STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2336

David Maroney, et al., petitioners,
Appellants,

vs.

State of Minnesota by its
Commissioner of Transportation, Carol Molnau,
Respondent.

Filed November 25, 2008
Reversed and remanded
Schellhas, Judge

Goodhue County District Court
File No. 25-CV-06-1943

Steven J. Quam, Fredrikson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, MN 55402 (for appellants)

Lori Swanson, Attorney General, Erik M. Johnson, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

SCHELLHAS, Judge

In this inverse-condemnation action, appellants challenge the district court's grant of summary judgment to respondent, arguing that the action should proceed because (1) respondent has gone beyond mere planning of the closure of the subject property's access point to Highway 52, and (2) whether the replacement highway access will be reasonably suitable and convenient is a fact question not properly decided on summary judgment. We agree with the district court that respondent has not gone beyond mere planning of the closure of the existing highway access, and for that reason, we conclude that appellant's action is premature; therefore, the district court erred in adjudicating the action on the merits by granting summary judgment. Because we also conclude that whether the replacement highway access will be reasonably suitable and convenient is a fact question and not appropriately decided on summary judgment, we reverse and remand for dismissal without prejudice.

FACTS

Appellants David Maroney and Bruce Bullert own approximately 34.4 acres of undeveloped real property (the property) that abuts Trunk Highway 52 in Pine Island, Minnesota, and allege that respondent State of Minnesota, through its Commissioner of Transportation (Mn/DOT), has adopted a plan to close the property's current access point to Highway 52. In a 1999 letter, Nelrae Succio, Transportation District Engineer for Mn/DOT, informed appellants that the "existing [Highway 52] access *will be acquired* and closed in conjunction with the creation of a new access from County Road 11 to the

[subject property]." (Emphasis added.) In a 2004 letter, however, Commissioner Carol Molnau stated that the claim to direct highway access has been investigated and the property "currently has access to the frontage road to [Highway] 52 but not to the highway itself." Commissioner Molnau informed appellants that: (1) "[b]ased on cost estimates for the project, review of our right of way maps and proximity of other Class I rest areas, Mn/DOT will not consider the realignment of [Highway] 52 and rest area proposal any further"; (2) appellants would have continued access to the frontage road when improvements were made as part of the Highway 52 upgrade; (3) the "preferred alternative has gone before the public, been endorsed by the partners in this study, and has been officially mapped"; (4) "Mn/DOT will proceed with the plans for this corridor as have been discussed previously in many public forums and as adopted through local resolutions by the partners along [Highway] 52"; and (5) "it is in the best interests of Mn/DOT and the taxpayers of Minnesota to move forward as indicated in the [Highway] 52 Subarea Study and official maps."

Appellants allege that because the preferred alternative, if implemented, will change their property's Highway 52 access from direct access to a circuitous and inconvenient route approximately 1.6 miles from the property via a frontage road, they have been unable to market their property as commercial property and the closure of the highway access amounts to a taking without just compensation under the Minnesota Constitution and United States Constitution.[1] Mn/DOT argued to the district court that

[1] Appellants do not allege that the planning activities alone result in a taking. They allege that closure of the access point will constitute a taking.

the closure of access Highway 52 is still in the planning stages, notwithstanding Commissioner Molnau's statement in 2004 that appellants' alternative plan would be given no further consideration and that Mn/DOT would proceed with its plans for the preferred alternative. In support of its motion for summary judgment, Mn/DOT submitted an affidavit of Craig Hansen, a Mn/DOT right-of-way project manager. Hansen stated that "MnDOT has not allocated, encumbered, designated, or otherwise set aside any money for funding a project that would close the access opening" onto Highway 52. He further stated that "[a]lthough the preferred alternative for [Highway] 52, referenced by petitioners in their petition, illustrates a preferred development for [Highway] 52, MnDOT is not bound or required to implement it at any future date."

In July 2006, appellants commenced this inverse condemnation action asking the district court to compel Mn/DOT to commence a condemnation proceeding for the right of access between appellants' real property and Highway 52. The district court issued an alternative writ of mandamus that commanded Mn/DOT to commence a condemnation proceeding or answer appellants' petition. Mn/DOT filed an answer and moved for summary judgment on the bases that (1) mere planning without actual taking does not create an entitlement to compensation, (2) a change in the frontage road's access to Highway 52 would merely result in a more circuitous route which does not amount to a compensable loss of reasonably suitable and convenient access, and (3) Mn/DOT has already acquired all right to control direct access across the frontage road located between the property and Highway 52. The district court granted summary judgment to

Mn/DOT and dismissed appellants' petition with prejudice, ruling that (1) mere planning to perform a project does not involve a taking for which a landowner is entitled to compensation and (2) the change in access to a more circuitous route does not amount to a taking. This appeal follows.

D E C I S I O N

I.

On appeal from summary judgment, this 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).

The district court's ruling that Mn/DOT's actions amount to "mere planning" appears to be based on dicta found in *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 820 (Minn. 1984). In *Spaeth*, the supreme court stated that "[g]enerally, a landowner has no action against a government body for *mere plotting or planning*, without more, in anticipation of taking land." *Id.* (emphasis added); *see also Fitger Brewing Co. v. State*, 416 N.W.2d 200, 206 (Minn. App. 1987) (characterizing the "mere plotting or planning" rule from *Spaeth* as dicta), *review denied* (Minn. Feb. 23, 1988). In *Spaeth*, the supreme court stated that it would not address whether adoption of a plan amounted to a taking because the governmental entity "clearly went beyond the mere planning stage by implementing its storm drainage plan with respect to Spaeth's property." *Id.*

Appellants argue that cases in which the appellate courts have addressed whether the power of eminent domain has been abused by the planning of projects that never came to pass support a conclusion in this case that more than "mere plotting or planning"

has occurred. *See Johnson v. City of Minneapolis*, 667 N.W.2d 109, 116 (Minn. 2003) (concluding that a taking had occurred where a governmental entity abused the power of eminent domain by misleading property owners while planning for and then cancelling a project); *see also Fitger Brewing Co.*, 416 N.W.2d at 208 (concluding that no taking had occurred because no abuse of the power of eminent domain had occurred where the governmental entity warned that a planned project could be changed or abandoned). But *Johnson* and *Fitger* dealt with abuse of the power of eminent domain by planning and then cancelling projects. In this case, the district court's ruling addresses a different question—whether, under *Spaeth*, Mn/DOT has gone beyond the "mere plotting or planning" stage.

In *Spaeth*, the supreme court embraced a general rule adhered to by jurisdictions outside Minnesota that "[g]enerally, a landowner has no action against a government body for mere plotting or planning, without more, in anticipation of taking land." 344 N.W.2d at 820. This rule is consistent with the standard adhered to in Minnesota and elsewhere, that a taking certainly occurs "[w]here government action results in a permanent physical appropriation or occupation of property." *Id.* at 821. Similarly, the rule embraced in *Spaeth* is consistent with that in many other jurisdictions, that a taking or inverse condemnation claim cannot be brought until there is physical interference with the use of property or until a valuable property right is appropriated, extinguished, or affected.[2]

[2] *See Selby Realty Co. v. City of San Buenaventura*, 514 P.2d 111, 117 (Cal. 1973) ("In order to state a cause of action for inverse condemnation, there must be an invasion or an

Appellants allege a taking of the right of access but their access point remains open and Mn/DOT has given no indication when it will actually implement this plan to close the access point. While we agree with appellants that Mn/DOT's communications strongly suggest that Mn/DOT intends to proceed with its plans to close the highway access and has no intention of changing its plans, the record reveals no indication of when the plans will be implemented. Because nothing in the record demonstrates that the changes are being implemented or are scheduled for implementation, Mn/DOT remains in the "mere plotting or planning" stage. The district court therefore correctly concluded that the "designation of future changes to the [Highway] 52 corridor between Pine Island and Oronoco as a 'preferred alternative'" does not entitle appellants to compensation for a taking of any right of access connected to their property. The district court therefore did not err in its determination that "[m]ere planning by a governmental entity to perform a public project does not involve a taking for which a landowner is entitled to compensation." Because appellants' action is premature, the district court erred in adjudicating the action on the merits by summary judgment.

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appropriation of some valuable property right which the landowner possesses . . . ."); *Textron Inc. v. Wood*, 355 A.2d 307, 315 (Conn. 1974) (applying rule that "where no land is physically taken and no interest in it which the law recognizes is extinguished or affected in a manner detrimental to the owner" no takings claim will lie); *Sproul Homes of Nevada v. State ex rel. Dept. of Highways*, 611 P.2d 620, 621-22 (Nev. 1980) (applying *Selby Realty*); *City of Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895, 904 (N.Y. 1971) ("[T]he mere announcement of impending condemnations . . . does not, in the absence of other acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a taking so as to warrant awarding compensation."); *see also* J.R. Kemper, Annotation, *Plotting or Planning in Anticipation of Improvement as Taking or Damage of Property Affected*, 37 A.L.R.3d 127 (1971) (reporting cases applying the "mere plotting or planning" rule).

Adjudication on the merits in this case is inappropriate because it could affect appellants' ability to bring a suit in the future if Mn/DOT implemented its plans. *Burma v. Stransky*, 357 N.W.2d 82, 88-89 (Minn. 1984) (addressing adjudication on the merits and that dismissal without prejudice cannot be entered after summary judgment). We remand with directions to enter dismissal without prejudice. *See Dupay v. Krugers, Inc.*, 285 Minn. 523, 524, 172 N.W.2d 567, 568 (Minn. 1969) (remanding with directions to enter a dismissal without prejudice).[3]

II.

The district court also granted summary judgment on the basis that a taking does not occur as a result of a more circuitous access route. Both because appellants' action is premature and because the question of whether replacement access is reasonably convenient and suitable is a question of fact, the district court erred in granting summary judgment to Mn/DOT on this basis. *See French*, 460 N.W.2d at 4 (stating that on appeal from summary judgment a reviewing court determines whether there are genuine issues of material fact and if district court erred in its application of the law).

"It is well settled under Minnesota law that property owners have a right of 'reasonably convenient and suitable access' to a public street or highway which abuts their property." *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978); *see also Thomsen v. State by Head*, 284 Minn. 468, 471, 170 N.W.2d 575, 578 (1969) (holding that when the state alters an abutting property owner's access to a roadway,

[3] While an inverse condemnation claim is, at this point, premature, nothing in this opinion should be read to prevent the parties from pursuing other types of actions to resolve the ownership dispute.

there can be a taking even if no property is actually physically appropriated). But "[n]ot every denial of immediate or convenient access . . . will support a claim for damages unless the aggravation is to a degree" proscribed in *Hendrickson v. State*, 267 Minn. 436, 446, 127 N.W.2d 165, 173 (1964). A property owner suffers compensable damage for loss of access only when the owner is left without reasonably convenient and suitable access in at least one direction. *Grossman Invs. v. State*, 571 N.W.2d 47, 50 (Minn. App. 1997), *review denied* (Minn. Jan. 28, 1998). Appellants argue that the district court erred in granting summary judgment on the question of whether the more circuitous replacement highway access was a taking because the reasonableness and suitability of replacement access is a fact question and there is a genuine issue of material fact on this point. Mn/DOT does not argue that no genuine issue of material fact exists; it merely asserts that the question is a legal question and therefore reviewable de novo.

In *Hendrickson v. State*, the supreme court held it was error for the district court to grant summary judgment without a trial. The supreme court said, "[w]hat is reasonable ingress and egress is a fact question. If the jury decides that the location of the proposed interchange substantially impairs plaintiffs' right to reasonably convenient and suitable access to the main thoroughfare, plaintiffs are entitled to damages." 267 Minn. at 445-46, 127 N.W.2d at 172-73. Similarly, in *Johnson*, 263 N.W.2d at 607, the supreme court said, "[w]hat constitutes reasonable access must, of course, depend to some extent on the nature of the property under consideration" and that "[t]he existence of reasonable access is thus a question of fact to be determined in light of the circumstances peculiar to each case."

Mn/DOT relies on *Grossman* to argue that reasonable access is a question of law. But Mn/DOT's reliance on *Grossman* is misplaced. While the district court in *Grossman* did conclude that reasonably suitable and convenient access was provided to property and that there was no taking, it did so after a stipulated-facts trial, not on summary judgment. 571 N.W.2d at 49. In fact, in *Grossman*, this court explained that claims of governmental taking involve mixed questions of fact and law. *Id.* at 50. "While either party may request a jury trial on the issues of fact, the court ultimately decides whether the facts as determined constitute a taking." *Id.* We explained that "[t]he existence of 'reasonable access' depends on the unique circumstances of each case." *Id.* (citing *Johnson*, 263 N.W.2d at 607). Thus, while the ultimate determination of the reasonableness of replacement access may be made by the court as a matter of law, it can be made only after disputed facts are resolved by the district court. *Id.* As in *Hendrickson*, we conclude the district court erred by granting Mn/DOT summary judgment, and we reverse.

III.

Mn/DOT argues that summary judgment should be affirmed on both grounds reached by the district court and for two additional reasons: first, that Mn/DOT already owns all highway access rights[4] and, second, that the present highway access is not "direct." We will not affirm based on these arguments both because these issues were not

[4] While we do not reach this issue, we note that both parties argue that the maps submitted to the district court support their respective positions. Whether or not premature, the question of ownership of the access rights appears to involve disputed facts, which are best left to a factfinder for resolution.

reached by the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), and because the action is premature.

Reversed and remanded.