STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1242

Vermillion Township, Dakota County, Minnesota,
Respondent,

vs.

Patrick McCarthy,
Appellant.

Filed April 20, 2010
Affirmed
Ross, Judge

Dakota County District Court
File No. 19HA-CV-08-1676

Daniel J. Fluegel, William J. Markert, Jr., Fluegel Law Firm, Hastings, Minnesota 55033

Edmund C. Meisinger, West St. Paul, Minnesota 55118 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

ROSS, Judge

After Vermillion Township brought a zoning enforcement action against Patrick McCarthy, the district court found several violations and ordered McCarthy to bring his land into compliance with the township's zoning ordinance. On appeal, McCarthy argues that there is insufficient evidence that signs on his property violated the ordinance; that

his use of a pole shed for storing and maintaining vehicles and other equipment is a preexisting nonconforming use; that the township's allegedly discriminatory enforcement of the ordinance violated his equal protection rights; that the township's allegedly inconsistent enforcement estops it from enforcing the ordinance against him; and that, instead of enjoining the violations, the court should have ordered McCarthy to obtain the permits necessary to authorize the land uses that violate the ordinance.

We affirm the district court's judgment for five reasons: the evidence is sufficient to establish that McCarthy's signs violated the ordinance; McCarthy's use of the pole shed is not a lawful preexisting use; McCarthy failed to demonstrate that the township enforced the ordinance in a discriminatory fashion; McCarthy failed to establish the necessary elements for equitable estoppel; and it was not an abuse of discretion for the district court to enjoin McCarthy's violations rather than to order him to obtain permits.

FACTS

Appellant Patrick McCarthy is the owner of a parcel of land in Vermillion Township. The rural property has been in McCarthy's family since his brother acquired it in 1984. At that time, the only structure on it was a pole shed constructed by the previous owner. Through the years, the pole shed has been used mostly for storing vehicles and other equipment. At times businesses—most recently a commercial recycling service—rented the shed for storage. At other times McCarthy's brother parked his equipment there. The record lacks any evidence that a permit was ever issued by the township for these uses of the pole shed.

In 2005, McCarthy moved a small, tan building onto the property without obtaining a move-in permit from the township. A commercial recycling business that was renting the pole shed to store its vehicles used the tan building as a night watchman's quarters. Also in 2005, McCarthy allowed two very large cargo or storage containers to be placed on the property. The owner of these containers paid McCarthy to keep them there. They bore large signs advertising their availability to be rented for storage. McCarthy allowed several other advertising signs to be placed on the property. The record has no evidence that township permits have been issued for any of these uses.

In May 2008, Vermillion Township brought an enforcement action against McCarthy in district court seeking a permanent injunction against violations of its zoning ordinance. The district court considered the following issues and identified the following zoning violations.

The township's zoning ordinance provides that every residential structure must have a qualifying on-site sewage treatment facility. Vermillion Township, Minn., Zoning Ordinance § 508 (2000). The district court found that the tan building on McCarthy's property was a residential structure that lacked an on-site sewage treatment facility. The court also found that McCarthy had moved the structure onto the property without first obtaining a move-in permit required by ordinance.

The zoning ordinance provides that all on-site advertising signs larger than 50 square feet and all off-site advertising signs require a conditional use permit. *Id.*, § 519 (2000). The district court found that there were several commercial signs on McCarthy's property for which McCarthy had not obtained conditional use permits.

McCarthy's property is zoned agricultural. The ordinance lists the uses permitted on agriculturally zoned land and provides that "all other uses and structures which are not specifically allowed . . . shall be prohibited." *Id.*, § 201 (2000). The district court found that prohibited commercial operations, such as the advertising, storage, and sale and leasing of storage containers, were occurring on McCarthy's property in violation of section 201.

Section 201 also lists certain uses of agricultural land that require a conditional use permit. The list includes equipment storage and maintenance. *Id.* The district court found that McCarthy had used his property for the storage and maintenance of fleet vehicles without obtaining a permit. And it found that McCarthy had leased part of his property to a commercial recycling and hauling service also without first obtaining a permit.

The district court ordered McCarthy to bring his property into compliance with the ordinance by (1) removing all equipment storage and terminating equipment maintenance; (2) ceasing commercial uses, including the advertisement, storage, and sale and leasing of shipping and storage containers; (3) ceasing all recycling and material hauling business; (4) removing all signs; and (5) removing the residential structure and ceasing all residential use of structures not having on-site sewage treatment systems. The court denied McCarthy's motion for amended findings, and McCarthy appeals.

D E C I S I O N

I

McCarthy contends that the evidence is not sufficient to support the district court's nonspecific order that he remove all advertising signs from his property. Not all sign types require a conditional use permit. The ordinance defines two types of advertising signs: An off-site sign is one that is not located on the lot of the use it advertises, *id.*, § 701(47) (2000), while an on-site sign is located on the lot of the use it advertises, *id.*, § 701(48) (2000). A property owner must obtain conditional use permits for all off-site advertising signs and for on-site advertising signs larger than 50 square feet. *Id.*, § 519. By implication, on-site advertising signs with an area less than the 50-square-foot threshold are allowed without a permit. The district court's order directing McCarthy to "remove all signs" from his property implies a finding that none of McCarthy's on-site signs are smaller than 50 square feet. The district court's factual findings "shall not be set aside unless clearly erroneous." Minn. R. Civ. P. 52.01.

McCarthy argues that there is no basis for ordering the removal of the signs on his property because no testimony established that they were larger than 50 square feet. Sometimes pictures speak louder than words. Photographs of the property taken several weeks before trial depict two large shipping containers. The face of one of these very large storage containers is mostly covered by a sign reading, "BUY ME," and the wall of the other is entirely covered by a sign inviting, "STORAGE $1 DAY." It is apparent from the photographs that the container signs are larger than 50 square feet. One of these signs specifies the container's use for "AG•BOAT•CAR•RV." The garage-like storage

container seems large enough to fit some of these sizeable objects, confirming the immediate impression from the photographs that the face of the container and the sign that covers it substantially exceeds 50 square feet. The district court's implicit finding of sign size is not clearly erroneous with respect to these two signs.

The other advertising signs on McCarthy's property appear to be off-site signs. There is a small, free-standing sign depicted in the photographs that reads "Sell it for a Buck.com." Photographs also show a sign indicating that hay and straw are for sale at a nearby farm. These signs appear to advertise products or services obtainable at locations other than McCarthy's property, and they therefore require a conditional use permit whatever their size. Vermillion Township, Minn., Zoning Ordinance § 519. McCarthy points us to no evidence of any signs smaller than 50 square feet containing on-site advertising. A more specific order would have been preferable—one that indentified the particular signs to be removed or that expressly limited itself to those signs for which a permit is required. But McCarthy did not identify any nonviolating signs. The evidence was sufficient for the district court to order McCarthy to remove all signs.

II

McCarthy argues that the use of the pole shed to store vehicles and other equipment is a valid preexisting nonconforming use under the ordinance. He relies on an unpersuasive legal theory.

Interpretations of zoning ordinances are questions of law, which we review de novo. *County of Morrison v. Wheeler*, 722 N.W.2d 329, 334 (Minn. App. 2006), *review denied* (Minn. Dec. 20, 2006). The township's zoning ordinance provides that

"[t]he use of a building or structure which was lawful at the time of the adoption of this ordinance may be continued although such use does not conform with the provisions of this ordinance." Vermillion Township, Minn., Zoning Ordinance § 403 (2000). McCarthy asserts that the pole shed has been used continuously since the early 1980s for equipment storage and maintenance. Because this use predates the currently effective 2000 ordinance, McCarthy argues, it is exempted as a preexisting nonconforming use.

But McCarthy fails to establish that this use was *lawful* when it began, and he mistakenly argues that the lawfulness of the prior use need not be proven to establish a protected nonconforming use. The 1982 zoning ordinance, which was in effect when the pole shed was constructed, is identical to the current ordinance so far as it concerns McCarthy's use of the shed. Both the current ordinance and its predecessor include equipment storage and maintenance as a conditional use, requiring a permit. *Compare id.*, § 201 *with* Vermillion Township, Minn., Zoning Ordinance § 201 (1982). Since McCarthy apparently concedes that his rental of the pole shed to store vehicles and other equipment without a permit violates the provisions of the current ordinance, he implicitly also concedes that these uses violated the prior substantively identical ordinance. And when pressed at oral argument, McCarthy could not provide any basis for claiming that these uses were lawful under the prior ordinance.

McCarthy argues that any use that predates the enactment of the current ordinance qualifies as a preexisting nonconforming use even if the prior ordinance would have prohibited it because the current ordinance "repealed" the prior 1983 ordinance, rendering the replaced ordinance a legal "nullity." This is a novel theory unsupported by

caselaw or logic. McCarthy cites no authority in his brief, and could offer none when pressed at oral argument, for the proposition that a repealed ordinance should be ignored when judging the legality of a nonconforming use that began when the prior ordinance was in effect. The argument also ignores the ordinance's express "lawful-at-the-time" qualifier. Under McCarthy's conception of the law, any use that is clearly illegal under an express ordinance would become instantly permissible as a preexisting use whenever the legislating authority slightly modifies or even re-enacts the express prohibition. This extraordinary idea does not accurately reflect the law. *See State v. Reinke*, 702 N.W.2d 308, 313 (Minn. App. 2005) (holding that use that was not lawful under prior zoning ordinance could not continue as preexisting nonconforming use under current ordinance). McCarthy's use of the pole shed for the storage and maintenance of commercial equipment cannot qualify as a preexisting nonconforming use because it was not lawful under the prior ordinance.

III

McCarthy asserts that the township has enforced its ordinance solely against property owners who do not live within the township and excluded "locals" from enforcement. He argues that this allegedly discriminatory enforcement is arbitrary and capricious and a violation of the Fourteenth Amendment's Equal Protection Clause. Because McCarthy is challenging alleged discriminatory enforcement and not a formal zoning decision, the "arbitrary and capricious" standard of review does not apply. *See Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 630 (Minn. App. 2002) (reviewing city's decision to grant variance for arbitrariness), *review denied* (Minn. July 26, 2002);

Chase v. City of Minneapolis, 401 N.W.2d 408, 412 (Minn. App. 1987) (reviewing denial of building permit for arbitrariness).

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits intentional, discriminatory enforcement of nondiscriminatory laws." *Thul v. State*, 657 N.W.2d 611, 616 (Minn. App. 2003), *review denied* (Minn. May 28, 2003). A party claiming that an ordinance has been enforced in a manner that violates his equal protection rights has the burden to establish

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right.

Id. (quotation omitted). That a municipality has not yet enforced an ordinance against all potential violators is insufficient to establish a claim of illegal discriminatory enforcement. *State v. Larson Transfer & Storage, Inc.*, 310 Minn. 295, 302, 246 N.W.2d 176, 181 (1976). A municipality may treat even similarly situated persons differently if the different treatment is based on a "reasonable distinction which is supported by the facts." *Id.* at 303, 246 N.W.2d at 181 (quotation omitted). We review equal protection claims de novo. *Thul*, 657 N.W.2d at 616.

McCarthy has not established that other township properties have violations that are qualitatively similar to his own. McCarthy presented photographs of several other agriculturally zoned properties that evinced uses similar to McCarthy's, such as signs,

storage containers, and vehicle and equipment storage. But the township presented a reasonable distinction between McCarthy's property and these other properties. One of the supervisors testified that the township board took action against McCarthy for several reasons: his property is "an eyesore along two major highways"; his violations spawned many complaints; and McCarthy failed to respond to the township's requests to bring the property into compliance. By contrast, the violations McCarthy pointed to were not as conspicuous as his own. It was not unreasonable for the township to bring an enforcement action against McCarthy before addressing other violations.

IV

McCarthy argues that the township's inconsistent enforcement requires that the township be estopped from enforcing the zoning ordinance against him. To establish an equitable estoppel defense against government action, a private party must prove that (1) the government misrepresented a material fact, (2) the government knew that the representation was false, (3) the government intended that its representation be acted upon, (4) the private party did not know the facts, and (5) the party relied upon the government's misrepresentation to its detriment. *In re REM-Canby, Inc. v. Minn. Dept. of Human Servs.*, 494 N.W.2d 71, 74 (Minn. App. 1992), *review denied* (Minn. Feb. 25, 1993). "Affirmative misconduct, rather than simple inadvertence, mistake, or imperfect conduct is required for estoppel to be applied against the government." *Id.* We determine de novo whether equitable estoppel applies to a party's conduct. *Lucio v. Sch. Bd. of Indep. Sch. Dist. No. 625*, 574 N.W.2d 737, 740 (Minn. App. 1998), *review denied* (Minn. Apr. 30, 1998).

McCarthy argues that estoppel applies because the township has failed to enforce the ordinance against other identified properties and because it voiced no objections in 2000 when he sought permission to widen the pole shed's door to accommodate a landscaping business to whom he was renting. But McCarthy fails to address any of the necessary elements of an equitable estoppel defense; there is no evidence that would support a finding that the township made any misrepresentation that McCarthy relied upon. Because McCarthy has not alleged, let alone proved, any affirmative misrepresentation by the township, his equitable estoppel defense fails.

V

McCarthy argues that the district court's injunction was inequitable because the court should have directed him to apply for the permits that would have allowed him to lawfully conduct on his property the activities that he has been conducting unlawfully. This court will not overturn the district court's decision to issue an injunction absent a clear abuse of discretion. *River Towers Ass'n v. McCarthy*, 482 N.W.2d 800, 805 (Minn. App. 1992), *review denied* (Minn. May 21, 1992).

McCarthy asserts that the district court could have directed him to apply for a conditional use permit that would allow him some use of the pole shed and the tan building. He maintains that the court could have ordered him to apply for a move-in permit for the tan building instead of requiring him to remove it. And he suggests that a rezoning application "should also be considered by the Township," presumably to rezone his parcel to allow commercial use. McCarthy fails to explain why this court should require the district court to order him to do what he did not do voluntarily. McCarthy had

notice at least from May of 2008 of the conditions on his property that the township alleged to violate its zoning ordinance but did not apply for remedial permits. It might be that McCarthy has identified alternative remedies that the district court could have, in its discretion, chosen to order. But he has not established any inequity or abuse of discretion in the district court's injunction.

Affirmed.