STATE OF MINNESOTA
IN COURT OF APPEALS
A09-795

State of Minnesota,
Respondent,

vs.

Ronald Charles Enright,
Appellant.

Filed March 30, 2010
Affirmed
Kalitowski, Judge
Dissenting, Minge, Judge

Dakota County District Court
File No. 19AV-CR-08-19242

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Alina Schwartz, Campbell Knutson, P.A., Eagan, Minnesota (for respondent)

Robert J. Bruno, Robert J. Bruno, Ltd., Burnsville, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Bjorkman, Judge.

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

KALITOWSKI, Judge

Appellant Ronald Charles Enright challenges his misdemeanor conviction of violating a Burnsville city ordinance requiring him to maintain a buffer fence between his

industrial property and the neighboring residential property. Appellant argues that (1) the ordinance is unconstitutionally vague because it fails to state which landowner is responsible for maintaining the buffer, and (2) enforcement of the ordinance violates due process. We affirm.

D E C I S I O N

I.

Burnsville, Minn., City Code § 10-7-18 (2009),[1] titled "SCREENING AND BUFFERS," provides:

> (C) Buffer Areas: Buffer areas shall be provided wherever business and/or industrial uses are located adjacent to or across the street from residential uses. Buffer areas shall separate parking areas, driveways and structures from residential uses and contain the following:
>
> > 1. A berm, fence, evergreen trees, hedge, or combination thereof not less than eighty percent (80%) opaqueness and not less than six feet (6') in height at the time of installation . . . .

Appellant was convicted of violating section 10-7-18 after he failed to repair a buffer fence separating his industrial property from adjacent residential property to the north. *See* Burnsville, Minn., City Code § 1-4-1 (A) (2009) (providing that violation of any code provision is a criminal misdemeanor punishable under Minnesota statute). Appellant

[1] We cite the 2009 city code because it is substantially similar to the one in effect at the time of the judgment and because appellant's rights have not been affected by the changes. *See Interstate Power Co. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that appellate courts are to apply the law in effect at the time of the judgment, except when "rights affected by the amended law were vested before the change in the law").

argues that section 10-7-18 is unconstitutionally vague because it fails to state which landowner is responsible for maintaining the buffer. We disagree.

The constitutionality of an ordinance is a question of law that this court reviews de novo. *State v. Botsford*, 630 N.W.2d 11, 15 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). A municipal ordinance is presumed to be constitutional, and a challenger has the burden to prove a constitutional violation beyond a reasonable doubt. *Thul v. State*, 657 N.W.2d 611, 618 (Minn. App. 2003), *review denied* (Minn. May 28, 2003).

A criminal statute "must meet due process standards of definiteness under both the United States Constitution and the Minnesota Constitution." *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985); *see* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. A criminal law may be unconstitutionally vague for either of two independent reasons: (1) it fails to provide the kind of notice that allows ordinary people to understand what conduct it prohibits, or (2) it authorizes or even encourages arbitrary and discriminatory enforcement. *State v. Rourke*, 773 N.W.2d 913, 917 (Minn. 2009). But general language does not make a statute vague. *State v. Christie*, 506 N.W.2d 293, 301 (Minn. 1993). "An ordinance that is flexible and reasonably broad will be upheld if it is clear what the ordinance, as a whole, prohibits." *State, City of Minneapolis v. Reha*, 483 N.W.2d 688, 691 (Minn. 1992). Vagueness challenges not involving the First Amendment are to be examined in light of the pertinent facts. *Christie*, 506 N.W.2d at 301; *see also Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 172 (Minn.

App. 2001) (stating that a challenger "must show that the ordinance lacks specificity as to [his] own behavior rather than some hypothetical situation") (quotation omitted).

Here, the ordinance was not unconstitutionally vague beyond a reasonable doubt because the record indicates that appellant was aware that he was in violation of the buffer-fence requirement. Appellant testified that after he built the fence in 1994, neighborhood kids repeatedly broke holes in the fence in order to cross the property. Appellant repaired the fence for seven or eight years, eventually giving up and leaving a section missing. *See Thul*, 657 N.W.2d at 618 (holding that appellant's behavior indicated that he understood his obligation to comply with city ordinance).

Significantly, before issuing the citation, the city sent appellant three notices informing appellant that the fence was not in compliance with the ordinance and requesting that appellant bring the fence into compliance to avoid being charged under the city code. *See Reha*, 483 N.W.2d at 692 (reasoning that the "fair-warning" requirement of the vagueness analysis was met where the appellant was given several notices, both orally and in writing, detailing specific code violations). Appellant testified that he did not receive two of the letters, but admitted that he received the August 20, 2008 notice from the city.

Notably, the August 20, 2008 notice cited Burnsville, Minn., City Code § 10-23-1, the buffer-fence ordinance which has since been moved, in pertinent part, to 10-7-18. Section 10-23-1 was titled "SPECIAL MINIMUM REQUIREMENTS IN ALL I DISTRICTS," indicating that it was appellant's responsibility as the industrial landowner to supply the buffer fence. *See* Burnsville, Minn., City Code § 10-6-1 (2009)

(designating industrial districts as "I" districts). And while the notice stated that appellant had seven days to repair the fence before being cited, the city did not conduct the final inspection and issue the citation until October 17, 2008. Thus, not only did appellant have notice that he was in violation of the ordinance, but once aware of his obligations, appellant had ample opportunity to comply. *See Thul*, 657 N.W.2d at 618 (stating that appellant had notice of requirements for exemption under city ordinance prohibiting helicopter use where he received a letter informing him of such requirements the day before the application for exemption was due).

Citing *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858 (1983), appellant argues that because the ordinance fails to indicate which landowner is liable under the ordinance, it permits a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." But in *Reha*, the supreme court stated that while the potential for arbitrary and discriminatory enforcement is a legitimate concern, "no evidence was introduced *in this case* to indicate whether the city enforced the ordinance in an arbitrary or discriminatory manner." 483 N.W.2d at 692. Likewise here, appellant fails to show that the buffer-fence ordinance was enforced in an arbitrary or discriminatory manner. Moreover, the plain language of the ordinance relates to the industrial use. *See generally* 101A C.J.S. *Zoning and Land Planning* § 60 (2005) (stating that a municipality has the power to impose restrictions on business, commercial and industrial districts, including the screening of business establishments from neighboring residential zones). Thus, the requirement to screen for the benefit of the residential use is reasonably the obligation of the industrial landowner.

We conclude that section 10-7-18 is not void for vagueness as applied here, because the record shows that appellant had notice from the city that he was in violation of the ordinance and the plain language of the ordinance supports the city's interpretation.

II.

Appellant argues that enforcement of the buffer-fence ordinance violates due process because the city had given appellant "explicit permission" to violate the ordinance. We disagree.

Whether enforcement of the ordinance violates due-process rights is a question of law that this court reviews de novo. *In re On-Sale Liquor License, Class B*, 763 N.W.2d 359, 366 (Minn. App. 2009).

Appellant cites *State v. McKown*, 475 N.W.2d 63, 68-69 (Minn. 1991), a Minnesota Supreme Court case that held that indictments issued against parents for second-degree manslaughter in the death of their son violated due process because the parents had relied on a child neglect statute that expressly permitted the parents to depend on Christian Science healing methods in treating their ill son. Appellant contends that similarly, here, the city gave appellant permission to disregard the buffer-fence requirement when in 1990 it rezoned the north-adjacent land to residential without requiring him to comply with the ordinance.

But appellant did not have permission to violate the buffer-fence ordinance. Rather, when the land adjacent to appellant's industrial property on the north was rezoned from agricultural to residential in 1990, the city did not require appellant to build a fence because his property constituted a nonconforming use allowed to continue under the

code. *See* Burnsville, Minn., City Code § 10-4-2 (2009) (defining a nonconforming use as "[u]se of land, buildings, or structures existing at the time of adoption of this title which does not comply with all the regulations of this title or any amendments hereto governing the zoning district in which such use is located"); Burnsville, Minn., City Code § 10-5-6 (D) (2009) (indicating that rezoning a district constitutes an amendment to the title); Burnsville, Minn., City Code § 10-7-2 (A) (2009) (stating that with regard to nonconforming uses and structures, "any structure or use lawfully existing upon the effective date of this title may be continued at the size and in a manner of operation existing upon such date"). But when appellant voluntarily built the buffer fence in 1994, the use was changed to a conforming use. And pursuant to Burnsville, Minn., City Code § 10-7-2 (C) (2009), once a nonconforming use is changed to a conforming use, "it shall not thereafter be changed to any nonconforming use."

In sum, once appellant voluntarily built the buffer fence, he had the obligation to ensure that it complied with the city code. Thus, we conclude that the city's enforcement of the ordinance against appellant did not violate due process.

Affirmed.

MINGE, Judge (dissenting)

I respectfully dissent. At the outset, I note that the Burnsville zoning ordinance simply specifies that buffers are to exist between industrial and residential districts. It does not specify whether the landowner in either district, a developer, the proponent of a plat, or the proponent of a change in zoning is responsible for establishing and maintaining the buffers.

Next, it is significant that appellant's premises were zoned, developed, and used for industrial purposes when the neighboring area was zoned agricultural. The Burnsville ordinance does not require any buffer between industrial and agricultural zones. Subsequently, a business that wished to promote the construction of a single family housing neighborhood purchased this adjacent agriculturally zoned land, had it platted, prevailed on the city to rezone it as residential, and promoted the development. Locating a new single family housing development adjacent to an existing industrial zone ignores the general principal of not having such dramatically differing uses adjacent to one another. 2 *Anderson's American Law of Zoning* § 9.08 (Kenneth Young, ed., 4th ed. 1996). Burnsville apparently did not condition the platting or rezoning from agricultural to residential on the establishment of any buffer. Certainly, the city could have interpreted its ordinance to obligate the residential developer to assume this responsibility as a part of rezoning or platting or building homes on what had been agricultural land.

Appellant voluntarily built the fence that children in the residential area vandalized. After unsuccessful attempts to keep the fence repaired, appellant left the fence as it was. The record is silent regarding on whose land the fence is located or

whether it constitutes a nuisance in its disrepaired state. The city simply asserts that it is interpreting and criminally enforcing the zoning ordinance so as to impose criminal liability for maintaining the buffer fence on appellant as the owner of the industrial land. There is no claim the industrial use or the fence itself is noxious, dangerous, or offensive.

Caselaw has set the framework for judicial review of zoning issues. "[T]he interpretation of an existing [zoning] ordinance is a question of law for the court. . . . Thus, where the question is whether an ordinance is applicable to certain facts, the determination of those facts is for the governmental authority, but the manner of applying the ordinance to the facts is for the court." *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). Furthermore, Minnesota adheres to the principle that "zoning ordinances should be construed strictly against the city and in favor of the property owner." *Id.* Finally, I note that this court has ruled that "the criminal consequences which attend violations of the [zoning] ordinance also obligate us to construe its provisions strictly in favor of the accused." *State v. Nelson*, 499 N.W.2d 512, 514 (Minn. App. 1993). In that litigation, Nelson had appealed a misdemeanor conviction for keeping a rooster in Maplewood and a fine of $100. *Id.* at 513. She challenged the determination by the city and the district court that the city's zoning ban on livestock included roosters. *Id.* This court stated that "Nelson should not bear the penal consequences of an ordinance the terms of which are reasonably capable of different meanings. Because a pet rooster does not plainly fall under the definition of livestock as used in the ordinance, we reverse Nelson's conviction." *Id.* at 514.

These three considerations—(1) our caselaw principles; (2) the sequence of development, zoning, and platting in the area of appellant's property; and (3) the lack of specificity in the Burnsville ordinance—lead me to conclude that the Burnsville zoning ordinance does not place on appellant the burden to establish or maintain this buffer fence. Accordingly, I would reverse appellant's conviction. Based on this conclusion, I would not reach the constitutional issues.