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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1223**

In the Matter of the Application for Relocation Benefits
of the Estate of Nellie Fischbach.

**Filed May 8, 2017
Affirmed
Halbrooks, Judge**

Office of Administrative Hearings
File No. OAH 5-8034-32497

Michael A. Sindt, Sindt & Associates, PC, Minneapolis, Minnesota (for appellant Estate
of Nellie Fischbach)

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City of Brooklyn Park)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant estate challenges the order of an administrative law judge (ALJ) denying
a replacement housing payment, arguing that it is entitled to the payment and that
respondent failed to provide other relocation assistance. We affirm.

FACTS

In 2010, respondent City of Brooklyn Park began planning to reconstruct the interchange between Highway 169 and County Road 30 due to significant traffic and congestion concerns. The project required the city to acquire 4.28 acres (186,437 square feet) owned by Nellie Fischbach, on which her house (the displacement dwelling) was located. The size of Fischbach's home was approximately 1,400 square feet. It was situated on a 29,234 square-foot residential plot that was its own parcel for tax purposes. An adjacent parcel was used for farming. Fischbach was 90 years old and had significant health issues. But she was capable of living independently with special accommodations.

The city hired D.W. to assist in the property acquisitions necessary to facilitate the project. In 2012, the city notified Fischbach that it was going to condemn her property. On February 24, 2012, D.W. met with Fischbach and her family to discuss her physical limitations and expectations for a replacement dwelling.

On June 19, 2012, D.W. sent Fischbach a letter informing her that the most comparable replacement dwelling he had found was a house located on 83rd Avenue North in Brooklyn Park that had a list price of \$169,000. The cost of modifying the house to add the accessibility features that Fischbach's original home had was estimated to be under \$10,000. Fischbach rejected the 83rd Avenue property because she felt that it was located

in an unsafe neighborhood, was too far from her primary caregivers, and did not accommodate her medical and physical needs.¹

On July 13, 2012, D.W. advised Fischbach that once she selected a replacement dwelling, the city could address how to modify the home to make it accessible to her and that the cost of doing so would be an eligible relocation expense. Between June 20, 2012 and August 22, 2012, D.W. sent Fischbach information on 25 potential replacement dwellings, but Fischbach did not visit any of the properties. Because she concluded that none was suitable, Fischbach built a new house (the replacement dwelling) that was 1,410 square feet in size and located six houses from her son and daughter-in-law's house. The cost to build the replacement dwelling was \$346,927.42, and Fischbach moved into it on January 31, 2013.

Through a condemnation proceeding on August 13, 2014, Fischbach was awarded \$1,820,700 for her 4.28 acres of property, which amounted to \$9.77 per square foot. On August 25, 2014, Fischbach filed a claim seeking a replacement housing payment and incidental expenses from the city under the Minnesota Uniform Relocation Act and the Uniform Relocation Assistance and Real Property Acquisition Policies Act. The city denied her claim on November 11, 2014. Fischbach died on March 7, 2015. On March 18, 2016, appellant Estate of Nellie Fischbach (the estate) filed an amended application for reimbursement to the Office of Administrative Hearings seeking \$240,145.54 in relocation

¹ Fischbach's primary caregivers were her son and daughter-in-law, who lived approximately 1.5 miles away. The 83rd Avenue property was 2.86 miles from Fischbach's son and daughter-in-law's home.

benefits. The ALJ determined that the city owed the estate \$5,040.98 for incidental expenses related to the purchase of the replacement dwelling, but that the estate is not entitled to a replacement housing payment. This appeal follows.

D E C I S I O N

This court may reverse or modify an ALJ's decision when the petitioner's substantial rights may have been prejudiced because the decision was:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69 (2016). “Although we defer to the Commissioner’s findings of fact if they are reasonably supported by the evidence in the record, the interpretation of statutes and their application to undisputed facts present questions of law that we review de novo.” *Mattice v. Minn. Prop. Ins. Placement*, 655 N.W.2d 336, 340 (Minn. App. 2002) (citation omitted), *review denied* (Minn. Mar. 18, 2003). We extend judicial deference “to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing.” *Id.* “The party seeking review on appeal has the burden of proving that the agency decision meets one or more of the above-listed statutory criteria.” *Id.*

I.

One purpose of the relocation-assistance regulations is “[t]o ensure that persons displaced as a direct result of Federal or federally-assisted projects are treated fairly, consistently, and equitably so that such displaced persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole.” 49 C.F.R. § 24.1(b) (2016).²

The estate contends that the ALJ erred when it denied Fischbach’s request for a replacement housing payment. The proper amount of a replacement housing payment includes the amount that must be added to the acquisition cost of the displacement dwelling and site to equal the lesser of the reasonable cost of a comparable replacement dwelling or the purchase price of the actual replacement dwelling. 49 C.F.R. § 24.401(b)(1), (c)(1) (2016).

A. Displacement Dwelling

We first address whether the ALJ abused its discretion when it determined that the city paid \$285,616 to acquire Fischbach’s displacement dwelling and site. The ALJ found that the city paid Fischbach a total of \$1,820,700 to acquire her 4.28-acre property. Dividing the condemnation payment by the total size of the property, the ALJ determined that Fischbach was paid \$9.77 per square foot for her property. The ALJ further found, based on the commissioner’s determination in the condemnation proceeding, that

² These regulations apply to persons displaced due to “acquisitions for highway purposes or acquisitions for which the state Department of Transportation performs relocation assistance services for the Department of Administration.” Minn. Stat. § 117.52, subd. 2 (2016).

Fischbach's displacement dwelling had no independent value because the property's best use had changed from residential to commercial. But the ALJ found that the dwelling site, where Fischbach's displacement dwelling was located, constituted 29,234 square feet, which was a typical size for a rural residential lot. Again, using the \$9.77 per square-foot figure, the ALJ determined that the city paid Fischbach \$285,616 for the displacement dwelling site.

The estate makes several arguments in support of its assertion that the ALJ used an incorrect value for the square footage of the displacement dwelling site in its replacement-housing-payment calculation. The estate contends that the ALJ's determination that the displacement dwelling site was 29,234 square feet is unsupported by substantial evidence in the record. A dwelling site is the "land area that is typical in size for similar dwellings located in the same neighborhood or rural area." 49 C.F.R. § 24.2(a)(11) (2016).

The ALJ relied on testimony from D.W. that the displacement dwelling was on a single-family lot of more than 29,000 square feet. The city's June 9, 2014 appraisal listed the property size as 29,234 square feet. The city also presented evidence of 24 similar lots in the area that had more than 20,000 square feet, ten of which had more than 29,234 square feet. This evidence substantially supports the ALJ's conclusion that Fischbach's displacement dwelling site of 29,234 square feet was a typical size for a rural residential lot in the area.

In addition, the estate contends that because Fischbach's property combined residential and commercial use, only the square footage of the dwelling is applicable for calculation of a replacement housing payment. The mixed-use provision states:

If the displacement dwelling was part of a property that contained another dwelling unit and/or space used for nonresidential purposes, and/or is located on a lot larger than typical for residential purposes, only that portion of the acquisition payment which is actually attributable to the displacement dwelling shall be considered the acquisition cost when computing the replacement housing payment.

49 C.F.R. § 24.403(a)(7) (2016). The estate notes that the total 4.28 acres of Fischbach's property contained not only her dwelling, but also multiple businesses and another residential property. For this reason, the estate asserts, the ALJ should have only considered "that portion of the acquisition payment which is actually attributable to the displacement dwelling . . . when computing the replacement housing payment." *Id.* The estate asserts that the land that was "actually attributable to the displacement dwelling" was the 1,400 square feet that the displacement dwelling occupied. Multiplying 1,400 square feet by the \$9.77 per square-foot amount that the city paid for Fischbach's property, the estate contends that the acquisition cost was only \$13,678.

The city responds that this provision does not apply because the land was valued as commercial, not residential, property. But even if the provision did apply, the city contends that it would result in the same relocation housing payment because the portion of the acquisition payment which is actually attributable to the displacement dwelling includes the dwelling site. Since the displacement dwelling site was 29,234 square feet, the city contends that, even under the mixed-use provision, Fischbach was paid \$285,616 for her displacement dwelling.

The ALJ determined that the displacement dwelling was located on a parcel larger than typical for residential purposes, so the provision applies. Substantial evidence in the

record supports this determination. It is undisputed that the displacement dwelling was on a 4.28-acre lot, which is much larger than a typical rural residential lot. But only the land actually attributable to the displacement dwelling is used in the replacement-housing-payment calculation. *Id.* As stated in the appendix to the regulations, application of the term *dwelling site* “ensures that the computation of replacement housing payments are accurate and realistic (a) when the dwelling is located on a larger than normal site, (b) when mixed-use properties are acquired, [or] (c) when more than one dwelling is located on the acquired property.” 49 C.F.R. app. A § 24.2(a)(11) (2016). Because the explanation of dwelling site contemplates properties that are larger than normal, as is the case here, we apply *dwelling site* to the mixed-use provision and conclude that the portion of the acquisition payment that is attributable to the displacement dwelling includes the dwelling site. *See id.* Therefore, the acquisition cost includes the amount that the city paid for the entire dwelling site.

Alternatively, the estate contends that, if Fischbach’s lot was a typical residential property and the mixed-use provision did not apply, the major exterior-attribute provision of the regulations required the ALJ to reduce the size of the displacement dwelling site in its replacement-housing-payment calculation. *See* 49 C.F.R. § 24.403(a)(2) (2016) (“If the site of the comparable replacement dwelling lacks a major exterior attribute of the displacement dwelling site . . . the value of such attribute shall be subtracted from the acquisition cost of the displacement dwelling for purposes of computing the payment.”). But the ALJ determined that Fischbach’s lot was not a typical residential lot. As previously noted, Fischbach’s lot totaled 4.28 acres and contained two dwellings and several

businesses. Furthermore, the lot was valued as a commercial lot, not a residential lot. Therefore, the major exterior-attribute provision is inapplicable.

Because the ALJ did not err in determining that the displacement dwelling site constituted 29,234 square feet, we conclude that the ALJ correctly determined that the city paid Fischbach \$285,616 to acquire her displacement dwelling.

B. Replacement Dwelling

We next review whether the ALJ abused its discretion when it determined the cost of the replacement dwelling. The ALJ determined that the city “failed to provide [Fischbach] with any comparable properties because the options presented lacked reasonable accommodations for [Fischbach’s] disabilities.” But the ALJ also concluded that, “[a]fter projected modifications, the [83rd Avenue property] was a comparable property under the Act.” The ALJ found that the 83rd Avenue property was listed for \$169,000 and that the necessary accessibility features could have been added for approximately \$10,000. As a result, the ALJ concluded that the 83rd Avenue property was a comparable replacement dwelling that was available for \$179,000 after modifications were made.

A comparable replacement dwelling must be:

- (i) Decent, safe and sanitary . . . ;
- (ii) Functionally equivalent to the displacement dwelling . . . ;
- (iii) Adequate in size to accommodate the occupants;
- (iv) In an area not subject to unreasonable adverse environmental conditions; [and]
- (v) In a location generally not less desirable than the location of the displaced person’s dwelling with respect to public utilities and commercial and public facilities,

and reasonably accessible to the person's place of employment.

49 C.F.R. § 24.2(a)(6) (2016). For displaced persons with disabilities, a dwelling is decent, safe, and sanitary if it is “free of any barriers which would preclude reasonable ingress, egress, or use of the dwelling by such displaced person.” 49 C.F.R. § 24.2(a)(8)(vii) (2016). Because the 83rd Avenue property was not accessible for Fischbach in its listed condition, it was not a comparable replacement dwelling.

But the city may provide alternative assistance under the replacement-housing-of-last-resort exception when a project cannot proceed on a timely basis because a comparable replacement dwelling is not available. 49 C.F.R. § 24.404(a) (2016). This assistance includes “additions to an existing replacement dwelling” and “removal of barriers for persons with disabilities.” 49 C.F.R. § 24.404(c)(1)(ii), (vii) (2016). Agencies “have broad latitude in implementing” the replacement-housing-of-last-resort exception. 49 C.F.R. § 24.404(c) (2016).

The estate contends that the 83rd Avenue property could not be a comparable replacement dwelling until the city performed a handicap-accessibility study. But the estate cites no authority in support of this proposition. The replacement-housing-of-last-resort exception permits the city to provide alternative assistance, which may include modifications to an existing replacement dwelling. 49 C.F.R. § 24.404(a), (c)(1)(ii), (vii). But the regulations do not require the city to conduct handicap-accessibility studies before utilizing the replacement-housing-of-last-resort exception. *See* 49 C.F.R. § 24.404 (2016). Here, D.W. advised Fischbach that the city would compensate her for the necessary and

reasonable cost to make the replacement dwelling consistent with the displacement dwelling. In the case of the 83rd Avenue property, that cost was projected to be \$10,000. We conclude that this was sufficient and that the city was not required to conduct a handicap-accessibility study prior to presenting a replacement dwelling to Fischbach.

The estate also contends that the 83rd Avenue property was not a comparable replacement dwelling because it lacked functional equivalency for two reasons: it was too far from Fischbach's primary caregivers and was located in a neighborhood with a higher crime rate.³ The ALJ found that the 83rd Avenue property was functionally equivalent to the displacement dwelling. A dwelling is functionally equivalent if it performs the same function, provides the same utility, and possesses the same primary features as the displacement dwelling. 49 C.F.R. § 24.2(a)(6)(ii). The regulations provide that, "[t]o the extent feasible, comparable replacement dwellings shall be selected from the neighborhood in which the displacement dwelling was located or, if that is not possible, in nearby or similar neighborhoods where housing costs are generally the same or higher." 49 C.F.R. § 24.403(a)(4) (2016). Here, while noting that the regulations are silent regarding a displaced person's distance from caregivers, the ALJ found that the city attempted to accommodate Fischbach's desire to be close to her son and daughter-in-law. The 83rd Avenue property was located 2.86 miles from them. The ALJ also noted that the regulations are silent with respect to crime rates.

³ Although the estate contends that the 83rd Avenue property was located in an area with a higher rate of crime, it provided no evidence substantiating its claim.

The regulations further provide that, “[g]enerally, functional equivalency is an objective standard, reflecting the range of purposes for which the various physical features of a dwelling may be used.” 49 C.F.R. § 24.2(a)(6)(ii). The ALJ determined that the 83rd Avenue property was similar to Fischbach’s displacement dwelling with regard to relevant features:

The Displacement Dwelling was built in 1950. It had approximately 1,400 square feet. The main floor had a kitchen, dining room, living room, two bedrooms, one bath, and an entry/mud room. There was an additional bedroom and storage area on the second floor. Ms. Fischbach used the basement for storage, although it also had two additional bedrooms and a second bathroom. The house at 5600 83rd Ave. North was built in 1969, had 2,088 finished square feet, and had been recently remodeled. The main floor had a kitchen, living room, dining room, three bedrooms, and two bathrooms. It had a finished basement with a fourth bedroom and additional bathroom. It had an attached two-car garage.

We conclude that the ALJ’s determination that the 83rd Avenue property was a comparable replacement dwelling is well-supported by the record and is not arbitrary or capricious.

The estate contends that the ALJ should have considered the cost of other comparable replacement dwellings in calculating the replacement housing payment. One such property was a house located on Setzler Parkway. The estate now contends that the parties reached an administrative settlement to use the cost of the Setzler Parkway property as the amount of a comparable replacement dwelling. The estate faults the ALJ for not addressing this settlement in its order, but this argument is being raised for the first time on appeal. We generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); see *Rouland v. Thorson*,

542 N.W.2d 681, 684 (Minn. App. 1996) (holding that we only consider issues that the ALJ considered and decided). Because this issue is not properly before us, we decline to consider it.

The regulations do not require consideration of the properties that the estate contends are comparable replacement dwellings. *See* 49 C.F.R. § 24.401(c)(1). The regulations provide that replacement housing costs are calculated by determining the lesser of the reasonable cost of a comparable replacement dwelling and the purchase price of the actual replacement dwelling. *Id.* Here, the ALJ determined \$179,000 to be the reasonable cost of a comparable replacement dwelling. Because the cost to acquire Fischbach's displacement dwelling site (\$285,616) was greater than the cost of a comparable replacement dwelling (\$179,000), we conclude that the ALJ properly exercised his discretion by determining that the estate is not entitled to a relocation housing payment. *See* 49 C.F.R. § 24.401(b)(1).

II.

The estate also asserts that the city failed to provide the necessary relocation assistance to Fischbach by failing to: (1) conduct an interview with her, (2) present her with information on comparable replacement dwellings, and (3) provide transportation to view the comparable replacement dwellings. The regulations require the city to provide relocation assistance advisory services. 49 C.F.R. § 24.205(c)(2)(ii) (2016). The ALJ did not find any support for the estate's assertions in the record. We agree.

In fact, representatives of the city did meet with Fischbach. D.W. talked with her on February 24, 2012, and they discussed Fischbach's physical limitations and expectations

for the replacement dwelling. One of D.W.'s coworkers met with Fischbach on April 23, 2012, to discuss Fischbach's concerns and requirements for the replacement dwelling. The record reflects that after Fischbach rejected the 83rd Avenue property, she advised her attorney that she did not want to have further meetings with the city. We conclude that substantial evidence in the record supports the ALJ's determination that the city conducted interviews with Fischbach.

The record also indicates that the city provided Fischbach with information on comparable replacement dwellings. Fischbach specifically contends that the city did not provide any information on houses identified through a March 2012 study. But the March 2012 study considered properties near Fischbach's daughter's home because D.W. understood, based on the February 24, 2012 meeting, that Fischbach's daughter was her primary caregiver. When D.W. subsequently learned in March 2012 that Fischbach's son and daughter-in-law served that role, he searched the area near their home. Consequently, there was no reason to present the findings of the March 2012 study. It is undisputed that, between June 19 and August 22, 2012, D.W. sent Fischbach information on 26 potential replacement dwellings in the area by her son and daughter-in-law. We conclude that the evidence does not support the estate's claim that the city failed to present Fischbach with adequate information on comparable replacement dwellings.

Finally, the record indicates that Fischbach did not visit any of the properties about which D.W. sent information. Because the estate failed to present any evidence that it incurred any costs related to Fischbach's transportation to view comparable replacement

dwellings, we conclude that substantial evidence supports the ALJ's denial of transportation costs to Fischbach.

Affirmed.