STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1714

In the Matter of: City of Ramsey, Anoka County, Minnesota,
Respondent,

vs.

Keith Allen Kiefer,
Relator.

Filed August 25, 2009
Reversed
Stoneburner, Judge

City of Ramsey
File No. 07-302265

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

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

STONEBURNER, Judge

In this certiorari appeal, relator challenges respondent city's notice to relator to abate a nuisance based on its conclusion that a vehicle is parked on relator's property in

violation of a city ordinance. Because the city's decision is not supported by evidence in the record and is based on an error of law, we reverse.

FACTS

Relator Keith A. Kiefer is one of the record owners of property located at 6203 Rivlyn Avenue Northwest in respondent City of Ramsey (city). The property is zoned R-1 Residential under the Ramsey Zoning Code. In December 2007, city issued a Notice of Violation to Kiefer that stated in relevant part: "Panel van parked in the rear yard. All vehicles must be parked on the driveway or a prepared surface. These Violations Must Be Corrected by: January 2, 2008."

Kiefer requested a hearing. The notice of hearing stated that Kiefer, "on December 17, 2007 and thereafter parked a motor vehicle in the front yard of the Premises on a site which is not the driveway of the Premises." The notice cited Ramsey City Code § 9.11, permitting motor vehicles to be parked in the front yard only if on a driveway or in the side or rear yard provided that they are parked on a bituminous pavement or concrete surface. The notice also cited Ramsey City Code § 5.08, defining as a public nuisance "[a]ny violation of City Code, Section 9.11.08, relating to off-street parking regulations."

At the contested-case hearing, the city clarified that the van is parked in the side yard, contrary to allegations in the notice of violation and notice of hearing. Kiefer argued that the van is legally parked in the side yard because it is parked on a historically existing driveway that, under the city code, is not required to be a bituminous or concrete surface. The hearing examiner did not allow Kiefer to introduce evidence of the previous

zoning of the property or a 1973 aerial photograph showing a driveway from the street to a garage at the back of the property. But the record contains substantial testimony and evidence that the van is parked on a dirt traffic lane or "drive lane" in Kiefer's side yard and the hearing examiner's findings of fact recite testimony about this fact. Emphasizing the provision in Ramsey City Code § 9.11 that requires vehicles parked in a side or rear yard to be "parked on a residential parking surface that consists of either bituminous pavement or concrete," the hearing examiner concluded that the city proved by a preponderance of the evidence that Kiefer violated section 9.11 specifically because the van is parked on a "dirt surface."

The city council considered the hearing examiner's recommendation that Kiefer be found in violation of the city code. Minutes of that meeting reflect that Kiefer argued to the city council that the van is parked on a driveway. The city attorney stated that the van is parked in the side yard and is clearly not parked on the driveway or a bituminous or concrete surface. The city council adopted verbatim the findings of fact, conclusions, and recommendations of the hearing examiner, determining that the van was parked in violation of the city code and ordered abatement of the nuisance created by the violation. This certiorari appeal followed.

D E C I S I O N

The city's notice of hearing to Keifer stated that the hearing would be conducted under the Minnesota Administrative Procedure Act (MAPA) and the Rules of the Office of Administrative Hearings, Minnesota Rules, Section 1400.5100–.8400. Therefore our standard of review is governed by MAPA. *Hard Times Cafe v. City of Minneapolis*, 625

N.W.2d 165, 173 (Minn. App. 2001) (applying MAPA standard of review to municipal decision based on case law and the city's election to conduct contested case hearings in accord with MAPA). Under MAPA, in relevant part:

> [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 . . . affected by [an] error of law; or . . . unsupported by substantial evidence in view of the entire record as submitted . . . .

Minn. Stat. § 14.69 (2008). "Review is limited to the record before the city council at the time it made its decision." *Hard Times*, 625 N.W.2d at 173 (quotation omitted).

In his appellate brief, Kiefer argues denial of due process by exclusion of his proffered evidence and denial of his opportunity to present a defense to the nuisance claim. He also argues that the city's provisions governing off-street parking and driveways are too vague to support a decision that a vehicle parked on a driveway in the side yard violates the code.

The city argues in its brief on appeal that (1) the evidence and law support the decision that Kiefer violated the city's off-street parking requirements because the van is not parked on Kiefer's driveway; (2) Kiefer's due-process rights were not violated; and (3) Kiefer could not raise the issue of vagueness on appeal because it was not raised below.

In his reply brief, Kiefer counters that the evidence does not support the decision, that he preserved his constitutional challenges, and that he was prejudiced by the exclusion of his evidence. We have carefully reviewed the record in this matter and

conclude that the city's decision is unsupported by the substantial evidence in view of the entire record and is affected by error of law, therefore we do not address Kiefer's constitutional challenges.

At the evidentiary hearing, the city argued that the van is parked in violation of the code because it is not parked on a bituminous or concrete surface *regardless of whether or not it is parked on a driveway*. This is illustrated by the city's objection to Kiefer's attempts to prove that his long-existing driveway runs from the street in front of his house, through the side yard to a garage in the rear yard. Counsel for the city stated: "The issue isn't whether there's a driveway here or not, it's whether or not there's a vehicle parked on the correct surface." Later in the hearing, counsel for city, objecting to Kiefer's questioning witnesses about the existence of a driveway in the side yard, stated:

> [T]he questioning as to whether or not there's a driveway or not a driveway is irrelevant for the purposes of this hearing. If we're talking about the particular surface that it's parked on, I think that would be relevant . . .[b]ut as to whether or not there is a driveway or its existence at any point in time, I think that's irrelevant . . . in the side or rear yard parking requires a bituminous pavement or concrete, residential parking surface . . . [w]hether that's a driveway or not."

The hearing examiner asked: "So the issue of whether or not it's parked on a driveway is irrelevant. The issue is to [sic] the surface of the spot where the vehicle is parked?" Counsel responded: "That's correct your honor," after which the hearing examiner sustained counsel's objection to further inquiry about whether the van is parked on a driveway in Kiefer's side yard.

The city council adopted the hearing examiner's findings of fact including a finding implicitly crediting testimony that that the van is parked on a "drive lane" that runs between the street and a garage on Kiefer's property. And the city does not dispute that a "drive lane" is a driveway, defined in Ramsey City Code § 9.02 as "[a]n on-site traffic lane leading directly to a garage from the closest street access." Nor does the city dispute that the code does not require a particular surface on a driveway. Additionally, notwithstanding its position at the hearing, on appeal, the city concedes that "Kiefer could park on a driveway (paved or not) that extended into the side or rear yard." On appeal, the city has abandoned the argument that even if parked on a driveway in the side yard, the surface must be bituminous or cement to comply with the code and now argues that Kiefer's van was not parked on a driveway.

The city's current argument is contrary to its adoption of the hearing examiner's findings of fact. The city now asks this court to credit the testimony of Assistant Community Development Director Sylvia Frolik, who oversees the administration of chapter 9 of the Ramsey City Code, as evidence that the van is not parked on a driveway. Frolik, when asked to opine "[f]rom . . . observation of the testimony and . . . significant experience in interpreting the City's ordinances" whether the van is parked on a driveway, stated: "[t]he driveway, in accordance with the definition of a driveway in the MUSA, is bituminous or concrete, and the existing driveway falls short of where that van is parked." Frolik acknowledged, however that the most direct route to an "outbuilding" (previously identified by witnesses as a garage) shown on a photograph in evidence, "would be where there's this clearing in the trees, but there's nothing that shows me that

it's a driveway." Despite Frolik's opinion, which misstates the city's definition of a driveway, the substantial evidence in the record supports only a finding that the van is parked on a driveway as defined in the city code. We reject as without merit the city's new theory of the case, asserted for the first time on appeal, that the evidence demonstrates that the van is not parked on a driveway.

The evidence supports only a finding that the van is parked on a driveway. And the city implicitly concedes that it would be an error of law to interpret the city code to require that a vehicle must be on a bituminous or cement surface even if it is parked on a driveway in a side or rear yard. Therefore, we reverse the decision that Kiefer violated City Code § 9.11 as unsupported by evidence and based on an error of law.[1]

Reversed.

[1] Although we do not reach Kiefer's constitutional arguments, the city's confusion about how to interpret its code demonstrates that Kiefer's vagueness argument has merit.