STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1261

In re: Building Wrecker Class B
License Held by Keith Carlson
d/b/a C & H Excavating Co.

Filed July 29, 2008
Affirmed
Hudson, Judge

Minneapolis City Council Public
Safety & Regulatory Services Committee

R. Daniel Rasmus, Charles A. Delbridge, Christensen, Laue & Rasmus, P.A., 5101 Vernon Avenue South, Suite 400, Minneapolis, Minnesota 55436 (for relator licenseholder)

Jay M. Heffern, Minneapolis City Attorney, Joel M. Fussy, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, Minnesota 55402 (for respondent city)

Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

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

HUDSON, Judge

In this certiorari appeal, relator challenges the City of Minneapolis' decision to revoke his business license, arguing that the revocation decision is defective because the city's decision (1) was made upon unlawful procedure; (2) was not supported by substantial evidence; and (3) was arbitrary and capricious. Because we conclude that

relator's rights were not violated, and that the city's decision was supported by substantial evidence and not arbitrary or capricious, we affirm.

FACTS

Relator Keith Carlson d/b/a/ C&H Excavating Company, has held a Building Wrecker Class B license since 1972. In February 1995, after a meeting of the Technical Advisory Committee (TAC), the City of Minneapolis found that relator had failed to complete several wrecking contracts, failed to properly fence a construction site, and worked on the weekends without a permit. As a result, the city made several recommendations, to which relator agreed, including that he (1) have no fewer than two persons at each job site; (2) secure each job site; (3) comply with all city ordinances; (4) obtain all necessary noise and weekend-work permits; and (5) complete all contracts within ten days unless adverse weather conditions exist.

In July 2001, the City of Minneapolis sent notice to relator informing him that, due to several alleged violations of the 1995 TAC agreement and city ordinances, the status of his Building Wrecker "Class B" License was to be readdressed at a technical advisory hearing.

In September 2001, the TAC issued its findings, conclusions, and recommendations. The city found that relator had violated the terms of the 1995 TAC agreement and a city ordinance that prohibited leaving refrigerators with doors on a job site and had allowed unsafe conditions on job sites. The TAC's recommendations included that (1) "[relator] will secure all job sites to prevent access to the debris or hole whenever no one is working at the job site"; (2) "[relator] will be in compliance with all

city ordinances at every job site at all times"; (3) "[a]ll contracts will be completed within ten days including the final grade and seeding unless an adverse weather condition exists." The TAC also recommended that (1) "[n]o weekend or weekdays after hours work shall be performed without first obtaining an after hours permit"; (2) relator not store appliances with doors on his job sites; and (3) relator abide by the terms of the previous TAC agreements. Relator signed the last page of the 2001 agreement, which states: "I understand that failure on my part [or] the part of my business to adhere to this agreement with the Department may lead to further action against my license."

After more alleged violations, relator was served with a notice of hearing in April 2007. The notice informed relator that "[a]n attorney may represent you if you so desire." The notice also informed relator that his building-wrecker's license could be revoked as a result of the alleged violations, which included: (1) working on a weekend without a permit on March 24 and 25, 2007; (2) failing to properly secure the jobsite at 1014 16th Avenue North from February 27, 2007 through March 9, 2007; (3) failing to properly secure the jobsite at 1115 25th Avenue North; (4) failing to complete the contract for work at 1115 25th Avenue North within ten days in 2005; and (5) failing to complete the contract for work at 1014 16th Avenue North within ten days in 2007. The notice also provided relator with the name and phone number of someone he could contact if he had any questions about "the issues or conduct of the hearing."

The Minneapolis City Council Public Safety & Regulatory Services Committee (PS&RS committee) heard the matter on May 2, 2007. An inspector in the City of

Minneapolis' Problem Properties Unit, a license inspector for the City of Minneapolis, and relator testified at the hearing.

Relator testified that he had been unable to finish a couple of projects because he did not have enough money, which had been caused, at least in part, by the city's failure to pay him in a timely manner for work that he had done. Relator also stated that he had been unable to finish one of the jobs because of weather. At the conclusion of relator's testimony, and without any further discussion, the PS&RS committee members voted to recommend revoking relator's license.

After the May 2007 hearing, relator hired an attorney. Shortly thereafter, relator's attorney wrote to a Minneapolis City Council member. The letter stated:

> I am writing this letter to request that you and your committee reconsider the decision to revoke [relator's] License. Specifically, I request that this matter be referred to an Administrative Law Judge for a full evidentiary hearing. Alternatively, I request that the matter be returned to your Committee for a rehearing.

In the letter, the attorney also noted that the committee had not made written findings or conclusions regarding its decision to revoke relator's license.

The next day, at a meeting of the full Minneapolis City Council, the matter of the revocation of relator's license was referred back to the PS&RS committee. A week later the PS&RS committee voted to deny relator's request to reopen the record and submit additional evidence. The PS&RS committee also denied relator's request for a stay pending appeal of his license revocation but voted to forward the issue of a stay to the full council without a recommendation.

In its written findings, the PS&RS committee found that "[t]he license hearing was completed and closed at the end of testimony on May 2, 2007," and that "[a]ny subsequent attempt by [relator] or counsel hired by [relator] to submit additional evidence after the close of the license hearing on May 2, 2007 is not timely. [Relator] has been afforded proper notice and hearing in this matter." The committee also found that "[t]he evidence clearly indicates – and at hearing [relator] did not substantially dispute – that the five violations as alleged by city staff did occur and that by operation of the 2001 conditional licensing agreement, such violations may result in further adverse license action." The committee further determined that relator

> did not offer testimony or evidence denying the violations as alleged by city staff. [Relator] did, however, state that financial constraints and operations cash flow issues hindered his ability to timely complete the jobs. . . . [Relator] did not address the un-permitted weekend work allegation nor the allegations of failure to properly fence and secure the job sites, instead stating that he believed the proper licensing sanction should consist of financial and contractual penalties as opposed to the proposed license revocation.

The committee stated that relator's violations of Minneapolis ordinances and the conditional licensing agreement were "good cause for the imposition of adverse license action in this matter" and recommended that relator's license be revoked.

The Minneapolis City Council then voted to revoke relator's license, deny relator's request to stay the revocation of his license, and adopt the findings of the PS&RS committee. The council found that relator's infractions included "multiple violations dealing with the safe securing of very hazardous building demolition sites," and stated: "Upon balancing the potential continuing adverse impact upon the city, its

resources and its citizens with [relator's] desire to preserve the status quo pending appeal, it is determined that the potential adverse impact upon the city outweighs the potential impact upon [relator]." The council also found that "[t]he history of past license settlements and imposition of conditions upon the subject business license is indicative of a general disregard or inability of [relator] to adhere to specific conditions and requirements." This certiorari appeal follows.

D E C I S I O N

I

Relator argues that the city council's decision was made upon unlawful procedure because he was deprived of his right to (1) cross-examine witnesses; (2) submit evidence; and (3) file exceptions to the committee's recommendation before the city council made its decision. We disagree.

Chapter 4, section 16, of the Minneapolis City Charter, entitled "Licenses May Be Revoked," states that:

> Any license issued by authority of the City Council may be revoked by the City Council at any time upon proper notice and hearing for good cause; and upon conviction before any court of any person holding such a license for a violation of the provisions of any law, ordinance or regulation relating to the exercise of any right granted by such license, the city council may revoke such license in addition to the penalties provided by law or by ordinance for any such violation.

City of Minneapolis, Minn., City Charter, ch. 4, § 16 (2008).

Generally, decisions of municipalities "enjoy a presumption of correctness" and as long as the municipality "engaged in reasoned decision-making, a reviewing court will

affirm its decision even though the court may have reached another conclusion." *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). "A city council's decision may be modified or reversed if the city . . . made its decision based on unlawful procedure, acted arbitrarily or capriciously, made an error of law, or lacked substantial evidence in view of the entire record submitted." *Montella v. City of Ottertail*, 633 N.W.2d 86, 88 (Minn. App. 2001). This court's review "is confined to the record before the city council at the time it made its decision." *Id.*

Right to cross-examine witnesses

Relator argues that his right to due process was violated because he was denied the right to cross-examine witnesses at the city council committee meeting. In his reply brief, relator asserts that "[t]he record is clear that not only did the Committee fail to inform [relator] of his right to cross-examination, it also never gave him the chance to exercise this right, whether he was aware of the right or not."

In support of his argument, relator cites Minn. Stat. § 14.60 (2006), a provision of the Minnesota Administrative Procedures Act (MAPA), which provides that "[e]very party or agency shall have the right of cross-examination of witnesses who testify." Minn. Stat. § 14.60, subd. 3. Under MAPA, this court:

> may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the agency; or

(c) made upon unlawful procedure; or

(d) affected by other error of law; or

(e) unsupported by substantial evidence in view of the entire record as submitted; or

(f) arbitrary or capricious.

Minn. Stat. § 14.69 (2006).

While MAPA guides and instructs our review of municipal decisions, we do not follow a literal interpretation of its provisions. In a recent case this court noted in a footnote:

> [T]he APA's plain language requires a decision-making body to possess "statewide jurisdiction" to qualify as an "agency" under the Minnesota APA. The city . . . does not possess such jurisdiction. We are aware that some of our decisions cite the APA as the applicable standard of review. In any event, the APA's scope of review is similar to the common law scope of review on certiorari. Thus, the same standard applies regardless of the applicability of APA.

Staeheli v. City of St. Paul, 732 N.W.2d 298, 304 n.1 (Minn. App. 2007) (citations omitted); *see also City of Mankato v. Mahoney*, 542 N.W.2d 689, 693 (Minn. App. 1996) (stating that "MAPA's definition of a contested case is thus limited to proceedings before an entity with statewide jurisdiction. As a city council does not have statewide jurisdiction, it cannot be considered an "agency" under MAPA"); *but see, e.g., Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 173 (Minn. App. 2001) (stating that because the city chose MAPA to govern its contested case procedures, the court will conduct its analysis pursuant to MAPA); *Rostamkhani v. City of St. Paul*, 645 N.W.2d 479, 483 (Minn. App. 2002) (citing *Hard Times Cafe*).

To receive sufficient due process, reasonable notice and a hearing are generally required. *CUP Foods*, 633 N.W.2d at 562–63 (holding that because relator had a property interest in his business license, the due process owed to relator was reasonable notice and a hearing). "A hearing must be meaningful and give the licensee an opportunity to respond to the charges, to present evidence, and to cross-examine witnesses under oath." *In re License of W. Side Pawn*, 587 N.W.2d 521, 523 (Minn. App. 1998) (citing *Trumbull Div., Owens-Corning Fiberglass Corp. v. City of Minneapolis*, 445 F. Supp. 911, 917 (D. Minn. 1978)).[1] And, in the context of collateral estoppel and administrative decisions, we have recently held that the Restatement (Second) of Judgments provides useful guidance to determine what procedural safeguards are necessary. *See State of Minnesota by Friends of the Riverfront, v. City of Minneapolis*, ___ N.W.2d ___, ____, 2008 WL 2492277 at *3 (Minn. App. June 24, 2008). The restatement requires the right "to present evidence and legal arguments" and "other procedural elements as may be necessary . . . having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions." Restatement (Second) of Judgments § 83(2) (1982).

[1] In the context of a challenge to a city's denial of a special-use permit, the Minnesota Supreme Court has also held that "cross-examination is not an essential of procedural due process in [quasi-judicial] hearings" and that "[t]he statements made at such a public hearing, unlike a regular judicial proceeding, are not given under oath and are not limited by the traditional rules of evidence." *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978) (stating that "[t]hese quasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings, civil or criminal, many of which would be plainly inappropriate in these quasi-judicial settings.").

Here, relator does not deny that he was given notice of the hearing and the opportunity to be heard. And because the city was not required to follow MAPA procedures, relator had no absolute right to cross-examine witnesses. But in any event, relator has not shown that he was in fact denied the right to cross-examine witnesses. During the hearing, relator was not specifically told that he had the right to cross-examine witnesses, but he was given an opportunity to speak, and at the beginning of the hearing, the Minneapolis Assistant City Attorney stated that relator "could object to any of the evidence [offered by the city], and the Committee would have to make a determination as to its admissibility." The record also shows that relator did not attempt to ask any questions of the witnesses. On this record, we conclude that relator was free to exercise his right to cross-examine witnesses if he so chose.

Right to submit evidence

Relator argues that his right to submit evidence was violated. Under MAPA, "[e]very party or agency shall have the right . . . to submit rebuttal evidence." Minn. Stat. § 14.60, subd. 3. MAPA also provides:

> All evidence, including records and documents containing information classified by law as not public, in the possession of the agency of which it desires to avail itself or which is offered into evidence by a party to a contested case proceeding, shall be made a part of the hearing record of the case.

Id., subd. 2.

Relator argues that he was not aware of the evidence that was going to be presented against him because he did not receive the packet of evidence presented by the

city until the hearing. Relator argues that, as a result, he was not able to prepare rebuttal evidence.

As noted by respondent, MAPA apparently does not require evidence to be provided prior to a hearing. And the notice relator received informing him of the May 2, 2007, hearing detailed each of the violations alleged by the city, including the dates the violations took place, the location of the violations, the type of violation alleged, and the agreements and ordinances that were violated. Relator knew what violations were alleged well before the PS&RS hearing and, as the restatement requires, had the opportunity "to present evidence and legal argument" at the May 2, 2007 hearing.

Relator also argues that the right to submit rebuttal evidence is, in this case, essentially equivalent to a right to reopen the record before the city council. But Minn. Stat. § 14.60, subd. 2, provides that evidence presented "shall be made a part of the *hearing* record of the case." (Emphasis added.) Here, during the hearing, relator had the opportunity to present evidence and testimony. Relator does not point to authority that would require a city council to reopen a closed record after the hearing has taken place when sufficient notice and an opportunity to be heard have been provided.

Right to file exceptions to the committee's recommendation

Relator argues that the city violated the provision of MAPA which requires that:

> In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the administrative law judge as required by sections 14.48 to 14.56, has been made available to parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely

> affected to file exceptions and present argument to a majority of the officials who are to render the decision.

Minn. Stat. § 14.61, subd. 1 (2006).

But as correctly noted by respondent, this provision specifically deals with contested case proceedings held before an administrative law judge, which was not the case here. *Id.* Although relator concedes this point, he maintains that because the goals of MAPA—to increase fairness in contested case proceedings and to simplify judicial review of agency action—are also applicable to decisions of city councils, "the protection provided by section 14.61 [applies] by analogy to the present case." But relator provides no legal support for the assertion that similar policy goals necessarily mean that similar procedures are required or even appropriate. This was not a contested case hearing, and we conclude that "having regard for the magnitude and complexity of the matter in question," relator was afforded sufficient procedural safeguards and that the city's decision was not based upon unlawful procedure.

II

Relator argues that the city council's finding that there was good cause to revoke his license was not supported by substantial evidence. We disagree.

Substantial evidence in the context of appellate review of a city council's decision is defined as: "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466

(Minn. 2002); *CUP Foods*, 633 N.W.2d at 563 (applying standard of review to decision by Minneapolis City Council). To reverse the revocation of his license, "relator must show that the evidence, considered in its entirety, and drawing inferences in favor of the decision, is not substantial, and, therefore, does not adequately support respondent's finding that good cause existed to take adverse action against his . . . license[]." *CUP Foods*, 633 N.W.2d at 563–64 (holding that, while the evidence was "hardly overwhelming," there was substantial evidence to reasonably support respondent's decision to revoke relator's business license).

Relator argues that the bulk of the evidence submitted to the city council related to events that occurred prior to 2001 and was insufficient to support a finding of good cause to revoke his license. Relator is correct in asserting that many of the documents submitted by the city related to violations that occurred before 2005; respondent acknowledged as much at the May 2, 2007 hearing when it stated:

> Although it appears to be an extensive evidentiary packet, it's my understanding of this matter that it's based on just a couple very narrow issues, and [that] . . . most of [the packet] sets up the past history and the conditions that this licensee operates under. The actual violations that are alleged by staff in this matter are very narrow and have to do only with two specific property addresses.

But in its argument before the PS&RS committee, respondent focused on the events that took place from 2005 through 2007. And the record shows that relator did not dispute the alleged violations. Instead, he argued that the violations were caused by his limited finances and poor weather. We conclude that the evidence was sufficient to support the city council's finding that there was good cause to revoke relator's license.

III

Relator argues that the city council's decision was arbitrary and capricious because (1) relator was not apprised of the reasons for the committee's decision; and (2) the city council did not engage in any discussion before voting to revoke his license. We disagree.

"An agency decision is arbitrary and capricious if it is an exercise of the agency's will, rather than its judgment, or if the decision is based on whim or is devoid of articulated reasons." *CUP Foods*, 633 N.W.2d at 565.

Relator argues that the committee's decision is arbitrary because it "did not initially make any written findings or recommendations." But after relator's attorney contacted a city council member, the city council voted to send the matter back to the committee "to draft supporting determination of the Committee's decision." And two weeks after its initial decision, the PS&RS committee voted to adopt findings of fact and recommendations that were drafted for the committee; relator was fully apprised of the reasons for the city council's decision.

Without citing any relevant legal support, relator also argues that the city's decision was arbitrary and capricious because the PS&RS committee did not engage in any discussion before voting. Although the committee did not engage in discussion after relator spoke and before voting, it did consider the detailed testimony of two witnesses who presented arguments and evidence regarding the alleged violations, which relator did not deny.

Affirmed.