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CLERK OF SUPREME COURT
NOVEMBER 10, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2022 ND 186

Robert Martinie Goff, Appellant

v.

William Panos, Director,
Department of Transportation, Appellee

No. 20220119

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Steven L. Marquart, Judge.

REVERSED AND REMANDED.

Opinion of the Court by Tufte, Justice.

Mark A. Friese (argued) and Drew J. Hushka (appeared), Fargo, N.D., for appellant.

Michael T. Pitcher, Assistant Attorney General, Bismarck, N.D., for appellee.

Goff v. NDDOT
No. 20220119

Tufte, Justice.

[¶1] Robert Goff appeals from a district court judgment affirming a Department of Transportation hearing officer's decision to suspend his driving privileges and denying costs and attorney's fees. We reverse, concluding the public does not have a right of access to a private parking lot for vehicular use when the lot is marked "private property" and a city ordinance makes such use unlawful when so marked. We remand to the district court to reconsider costs and attorney's fees.

I

[¶2] In December 2021, Fargo Police Department officers responded to a report of an unresponsive motorist parked in the parking lot of an apartment building. When Officer Blake Omberg arrived at the scene, he saw an individual, later identified as Goff, asleep in a pickup truck parked in the parking lot. Another officer and emergency personnel were already at the scene. Firefighters eventually unlocked the vehicle and Goff was awoken by law enforcement. Goff called his father, John Goff, an attorney who owns the apartment building and parking lot. John Goff arrived at the scene and spoke with law enforcement. Robert Goff was eventually arrested for being in actual physical control of a vehicle while under the influence of intoxicating liquor. The Department of Transportation issued Goff a report and notice informing him that it intended to suspend his driving privileges. Goff requested an administrative hearing.

[¶3] Officer Omberg and John Goff testified at the hearing. The evidence showed that Goff's truck was parked in the private parking lot outside of the apartment building where he lived. The building is three stories and contains 24 separate apartment units. The parking lot is on the south side of the building along with individual garages arranged in an "L" shape. John Goff testified that each tenant is assigned one garage and allowed to park in one parking space. The parking lot is accessible by a driveway located on the east

side of the building, which is the only way in and out of the parking lot. The building has doors on the east and west sides. Partway up the driveway on the east side is a fence running perpendicular to the driveway. A sign on the fence reads "private property, private drive."

[¶4] John Goff testified his family has owned the property since its construction in 1968 and he has previously resided at the building. He testified that the parking lot is for tenants only and deliverers and visitors do not use the parking lot but instead park on the street. He acknowledged possible use of the driveway for picking people up and dropping people off up to, but not past, the fence and sign on the east side of the building. He testified that deliverers and visitors are not allowed to go beyond the sign to access the parking lot and that unauthorized vehicles parked in the parking lot have been towed over the years. John Goff further testified that he has served a notice of trespass upon an individual who was confronting tenants in the parking lot and reported the notice of trespass to law enforcement. He testified that the parking spot his son's truck was located in was not visible from the street or driveway when he arrived at the scene.

[¶5] After the hearing, the Department hearing officer issued a decision finding the parking lot was a private area to which the public has a right of access for vehicular use and suspending Goff's driving privileges for 91 days. Goff appealed to the district court. The court affirmed the hearing officer's decision and denied costs and attorney's fees.

II

A

[¶6] The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs our review of the Department's decision to suspend driving privileges. *McClintock v. Dep't of Transp.*, 2021 ND 26, ¶ 6, 955 N.W.2d 62. We review the Department's original decision, giving deference to its findings of fact and reviewing its legal conclusions de novo. *Id.* We only determine whether "a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." *Suelzle v. N.D. Dep't of*

Transp., 2020 ND 206, ¶ 12, 949 N.W.2d 862. We will affirm the Department's decision unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of [chapter 28-32] have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

B

[¶7] Goff argues the hearing officer erred in finding the public has a right of access to his apartment building parking lot for vehicular use.

[¶8] "A person may not drive or be in actual physical control of any vehicle upon . . . *private areas to which the public has a right of access for vehicular use* in this state" if that person is under the influence of intoxicating liquor. N.D.C.C. § 39-08-01(1) (emphasis added). A public right of access is an area that is "open to the general public for purposes of visiting, making deliveries, or otherwise interacting with the owner of the private [property]." *State v. Mayland*, 2017 ND 244, ¶ 13, 902 N.W.2d 762. Whether the parking lot is a private area to which the public has a right of access for vehicular use is a question of fact. *Id.* at ¶ 14. "The factual question may be determined by such factors as the existence or absence of signs, gates, or barriers, whether or not

there is routine use by the public not specifically invited to use the property, or the location of the vehicle on the property." *Id.*

[¶9] In *Mayland*, we concluded a private driveway was an area to which the public had a right of access for vehicular use:

> Mayland was on a driveway which the jury could conclude was commonly used by the public for deliveries, solicitations, and similar activities. The photographic exhibits and testimony established that the driveway was located in the front of the home and had direct access to a public roadway. The parties offered no evidence that the driveway had "no trespassing" or "keep out" signs, a gate, or other barrier. A jury could have reasonably concluded the driveway, although private, was an area "to which the public has a right of access for vehicular use."

2017 ND 244, ¶ 14; *see also State v. Thomas*, 420 N.W.2d 747, 754 (N.D. 1988) (concluding that because a portion of a gun club parking lot was used by the public as an access route to a public plinking range, the parking lot was an area to which the public had a right of access for vehicular use).

[¶10] In *Suelzle*, the location of the parked vehicle was the individual's grass lawn next to his residence. 2020 ND 206, ¶ 2. We reversed the Department's revocation of Suelzle's driving privileges because the hearing officer did not consider the *Mayland* factors "relating to whether the public has a right of access in the sense of visitors and other uninvited guests making routine use of Suelzle's grass lawn for driving or parking." *Id.* at ¶ 17. In addition to the misapplication of the law, we concluded the hearing officer's finding—that the grass lawn was a private area to which the public had a right of access for vehicular use—was not supported by the evidence in the record. *Id.*

[¶11] Here, the hearing officer considered the *Mayland* factors, including finding a sign present. However, the hearing officer considered the content of the "private property, private drive" sign separately from the significance of the applicable city ordinance, stating the sign "does not say 'no trespassing' or 'keep out,'" but "informed people not to park there and say[s] nothing about accessing the parking lot."

[¶12] Goff asserts that Fargo Municipal Code § 8-1011 limits the public right to access private property by vehicle without written permission when marked as "private." Section 8-1011 provides, "It shall be unlawful to trespass upon by driving or parking a motor vehicle or trailer or vehicle of any kind upon private property within the city limits where there is displayed upon said property a sign containing the words 'Private Property' or 'Private Parking', without first obtaining permission in writing from the owner or lessee thereof." Because the sign in this case contains the words "private property," Section 8-1011 makes it unlawful to drive or park upon the parking lot without prior written permission. The hearing officer misinterpreted this ordinance as prohibiting the public only from parking in the parking lot. Contrary to the hearing officer's analysis, in the context of this ordinance, a sign stating "private property" means "no trespassing" and "keep out."

[¶13] In addition to the sign, the hearing officer found the parking lot is located behind the apartment building, accessible only by the driveway off of the public road, without gates or barriers blocking the entrance. These findings are supported by the evidence in the record. Under the final *Mayland* factor—whether or not there is routine use by the public not specifically invited to use the property—the hearing officer found that visitors and deliverers are "able to access the area" and specifically the driveway "to drop off items or turn around." To the extent the hearing officer found this factor weighed against Goff, we conclude this finding is not supported by the evidence.

[¶14] John Goff testified to his familiarity with the property, including his family having owned the property since 1968, his having lived at the property, and now his ownership of the property. He testified that the parking lot is for tenant parking only. Deliverers and visitors do not park in the parking lot but instead park on the street. The sole "possible exception" he cited was when vehicles pick people up and drop people off. However, even that exception does not extend to the parking lot, but merely up to the fence in the driveway, which is where the sign is located. He testified that deliverers and visitors are not allowed to go past the sign to access the parking lot. John Goff noted that unauthorized vehicles parked in the parking lot have been towed over the years and that he has even served a notice of trespass upon an individual for

confronting tenants in the parking lot. This uncontradicted testimony does not support a finding that there is routine use of the parking lot by the public not specifically invited to use the property.

[¶15] Fargo citizens through their elected local representatives and law-making body enacted Fargo Municipal Code § 8-1011 making it unlawful to drive or park a vehicle on private property marked "Private Property" or "Private Parking" within the city limits without first receiving written permission from the owner or lessee. We see no conflict between this ordinance and N.D.C.C. § 39-08-01(1), prohibiting a person from being in actual physical control of a vehicle upon private areas to which the public has a right of access for vehicular use. *See City of Jamestown v. Casarez*, 2021 ND 71, ¶¶ 10, 14, 958 N.W.2d 467 (concluding plain language of ordinance does not authorize that which the statute expressly prohibits). Rather, the ordinance provides necessary context to a member of the public to understand what the sign means: that without written permission one may not drive or park upon property marked as "private property." *See Diegel v. City of West Fargo*, 546 N.W.2d 367, 373 (N.D. 1996) (noting that "[a]ll persons are presumed to know the law"). In the context of the ordinance, the sign in this case establishes that the public has no right of access to this particular parking lot for vehicular use. Further, the *Mayland* factors as a whole confirm that the parking lot is a private area to which the public does not have a right of access for vehicular use. We conclude the hearing officer's finding that the public has a right of access to this private parking lot for vehicular use is not supported by a preponderance of the evidence.

III

[¶16] Goff argues he is entitled to costs and attorney's fees. Under N.D.C.C. § 28-32-50(1), the court must award costs and attorney's fees to a prevailing party in a civil action against an administrative agency if the agency acted without "substantial justification." Determining whether the agency acted with substantial justification is discretionary with the district court, and we apply an abuse of discretion standard on appeal. *Tedford v. Workforce Safety & Ins.*, 2007 ND 142, ¶ 26, 738 N.W.2d 29. The district court denied costs and

attorney's fees without providing a reason. Presumably, the court's reason was that Goff was not the prevailing party. Because Goff is the prevailing party on appeal, we remand to the district court to determine in the first instance whether the Department acted without substantial justification requiring an award of costs and attorney's fees to Goff.

IV

[¶17] We reverse the district court judgment affirming the Department of Transportation's suspension of Goff's driving privileges and remand for reconsideration of costs and attorney's fees in light of Goff's prevailing on appeal.

[¶18] Jon J. Jensen, C.J.
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte
Rhonda R. Ehlis, D.J.

[¶19] The Honorable Rhonda R. Ehlis, District Judge, sitting in place of VandeWalle, J., disqualified.