This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0267

Marshall Municipal Utilities, petitioner,
Respondent,

vs.

Donald J. DeLanghe, et al.,
Appellants.

Filed November 27, 2017
Affirmed
Reilly, Judge

Lyon County District Court
File No. 42-CV-13-269

Peter G. Mikhail, Elizabeth C. Brodeen-Kuo, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for respondent)

Court J. Anderson, Benjamin J. Hamborg, Henson & Efron, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Reyes, Judge.

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

REILLY, Judge

In this condemnation action, appellant-landowners argue that the district court clearly erred in assessing the fair market value of appellants' land and in rejecting appellants' damages claim. We affirm.

FACTS

Appellants Donald J. DeLanghe et al. are the owners of real property located south of the City of Marshall and used for family farming and cattle feeding. The property sits above two water aquifers, one of which is identified as the Marshall Aquifer. The Marshall Aquifer extends beyond the borders of appellants' property.

Respondent Marshal Municipal Utilities (MMU) is a governmental agency with condemnation authority whose purpose, in part, is to provide water utility services for Marshall residents. MMU owns ten high-capacity wells on properties accessing the Marshall Aquifer, including four well sites on appellants' property. MMU has a water appropriation permit from the Minnesota Department of Natural Resources (DNR) to withdraw water from the Marshall Aquifer at a rate not to exceed 4,020 gallons per minute, or 1,065 million gallons per year.

MMU and the City of Marshall have experienced difficulty locating a water source sufficient to supply water to satisfy public demand. In an effort to meet consumer demand and secure its ability to provide a high-quality water source to the public, MMU exercised its eminent-domain powers to take certain lands for public water utility purposes. MMU acquired 50-foot strips of land around eight of its ten wells, including the four wells on appellants' property. MMU filed a condemnation petition under Minnesota Statutes section 117.042 (2016) to acquire fee title to property surrounding the four existing well sites in order to obtain the statutorily required 50-foot buffer strips. Based upon a stipulation of the parties, the district court granted MMU's condemnation petition and immediately transferred fee title to the real estate to MMU, along with the right of

immediate possession. The district court found that, prior to the taking, appellants used the buffer strips for crop farming and that, both prior to and after the taking, new high-capacity wells could not be installed on the buffer strips. As part of the condemnation process, MMU obtained a property appraisal to determine the value of the condemned property. The appraiser determined that the fair market value of the property was $21,160, and MMU deposited funds with the county administrator. Appellants contested the fair market value of the property, and the district court reserved the issue of damages for further determination.

The district court appointed three commissioners to make a fair and impartial assessment of damages sustained by appellants by reason of the condemnation. Following an evidentiary hearing, the commissioners determined that the amount of damages sustained by appellants as a result of the taking was $250,000. MMU appealed the decision and requested trial de novo.

The district court held a trial de novo to determine damages. The crux of the dispute centered on the highest and best use of the property, before acquisition. The experts agreed that the highest and best use of the property, post-condemnation, was agricultural. The experts also came to similar conclusions regarding the range of values for agricultural land after the date of the taking, and concluded that the appropriate fair market value was between $10,500 and $11,500 per acre. However, the experts disagreed about the highest and best use of the property before acquisition: MMU's experts concluded that the highest and best use of the property before condemnation was agricultural, while appellants' expert

concluded that the highest and best use of the property was a combination of agricultural use and as potential sites to drill for high-capacity wells.

The district court found that the highest and best use of the property, both pre- and post-condemnation, was and is agricultural. The district court valued the land at $11,500 per acre, and found that the loss of value to the property as a result of the taking was $21,160. The district court ordered the county administrator to remit that sum of money to appellants upon entry of judgment. The parties filed cross-motions for amended findings. The district court denied appellants' motion in its entirety, but amended the order to correct certain errors identified by MMU.

This appeal follows.

DECISION

"Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. "A finding of fact is clearly erroneous if [the appellate court is] left with the definite and firm conviction that a mistake has been made." *In re Distrib. of Attorney's Fees*, 870 N.W.2d 755, 759 (Minn. 2015) (quotation omitted). "[W]hether the findings of fact support a district court's conclusions of law and judgment is a question of law, which we review de novo." *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003) (quotation omitted).

I. The district court did not clearly err in determining the highest and best use of the pre-condemned property.

a. Standard of review

The United States and Minnesota Constitutions provide that private property shall not be taken for public use without just compensation. U.S. Const. amend. V; Minn. Const. art. I, § 13. To determine the appropriate amount of just compensation for a partial taking, the Minnesota Supreme Court applies the following standard: "[T]he measure of damages is the difference between fair market value of the entire piece of property immediately before the taking and the fair market value of the remainder of the property after the taking." *City of Moorhead v. Red River Valley Coop. Power Ass'n*, 811 N.W.2d 151, 156 (Minn. App. 2012) (alteration in original) (quotation omitted), *aff'd*, 830 N.W.2d 32 (Minn. 2013). "To determine fair market value, any competent evidence may be considered if it legitimately bears upon the market value." *Id*. (quotation omitted). Appellants, as landowners, bear the burden of proof respecting damages. *Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 460, 277 N.W. 394, 403 (1937).

b. MMU is the only entity permitted to draw water from the Marshall Aquifer

Appellants argue that, prior to condemnation, the land could be used for agricultural purposes or for well-drilling purposes. The parties do not dispute that the land is suitable for agricultural purposes. However, appellants argue that there is a commercial market for well sites in the Marshall area from commercial enterprises that require large quantities of water for their operations. Appellants claim that these commercial entities are "public competitor[s] of MMU for the acquisition of well sites and water." Our highest-and-best-

use analysis therefore begins with a consideration of whether other potential purchasers could acquire a well permit from the DNR to drill water wells in the Marshall Aquifer.

Generally, "the state, a person, partnership, or association, private or public corporation, county, municipality, or other political subdivision of the state may not appropriate or use waters of the state without a water-use permit from the commissioner [of natural resources]." Minn. Stat. § 103G.271, subd. 1 (2016). Any water-use permit issued under section 103G.271, must be "consistent with state, regional, and local water and related land resources management plans." *Id.*, subd. 2. The statute requires a water-use permit for wells withdrawing more than 10,000 gallons of water per day. *Id.*, subd. 4. Minnesota established water-allocation priorities, directing the commissioner to adopt rules for allocating waters based on the following priorities "for the consumptive appropriation and use of water:"

> (1) first priority, domestic water supply, excluding industrial and commercial uses of municipal water supply, and use for power production . . . ;
> (2) second priority, a use of water that involves consumption of less than 10,000 gallons of water per day;
> (3) third priority, agricultural irrigation, and processing of agricultural products involving consumption in excess of 10,000 gallons per day;
> (4) fourth priority, power production in excess of the use provided for in the contingency plan . . . ;
> (5) fifth priority, uses, other than agricultural irrigation, processing of agricultural products, and power production, involving consumption in excess of 10,000 gallons per day; and
> (6) sixth priority, nonessential uses.

Minn. Stat. § 103G.261(a) (2016).

In this case, MMU is a first priority domestic water supplier and has a water appropriation permit to withdraw up to 4,020 gallons per minute from the Marshall Aquifer. Further, MMU is the only entity with a DNR permit to draw high-capacity lines from this aquifer.

c. Highest-and-best-use analysis

Appellants challenge the district court's determination that the highest and best use of the pre-condemned property was agricultural. "The highest and best use of a property is the one that is physically possible, legally permissible, financially feasible, and maximally productive." *Menard, Inc. v. County of Clay*, 886 N.W.2d 804, 811 (Minn. 2016) (citing *County of Aitkin v. Blandin Paper Co.*, 883 N.W.2d 803, 810 (Minn. 2016)). "Property is appraised at its highest and best use, which is the most profitable, competitive use to which the subject property can be put." *Macy's Retail Holdings, Inc. v. County of Hennepin*, 899 N.W.2d 451, 453 n.1 (Minn. 2017) (quotation omitted).

The parties' experts disagreed as to the highest and best use of the property before it was condemned. Prior to the taking, appellants used the condemned land for crop farming. MMU solicited opinions from two experts, both of whom concluded that the highest and best use of the property before condemnation was agricultural. MMU offered expert testimony from a real estate appraiser, who testified that "the highest and best use was for agriculture," and that "none of the other potential uses had a legal permissibility or a financial[ly] feasible use." MMU's second expert also performed an appraisal and concluded that the highest and best use of the land was agricultural.

Appellants' expert disagreed, opining that the "highest and best use of the [property] is for a combination of agricultural use and as potential well sites." Appellants argue that if MMU had not acquired buffer strips around eight of its ten wells, it would have "eventually lost the ability to operate wells on those sites," leaving water available for appellants or for private purchasers. Therefore, appellants claim that the pre-condemned land "had the economic potential to be sold as well sites to private purchasers" because MMU could not sustain the wells in their present condition indefinitely. The district court rejected appellants' argument, finding that:

> a. Such a use was not legally permissible. No third party had or was in the process of obtaining a DNR permit to access the Marshall Aquifer.
>
> b. There is no reasonable likelihood that such a permit would be granted due to the depleted nature of the Marshall Aquifer, MMU's withdrawals from the Marshall Aquifer . . . , the continuing need for water from MMU by the public, and the prioritization of access to water for public use.
>
> c. [Even assuming a theoretical possibility of future drilling], the financial feasibility of such a use is extremely limited, if not absent altogether.
>
> d. There was no evidence of a prospective purchaser who would have been interested in purchasing a portion of the [property] for the purpose of drilling a high capacity well (a) when and if MMU's wells accessing the Marshall Aquifer ceased withdrawing their permitted amount and (b) with the uncertainty (indeed, unlikelihood) that the DNR would issue a permit to the prospective purchaser. . . .
>
> e. It is not reasonably probable that it would be legally permissible or financially feasible for [appellants] to have used the [property] for high capacity well sites prior to the taking.

The district court did not credit the testimony of appellants' expert; it found the testimony presented by MMU more persuasive. The weight and credibility given to an appraiser's expert valuation is an issue for the district court to determine. *DeSutter v. Township of Helena*, 489 N.W.2d 236, 240 (Minn. App. 1992), *review denied* (Minn. Sept. 30, 1992). The district court discredited appellants' expert's testimony, finding that the expert's testimony regarding the pre-condemnation value of appellants' land was "flawed" and "not credible."

For example, appellants' expert testified that it was both physically possible for appellants to drill for water in the Marshall Aquifer and legally permissible for them to acquire a permit to drill. MMU's expert disagreed and testified that "none of the other potential uses had a legal permissibility or a financial[ly] feasible use." MMU's expert's testimony was informed in part by a technical memorandum, which stated that:

> Potential use of the 50 foot buffer strips for construction of wells and new water appropriation by MMU would not comply with [Minnesota Department of Health] regulations. Potential use of the 50 foot buffer strips for construction of wells and new water appropriation by any other entity would be practically impossible based on limited ability of the aquifer to supply additional volumes of water in addition to DNR permitting requirements.

Appellants' expert conceded that he had not reviewed this report before trial and did not incorporate its findings into his highest-and-best-use analysis. The report—including the finding that new wells could not be drilled on the property pre-condemnation—was undisputed. At trial, the author of the technical memorandum reiterated that the buffer strips did not give MMU "any additional rights to take any more water." The witness

testified that given "the proximity to a public supply well and the hierarchy of water use . . . it's just not available for anyone else to . . . put a well on either." Appellants did not present evidence countering the testimony that it was not legally permissible to construct new wells on the site. *See Menard, Inc.*, 886 N.W.2d at 811 (requiring legal permissibility of use).

It is further uncontested that the water in the aquifer is owned by the state, which establishes water-level thresholds for an aquifer to serve the purpose of protecting the aquifer from over pumping. A highest-and-best-use analysis requires a showing that the use is legally permissible. *Id.* Appellants' expert testified that it would be legally permissible for appellants to "obtain a permit" for water from the Marshall Aquifer, or to sell a high-capacity well to someone else. But during cross-examination, MMU's attorney inquired: "[O]n the date of the taking, no one else had the legal right to drill well sites into that aquifer. Isn't that true?" Appellants' expert responded: "That is true." MMU's expert testified that "it does not appear that [MMU] could get a permit for additional well or any other entity . . . would be granted a permit," and therefore the legal-permissibility test is not satisfied. The district court weighed the testimony regarding the legal permissibility of the use and found that:

> On the date of the taking, [appellants] could not sell a portion of the [property] to a third party [to drill wells] because no third party had a permit to do so. [And even though it was highly unlikely that the DNR would issue new permits, the expert] testified that his appraisal was based upon the premise that, prior to the taking, [appellants] could have sold high capacity well rights for immediate operation.

Appellants' expert agreed that his analysis on the legal-permissibility prong rested on his understanding that the public does not have priority on municipal water supplies over other users. The expert acknowledged that if that assumption was incorrect, his legal-permissibility conclusion could be invalid. Minnesota prioritizes water use, and the "number one priority is . . . public water supply for domestic consumption." Minn. Stat. § 103G.261(a)(1) ("The commissioner shall adopt rules for allocation of waters based on the following priorities for the consumptive appropriation and use of water: (1) first priority, domestic water supply. . . ."). In its factual findings, the district court found that appellants' expert's testimony was not credible because he "testified that he believed that [the] public water supply did not have priority over other uses for a DNR permit and, that if this belief was incorrect, his conclusions may be invalid. [But] public water supply has priority over all other uses."

Ample evidence in the record supports the district court's factual findings that MMU has the only DNR permit for a well on the site and that no third party was in the process of obtaining a permit to access the Marshall Aquifer to draw additional supplies of water, that MMU and the City of Marshall have experienced difficulty locating a water source sufficient to supply water to meet the public's needs, that there is a continuing need for water from MMU to supply the public, and that the public has priority on the water supply over other users. The record supports the conclusion that the highest and best use of the pre-condemned land was agricultural. On this record, we determine that the district court did not clearly err in determining that the highest and best use of the property, prior to condemnation, was agricultural.

d. We decline to extend the project-influence rule to the facts of this case

Appellants argue that MMU's acquisition of buffer strips around its well sites was part of an overall project to secure water sources and the district court erred by failing to apply the project influence rule. The project-influence rule articulates that an "enhancement in value caused by a proposed or constructed governmental improvement is not to be included in determining the fair market value of the land to be taken for the improvement." *State by Head v. Anderson*, 293 Minn. 458-59, 197 N.W.2d 237, 240 (1972); *see also Hous. & Redevelopment Auth. v. Minneapolis Metro. Co*., 273 Minn. 256, 260, 141 N.W.2d 130, 135 (1966) ("[A]ny increase or decrease in market value due to the proposed improvement may not be considered in determining market value.").

Minnesota courts have generally applied this rule where the success of an overall project was contingent upon the challenged taking. *See, e.g.*, *Regents of the Univ. of Minn. v. Hibbing*, 302 Minn. 481, 483-86, 225 N.W.2d 810, 811-13 (1975) (considering application of rule when condemnor previously acquired five other properties on same block as condemned property for university expansion); *Anderson*, 293 Minn. at 460, 197 N.W.2d at 241 (determining that condemned property due to street extension was within scope of original condemnations arising from highway-interchange project). But evidence is inadmissible under the project-influence rule when the evidence serves "no useful purpose" and has "no bearing on, or relevancy to, the only issue for trial"—a determination of the fair market value of a landowners' property. *Hibbing*, 302 Minn. at 484-85, 225 N.W.2d at 812.

Moreover, *Hibbing* is factually distinguishable. In that case, the landowner's property was within the boundaries of the university's expansion project, and the university's ability to expand rested on its acquisition of the landowner's property. 302 Minn. at 483, 486, 225 N.W.2d at 811, 813. Here, the court found that while each buffer-strip acquisition was part of MMU's larger goal to ensure consistent and reliable water access to the community, this goal would not fail if a particular buffer strip could not be acquired.[1] These facts make this case distinguishable from *Hibbing*.

Further, the district court determined that, as of the date of the taking, appellants "could not sell a portion of the [property] to a third party [to drill wells] because no third party had a permit to do so." Because appellants lack a reasonable possibility of obtaining well permits in the future, evidence that the MMU acquired buffer strips around several wells as part of an overall "project" has limited bearing on the main issue presented at trial—the fair market value of the land as of the date of the taking. *See Minneapolis Metro. Co.*, 273 Minn. at 260-61, 141 N.W.2d at 135 (noting that just compensation is based on

[1] MMU performs regular maintenance on the wells, but eventually all wells become unusable and need to be modified or redrilled. In order to redrill one of its wells in the future, MMU must comply with the Minnesota Department of Health's (MDH) permitting process. MDH requires a 50-foot buffer around public water-supply wells. *See* Minn. Stat. § 103I.205, subd. 6 (2016) (stating that a person or entity may not "place, construct, or install an actual or potential source of contamination any closer to a well than the isolation distances prescribed by the commissioner [of health] by rule"); Minn. R. 4725.4450, subp. 1(E) (establishing 50-foot contamination buffer zone for water-supply well), .5850, subp. 3 ("A well for a community public water system must be located according to the distances specified in part[] . . . 4725.4450, but in no case less than 50 feet from a source of contamination . . . .") (2015).

market value as of taking date and "any increase or decrease in market value due to [a] proposed improvement may not be considered in determining market value").

Neither *Hibbing* nor *Anderson* compels a conclusion that the project-influence rule should be expanded to the extent urged by appellants, and it is not the role of this court to alter or modify existing law. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (setting forth principle that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"), *review denied* (Minn. Dec. 18, 1987).

II. The district court did not err in rejecting appellants' damages claim.

Appellants argue that the district court erred by rejecting appellants' damages claim, as presented by their expert. We review the district court's findings of fact for clear error and defer to the district court's credibility determinations. Minn. R. Civ. P. 52.01. "The decision of a district court should not be reversed merely because the appellate court views the evidence differently. Rather, the findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole" to merit reversal. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999) (quotation and citation omitted).

The estimate of damages varied greatly, with the MMU's expert testifying that the amount of damages was approximately $11,500 per acre and appellants' expert testifying that the amount of damages was $484,000, which he later adjusted downward to $386,763. The district court did not find appellants' expert credible, finding that he testified to "substantially different opinions as to damages," and "relied heavily, if not exclusively, on

a single lease agreement between [a neighboring property-owner] and [a commercial well-driller]," which had "inherently limited reliability." We decline to reweigh the district court's credibility determinations. Minn. R. Civ. P. 52.01. A review of the record, as a whole, reveals that the district court's factual findings and credibility determinations were based on reasonable and substantial evidence, and we will not disturb the district court's factual findings or credibility determinations where there is reasonable evidence in the record to support them. *Rogers*, 603 N.W.2d at 656.

Affirmed.