when issuing and serving the notice of intent to condemn, and when issuing and serving the notice of condemnation. The court also determined that appellant failed to meet its burden of proof on its claims that respondent failed to provide appropriate notice of required repairs and that respondent's action in condemning the property constituted a taking or inverse condemnation of the property. Finally, the court determined that appellant failed to amend its complaint to include a cause of action for a violation of due process but noted that respondent provided adequate due process to appellant "as [appellant] received multiple notifications over a four month period prior to the condemnation of the property." Judgment was entered dismissing appellant's action in its entirety with prejudice. This appeal followed.

D E C I S I O N

I.

The Minnesota Constitution states that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." Minn. Const. art. I, § 7. "The due-process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States." *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988). We review de novo whether a party was afforded procedural due process of law. *Comm'r of Natural Res. v. Nicollet Cnty. Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 29 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001).

To comply with due-process requirements in a nuisance-abatement proceeding, a government entity must give the property owner notice and an opportunity to be heard. *Village of Zumbrota v. Johnson*, 280 Minn. 390, 395-96, 161 N.W.2d 626, 630 (1968); *City of Minneapolis v. Fisher*, 504 N.W.2d 520, 525 (Minn. App. 1993), *review denied* (Minn. Sept. 30, 1993). "In general, due process requires notice and a meaningful opportunity to be heard before a fair and impartial decisionmaker." *State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792, 794 (Minn. App. 2008). "The requirements of due process are flexible and call for such procedural protections as the particular situation demands." *Baker v. Baker*, 494 N.W.2d 282, 287 (Minn. 1992), *superseded by statute as stated in Burkstrand v. Burkstrand*, 632 N.W.2d 206, 216 (Minn. 2001). In evaluating whether a party has been afforded procedural due process, a court considers (1) the private interest affected by government action; (2) the risk that the party was erroneously deprived of a

protected interest through a lack of procedural safeguards and the value of additional or substitute procedural safeguards; and (3) the governmental interest implicated, including the function involved and any administrative or cost burdens. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976).

Appellant argues that it was not afforded due process because respondent's ordinances do not provide for a hearing on or an appeal from an intent to condemn or a condemnation. But the "[Supreme] Court has recognized, on many occasions, that where a [governmental entity] must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930, 117 S. Ct. 1807, 1812 (1997). "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.* at 930-31, 117 S. Ct. at 1812 (quotation omitted).

1. Private interest affected

The private interest affected by the condemnation was appellant's use of the property, including collecting rent from tenants. "[I]n determining what process is due, account must be taken of the length and finality of the deprivation." *Id.* at 932, 117 S. Ct. at 1813 (emphasis omitted) (quotations omitted). Minneapolis, Minn., Code of Ordinances (MCO) § 244.1500 (2012) limits the length and finality of the deprivation by permitting re-occupancy of a building when the defect on which the condemnation was based has been eliminated and a certificate of code compliance is issued. A certificate of

code compliance shall be issued when an inspection shows a building is in compliance with city ordinances. MCO § 87.260 (2012).

2. Risk of erroneous deprivation

The next factor to consider is the risk of erroneous deprivation of the private interest involved and the value of additional or substitute procedures. Although appellant correctly asserts that city ordinances do not provide for a hearing on or an appeal from an intent to condemn or a condemnation, the interest involved in this case was appellant's use of the property. Appellant could have avoided any deprivation of that interest by repairing the chimney and obtaining a certificate of code compliance before the scheduled vacation date. Having failed to use that procedure, appellant cannot now complain of its inadequacy. *See Hous. & Redevelopment Auth. of City of St. Paul v. Greenman*, 255 Minn. 396, 408, 96 N.W.2d 673, 682 (1959) (rejecting claim that lack of notice deprived property owner of due process when property owner showed no prejudice resulting from lack of notice).

Appellant also argues that respondent's ordinances "give no guidance as to what will cause the property to be condemned or any criteria for condemning the property." But MCO § 244.1470(c) (2012) requires that a notice of condemnation "[i]nclude a statement of the reason or reasons why it is being issued." Appellant does not dispute that the chimney was in disrepair or that the notice of intent to condemn provided adequate guidance as to the condition resulting in condemnation.

3. Government interest implicated

The final factor to consider is the governmental interest implicated. MCO § 244.1450 (2012) authorizes condemnation when a dwelling "constitutes a hazard to the health, safety or welfare of the occupants or to the public because it lacks maintenance." Respondent has a significant interest in abating hazardous conditions.

We conclude that, as applied in this case, respondent's ordinances afforded appellant due process. Appellant received notice of the hazardous condition and an opportunity to repair it before the condemnation occurred, and the risk of injury caused by falling bricks or a malfunctioning chimney justified postponing an opportunity to be heard until after the initial deprivation. Appellant has not shown how it could have benefitted by additional or substitute procedures. Also, if appellant's building had been taken in violation of due-process guarantees, appellant could have sought damages in an inverse-condemnation action. *See City of Minneapolis v. Meldahl*, 607 N.W.2d 168, 172 (Minn. App. 2000) (stating that "destruction of property without due process of law constitutes a taking, entitling the plaintiff to a determination of damages by the district court"); *see also DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 811 N.W.2d 610, 612 (Minn. 2012) (stating that "inverse condemnation is an appropriate remedy for a property owner whose property has been taken, if only temporarily, by government regulation") (emphasis omitted).

II.

> A district court's factual findings will not be disturbed absent clear error. When reviewing findings of fact for clear error, we recognize that it is the district court's exclusive

> responsibility to reconcile conflicting evidence. A finding is clearly erroneous when, after viewing the evidence in the light most favorable to the finding, we are nonetheless left with the definite and firm conviction that the district court made a mistake.

Am. Bank of St. Paul v. City of Minneapolis, 802 N.W.2d 781, 789 (Minn. App. 2011) (quotation and citations omitted).

Appellant argues that the bricks were removed and the chimney was wrapped in a tarp before the condemnation on March 26, 2009, and that respondent did not know whether the chimney was a hazard on the date of condemnation. Respondent argues that this issue is not properly before this court because appellant did not present it to the district court. But appellant raised this issue in its proposed order and in a posttrial memorandum. Therefore, we will address the question. *See* Minn. R. Civ. App. P. 103.04 (allowing appellate courts to address question in the interest of justice).

Regarding the merits, the district court found that the chimney was wrapped in a tarp on March 25, 2009. Respondent was not required to show that the chimney remained a hazard to proceed with condemnation. Respondent begins the condemnation process by providing the property owner with notice of intent to condemn. MCO § 244.1470 (2012). Under MCO § 244.1470(d), once a notice has been issued, the property owner must bring the condition into compliance with the housing maintenance code to avoid condemnation. Appellant does not dispute that the chimney remained noncompliant with the housing maintenance code until repairs were completed on March 31, 2009. We, therefore, cannot conclude that respondent acted improperly in proceeding with condemnation on March 26, 2009.

III.

MCO § 244.1480 (2012) requires that a notice of condemnation be served on the owner and allows service by mail addressed to the owner at the owner's last-known address. Appellant's rental-license application designated Mary Durkop as appellant's contact person and stated that "I UNDERSTAND ALL MAILINGS FROM INSPECTION DIVISION INCLUDING THE ANNUAL RENTAL LICENSE BILLING STATEMENT WILL BE MAILED TO THE APPOINTED AGENT/CONTACT PERSON UNLESS INSPECTIONS DIVISION IS NOTIFIED OF ANY CHANGES." But respondent mailed the notice of intent to condemn to appellant at its Coon Rapids address.

Appellant claims it did not receive the notice of intent to condemn until March 17, 2009, seven days after it was mailed. But appellant was not prejudiced by any late notice because the repairs to the chimney were completed on March 31, 2009, one day before the property was scheduled to be vacated. The district court found that appellant then "took no action to have a Code Compliance Inspection completed at the Property in an attempt to bring the Property into compliance and have it re-occupied." It was not respondent's conduct, but appellant's inaction, that resulted in the loss of rent.

Affirmed.