STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0389

Valley Paving, Inc.,
Appellant,

vs.

Hampton Township,
Respondent.

Filed January 27, 2009
Affirmed
Johnson, Judge

Dakota County District Court
File No. 19-C9-07-008571

Matthew R. Zahn, Zahn & Associates, P.A., 500 Olympic Place, 7825 Washington Avenue, Bloomington, MN 55439 (for appellant)

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Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Valley Paving, Inc., operated an asphalt-mixing plant in Hampton Township between 1999 and 2007, initially based on the informal approval of the township board and later pursuant to an interim-use permit. When its permit expired in 2007, Valley

Paving sued the township to establish that (1) the township's informal approval in 1999 was a conditional-use permit that continues to justify its asphalt-mixing operations, (2) the township acted arbitrarily and capriciously in 2007 by refusing to renew the interim-use permit, and (3) the city should be equitably estopped from enforcing its present zoning ordinance. The district court entered summary judgment for the township. For the reasons explained below, we affirm.

FACTS

Valley Paving provides asphalt paving services. In the spring of 1999, Valley Paving began leasing a gravel pit from Nicholas M. Stein, Jr. The gravel pit is located on U.S. Highway 52 in Hampton Township in Dakota County. The pit, which had been vacant for several years, was located near some of Valley Paving's worksites.

Before Valley Paving began using the Stein property, Valley Paving's president, Richard A. Carron, and Stein asked a township board supervisor, Wilfred Tix, whether Valley Paving could engage in asphalt-mixing operations at the Stein property. Supervisor Tix responded by saying that the township board would need to decide the matter. Approximately two months after Carron's and Stein's inquiry, representatives of Valley Paving attended a township board meeting. According to witnesses, the matter was discussed at the meeting, although the discussion is not reflected in the minutes of the meeting. Although the board did not issue a written permit, it is undisputed that the board informally agreed that Valley Paving could operate an asphalt-mixing plant on the Stein property.

After receiving the board's oral permission, Valley Paving entered into a month-to-month lease with Stein for $150 per month. Valley Paving then set up its plant, which is on wheels and occupies a space approximately the size of a football field. Before setting up the plant, the site was prepared by removing and replacing porous soils to create a solid foundation. The assembly of the plant required heavy cranes, and the mixing equipment was recalibrated after it was set in place. The entire installation process took approximately two weeks.

The Hampton Township Zoning Ordinance in effect at that time, which was enacted in 1982, divided the township into five districts: agricultural preservation, floodplain overlay, shoreland overlay, rural residential, and light industrial. Hampton Twp., Minn., Zoning Ordinance Map (1982). The Stein property is within the agricultural preservation district. For land in the agricultural preservation district, the 1982 ordinance recognized three types of uses: permitted uses, accessory uses, and conditional uses. Hampton Twp., Minn., Zoning Ordinance § 202(B)-(D) (1982). The ordinance listed specific types of recognized uses below each category and further provided, "All other uses and structures which are not specifically allowed as permitted or conditional uses, or cannot be considered as an accessory use, shall be prohibited in the AP -- Agricultural Preservation District." *Id.*, § 202(E) (1982). Asphalt mixing is not listed among the recognized uses.

In August 2002, the township adopted a new zoning ordinance that superseded the 1982 ordinance. Under the 2002 ordinance, the Stein property remained classified as agricultural preservation land. The 2002 ordinance recognized a new category of uses

within the agricultural preservation district called "Interim Uses," one of which is "Mineral Extraction." Hampton Twp., Minn., Zoning Ordinance § 301(E)(1) (2002). Mineral extraction requires a permit and is defined as the "excavation, crushing, screening, blending, stockpiling, and removal of sand, gravel, rock, clay, and other non-metallic minerals from the ground." *Id.*, §§ 102(48), 616(B) (2002). The 2002 ordinance limits the duration of an interim-use permit to a maximum of three years and provides that an interim-use permit may be renewed only once. *Id.*, § 616(D)(28)-(30) (2002).

In October 2004, Valley Paving learned that residents of the area surrounding the Stein property had begun to complain to the township board about smoke and odor emanating from the plant. It appears that the complaints were due to an increase in volume at the plant; although Valley Paving mixed an average of approximately 70,000 tons of asphalt per year between 2000 and 2003, it mixed approximately 225,000 tons in 2004. Valley Paving pledged to address the neighbors' concerns. At several subsequent township board meetings, representatives of Valley Paving presented a variety of data to explain the plant's operations and to assure residents that emissions were at acceptable levels. To address concerns about odor, Valley Paving began to mix additives into its asphalt and installed a taller smoke stack to direct fumes away from nearby residences. To address complaints about noise produced by trucks entering and exiting the plant, Valley Paving posted signs warning drivers that they would be fired if they were unnecessarily noisy.

In light of the neighbors' concerns, the township sought to enforce its recently amended zoning ordinance. After extended negotiations, Valley Paving and the township

agreed to an interim-use permit expiring December 31, 2006, which was signed by representatives of both parties on June 21, 2005. The interim-use permit deemed the asphalt-mixing operation to be within the mineral-extraction provisions of the 2002 ordinance. The interim-use permit included conditions that, among other things, required Valley Paving to minimize dust, noise, and odor, and to limit its hours of operation to 6:00 a.m. to 9:00 p.m. on weekdays. The permit also provided that Valley Paving could renew its interim-use permit only by reapplying, and the township board made no commitment to renew the permit upon such reapplication.

In March 2007, the township board considered new complaints from nearby residents that Valley Paving had violated the conditions of the permit by operating outside of the permitted hours. Residents reiterated complaints about odors. The board decided to not renew Valley Paving's permit. Valley Paving threatened legal action. In response, the board altered its earlier decision by renewing the interim-use permit until December 31, 2007.

In May 2007, Valley Paving commenced this action, seeking declaratory relief and an injunction requiring the township to allow Valley Paving to operate its asphalt-mixing plant on the Stein property. In January 2008, the parties filed cross-motions for summary judgment. The district court denied Valley Paving's motion and granted the township's motion. Valley Paving appeals.

D E C I S I O N

A motion for summary judgment shall be granted when "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 a judgment as a matter of law." Minn. R. Civ. P. 56.03; *see also Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). On appeal, a reviewing court asks two questions: "(1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

I. Informal Approval in 1999

Valley Paving first argues that the township board's informal approval of Valley Paving's request to operate its asphalt-mixing plant on the Stein property in 1999 should be construed to be the issuance of a conditional-use permit. Interpretation of a zoning ordinance is a question of law, which appellate courts review de novo. *Watab Twp. Citizen Alliance v. Benton County Bd. of Comm'rs*, 728 N.W.2d 82, 94 (Minn. App. 2007), *review denied* (Minn. May 15, 2007).

The district court found that the township did not issue a conditional-use permit to Valley Paving. It is undisputed that the township never issued a written conditional-use permit to Valley Paving for the operation of an asphalt-mixing plant. There is no evidence that Valley Paving ever submitted a formal application for a conditional-use permit or paid an application fee, as required by the 1982 ordinance. *See* Hampton Twp., Minn., Zoning Ordinance § 711 (1982). As Supervisor Tix testified in his deposition,

"There was a board meeting. Valley Paving did not get a permit. It was just agreed upon between the board members to let the plant go into the pit."

Valley Paving acknowledges the general rule that an approval given by a municipality "in violation of a zoning ordinance by an official lacking power to alter or vary the ordinance is void, and the zoning regulation may be enforced notwithstanding the fact that" a person or company has taken action in reliance on the approval. *See Lowry v. City of Mankato*, 231 Minn. 108, 117, 42 N.W.2d 553, 559 (1950). In arguing for an exception to the general rule, Valley Paving relies primarily on *Haen v. Renville County Bd. of Comm'rs*, 495 N.W.2d 466 (Minn. App. 1993), *review denied* (Minn. Mar. 30, 1993), which Valley Paving contends stands for the proposition that written findings are not necessary for the issuance of a permit. But in *Haen*, the petitioner had formally applied for a conditional-use permit, and the board had formally adopted a resolution to approve the application. *Id.* at 468. The issue on appeal was whether the board had acted arbitrarily and capriciously in failing to make written findings giving "reasons for its decision." *Id.* at 471. This court stated that when "an application for a special use permit is approved, the decision-making body has implicitly determined that all requirements for the issuance of the permit have been met." *Id.* The *Haen* court did not hold that a municipal board's informal action may be construed to be a formal action under its zoning ordinance. *Id.* Thus, *Haen* does not support Valley Paving's argument.

Valley Paving has not identified any other legal authority supporting its argument, and we are not aware of any such caselaw. Thus, the district court did not err by

concluding that the township board's informal actions in 1999 should not be construed to be a conditional-use permit.

II. Non-Renewal of Interim-Use Permit in 2007

Valley Paving next challenges the reasonableness of the township board's actions in 2005 and 2007. More specifically, Valley Paving argues that the township board acted arbitrarily and capriciously by placing conditions on the 2005 interim-use permit and by denying Valley Paving's 2007 request for a renewal of the interim-use permit.

"We review zoning actions to determine whether the zoning authority was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and to determine whether the evidence could reasonably support or justify the determination." *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (quotation omitted). Courts will uphold a city's land-use decision, even if it is questionable, unless the decision is "unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006) (quotation omitted). A municipality's legitimate exercise of police powers includes the power to regulate land use and development and, accordingly, to "prohibit certain businesses in designated areas." *Wedemeyer v. City of Minneapolis*, 540 N.W.2d 539, 542 (Minn. App. 1995). "An individual's right to operate a specific business at a specific location is subordinate to the municipality's police power; no individual can acquire a vested right to a particular zoning scheme." *Id.* Interpretation of a zoning ordinance is a question of law, which appellate courts review de novo. *Watab Twp. Citizen Alliance*, 728 N.W.2d at 94.

A. Conditions Established in 2005

Valley Paving argues that the township acted arbitrarily and capriciously by applying certain conditions to the 2005 interim-use permit. We assume that Valley Paving is challenging the conditions of the expired permit only for the purpose of determining whether the conditions should apply in the future in the event that Valley Paving is successful on its equitable estoppel claim.[1]

The township argues that Valley Paving may not pursue its challenge to the conditions that were established in 2005 because the conditions were the product of negotiation between the parties. A "conditional use permit is in the nature of a contract between the city and a private party for the use of a piece of property." *State v. Larson Transfer & Storage, Inc.*, 310 Minn. 295, 304 n.4, 246 N.W.2d 176, 182 n.4 (1976). If a party intentionally relinquishes a known right, the party is deemed to have waived it. *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 925-26 (Minn.

[1]The township argues that Valley Paving's challenge to the 2005 ordinance is moot. Appellate courts "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). A case is moot if there is no justiciable controversy for a court to decide. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005); *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). A justiciable controversy is one that "involves definite and concrete assertions of right," *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008), and "allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts," *Sviggum*, 732 N.W.2d at 321 (citing *Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n of Minneapolis*, 271 N.W.2d 445, 447 (Minn. 1978)). Although the initial interim-use permit has expired, Valley Paving seeks a declaration that it is authorized to operate its asphalt-mixing plant on the Stein property and an injunction directing the township to permit Valley Paving to operate its plant. This issue is not moot because Valley Paving continues to assert an interest in operating an asphalt-mixing plant at the Stein property pursuant to certain conditions and because the district court conceivably could fashion a judgment that would award the relief that Valley Paving seeks.

App. 2002) (analyzing waiver in zoning context), *review denied* (Minn. Sept. 25, 2002). The interim-use permit was the product of extended negotiations by the parties. The interim-use permit is signed by the chair and the clerk of the township board and by Valley Paving's president. Thus, Valley Paving waived its objections to the conditions placed on the interim-use permit.

In any event, the conditions of the interim-use permit are not arbitrary, capricious, or unreasonable. The interim-use permit required only that the plant limit its hours of operation and minimize disturbances to the surrounding area. These conditions are sufficiently related to "public health, safety, morals, or general welfare." *Mendota Golf, LLP*, 708 N.W.2d at 180. Valley Paving contends that the conditions were imposed based only on "vague complaints of noise and smell" rather than "scientific evidence." In light of this court's "narrow" rational basis review, *id.* at 179-80, we conclude that the conditions were "reasonably support[ed]" by the evidence of resident complaints such that no scientific evidence is required, *County of Morrison v. Wheeler*, 722 N.W.2d 329, 334 (Minn. App. 2006), *review denied* (Minn. Dec. 20, 2006).

B. Actions Taken in 2007

Valley Paving argues that the township board acted arbitrarily and capriciously when it denied Valley Paving's request for renewal of the interim-use permit. The district court concluded that the township board's decision was not arbitrary and capricious. The district court's conclusion is supported by the record. Furthermore, the prospective relief sought by Valley Paving is unavailable because the applicable ordinance does not allow the consideration of an application to renew a permit for a

second time unless two years have passed since the permit expired. Under the 2002 zoning ordinance, after one renewal, a subsequent interim-use permit application will not be processed for two years after the expiration of the permit. Hampton Twp., Minn., Zoning Ordinance § 616(D)(28)-(30). The township board's denial of Valley Paving's request for a renewal in 2007 was not arbitrary, capricious, or unreasonable.

III. Equitable Estoppel

Valley Paving last argues that the township should be equitably estopped from enforcing its zoning ordinance against Valley Paving. "When the facts permit only one conclusion, the application of equitable estoppel is a question of law subject to de novo review." *Concept Props., LLP v. City of Minnetrista*, 694 N.W.2d 804, 821 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

A plaintiff alleging a claim of equitable estoppel against a governmental entity must prove that the defendant engaged in wrongful conduct, that the plaintiff reasonably relied on the defendant's conduct, that the plaintiff incurred a unique expenditure, and that a balancing of the equities favors estoppel. *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292-93 (Minn. 1980). The district court rejected Valley Paving's equitable estoppel claim on the grounds that the township committed no malfeasance, that Valley Paving's expenditures were not unique to the proposed project, and that the public's interest in protecting the property rights of landowners outweighed Valley Paving's interests.

A. Wrongfulness of Conduct

The threshold question when analyzing a claim of equitable estoppel is whether the government's conduct was wrongful. *Ridgewood Dev. Co.*, 294 N.W.2d at 292-93; *see also Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 576 (Minn. 2000). Generally, for an act to be wrongful in this situation it must be "[a]ffirmative misconduct, rather than simple inadvertence, mistake, or imperfect conduct." *AAA Striping Servs. Co. v. Minnesota Dep't of Transp.*, 681 N.W.2d 706, 720 (Minn. App. 2004) (quotation omitted); *see also Concept Props., LLP*, 694 N.W.2d at 822; *Semler Constr., Inc. v. City of Hanover*, 667 N.W.2d 457, 466 (Minn. App. 2003), *review denied* (Minn. Oct. 29, 2003). The "wrongful conduct" element of estoppel has been interpreted "to require some degree of malfeasance." *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006); *see also In re Westling Mfg., Inc.*, 442 N.W.2d 328, 332 (Minn. App. 1989) (interpreting *Ridgewood* to require "affirmative misconduct" on part of government), *review denied* (Minn. Aug. 25, 1989).

The parties agree that the 1982 ordinance did not authorize the township board to issue a conditional-use permit that would allow Valley Paving to operate an asphalt-mixing plant on the Stein property. But there is no evidence in the record that the township board engaged in malfeasance. Valley Paving argues that malfeasance is not required to demonstrate wrongful conduct, but the supreme court and this court have explicitly stated otherwise. *See Kmart Corp.*, 710 N.W.2d at 771-72; *In re Westling Mfg., Inc.*, 442 N.W.2d at 332. Likewise, there is no evidence in the record that the township board wrongfully induced Valley Paving to begin asphalt-mixing operations for

the township's benefit. *See Semler Constr., Inc.*, 667 N.W.2d at 466 (holding that city's actions were wrongful where city requested change to private development for city's own benefit and later refused to approve development). Rather, the township board's conduct was no more than "simple inadvertence, mistake, or imperfect conduct," which this court has stated is insufficient. *AAA Striping Servs. Co.*, 681 N.W.2d at 720; *see also State v. Lee*, 584 N.W.2d 11, 14 (Minn. App. 1998) (holding that city not estopped from enforcing ordinance because "mere failure of the city to ticket [defendant] earlier does not rise to the level of wrongful action"). Thus, Valley Paving cannot satisfy the first requirement of its equitable estoppel claim.

B. Reasonableness of Reliance

To establish a claim of equitable estoppel, plaintiff must prove that the "defendant made representations or inducements, upon which plaintiff reasonably relied." *In re Westling Mfg., Inc.*, 442 N.W.2d at 333 (quotation omitted). It is undisputed that Valley Paving relied on the township board's 1999 approval by installing its asphalt-mixing plant on the Stein property. The pertinent question is whether Valley Paving's reliance was reasonable. Although the reasonableness of reliance is a fact question that is "ordinarily" for the jury, that question can be decided by the court when the facts lead only to one conclusion. *Id.* at 331; *see also Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).

As a general rule, "those who deal with Government are expected to know the law and may not rely on the conduct of government agents contrary to law." *In re Westling Mfg., Inc.*, 442 N.W.2d at 333 (quotation omitted). Nonetheless, "a party may generally

rely upon notification from the agency charged with interpreting and enforcing the relevant rules." *Id.* at 334. The authority of a governmental official to make the representations in question is a factor in determining whether reliance was reasonable. *Id.* at 333. In this case, the 1982 ordinance, by its terms, required Valley Paving to submit a written application for a conditional-use permit. But the township board, which had the authority to grant permits, communicated to Valley Paving, without equivocation, that Valley Paving did not need to satisfy any particular requirements before commencing operations. Valley Paving's president testified that Supervisor Tix told him, "You don't need a permit because you are grandfathered in. It's a site where you can put an asphalt plant."

Regardless whether Valley Paving's reliance was reasonable in 1999, its reliance became unreasonable in 2005, when Valley Paving expressly agreed to continue its operations pursuant to an interim-use permit that was issued under the amended ordinance. To prove reasonable reliance for purposes of an equitable estoppel claim, a party must assert its claim in a timely fashion; if a party "has failed to exercise due diligence in filing its action after the grounds giving rise to the claimed estoppel have ceased to exist," the claim may be denied. *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990) (emphasis omitted); *see also Northern Petrochemical Co. v. U.S. Fire Ins. Co.*, 277 N.W.2d 408, 411 (Minn. 1979) ("Estoppel does not continue indefinitely if the circumstances relied on to justify estoppel cease to be operational.")

Valley Paving does not seek money damages but, rather, an injunction against the township board to prevent the board from applying its current zoning ordinance to Valley

Paving. But Valley Paving cannot prove that its reliance on the board's wrongful conduct was continuously reasonable or that it was diligent in pursuing its equitable estoppel claim in light of its agreement to the interim-use permit in 2005. Thus, Valley Paving cannot satisfy the second requirement of its equitable estoppel claim.

C. Uniqueness of Expenditures

A local government may not be estopped from exercising its zoning powers unless a property owner "made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired." *Save Lantern Bay v. Cass County Planning Comm'n*, 683 N.W.2d 862, 868 (Minn. App. 2004) (quoting *Ridgewood Dev. Co.*, 294 N.W.2d at 292). The expenditures must be "unique to the proposed project and would not be otherwise usable." *Ridgewood Dev. Co.*, 294 N.W.2d at 292.

The record does not contain any evidence concerning the specific amount of money and other resources Valley Paving devoted to the installation of its asphalt-mixing plant at the Stein property. Carron testified that some preliminary groundwork was done, that cranes were used to assemble the plant, and that the entire process took a couple of weeks. It is true that Valley Paving made some expenditures that are "unique to the proposed project and would not be otherwise usable," *id.*, but those expenses do not appear to be significant in light of the benefits actually realized. The installation costs that Valley Paving incurred in 1999 were not wasted because Valley Paving enjoyed eight years of operation at that location between 1999 and 2007. Furthermore, Valley Paving will not sustain future losses related to the Stein property because it has a month-

to-month lease. Moreover, Valley Paving may relocate its asphalt-mixing plant relatively easily because the plant is designed to be mobile and is mounted on wheels. In short, Valley Paving's expenditures are not so great that it would be "highly inequitable and unjust to destroy the rights which [Valley Paving] ostensibly had acquired." *Id.* (emphasis omitted) (quotation omitted). Thus, Valley Paving cannot satisfy the third requirement of its equitable estoppel claim.

D. Equitable Considerations

"Estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel." *Ridgewood Dev. Co.*, 294 N.W.2d at 293 (quotation omitted). Courts weighing the equities in this type of situation should consider whether "the public's interest would . . . be unduly damaged by the imposition of estoppel." *Id.* (quotation omitted); *see also Mesaba Aviation, Inc. v. Itasca County*, 258 N.W.2d 877, 880 (Minn. 1977).

Valley Paving contends that it would be unjust for the township to enforce its ordinance because the company has spent over $20,000 in lease payments. But those lease payments were made primarily during the eight years in which Valley Paving actually operated its plant. Valley Paving also contends that it would be unjust for the township to enforce its ordinance because it will be difficult to find a new location. But Valley Paving does not contend that it will be impossible to find an alternative location.

The public has an interest in the enforcement of the township zoning ordinances to ensure uniform and equitable application of the law, minimize nuisances, and protect

property values. *See Dege v. City of Maplewood*, 416 N.W.2d 854, 857 (Minn. App. 1987). To estop the township from enforcing its current zoning ordinance would contravene these interests. Thus, Valley Paving cannot satisfy the fourth requirement of its equitable estoppel claim.

In sum, the district court did not err by granting summary judgment to the township on Valley Paving's equitable estoppel claim.

Affirmed.