This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0314

William B. Wood, et al.,
Appellants,

vs.

County of Blue Earth,
Respondent,

Mesenbrink Construction, et al.,
Respondents Below.

Filed November 28, 2022
Affirmed
Frisch, Judge

Blue Earth County District Court
File No. 07-CV-20-3532

Gary A. Van Cleve, Timothy A. Rye, Bryan J. Huntington, Larkin Hoffman Daly & Lindgren, Ltd., Minneapolis, Minnesota (for appellants)

Thomas J. Radio, Felhaber Larson, Minneapolis, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent county)

Considered and decided by Ross, Presiding Judge; Frisch, Judge; and Cleary, Judge.[*]

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

In this condemnation appeal, appellants argue that the district court abused its discretion by excluding evidence regarding appellants' access to a newly constructed controlled-access highway and evidence using the development cost approach. Because the district court did not abuse its discretion in these evidentiary rulings, we affirm.

FACTS

Respondent County of Blue Earth filed a condemnation petition seeking to take portions of land owned by appellants William B. Wood, Elise C. Wood, and Telemark Properties, LLC for the purposes of extending county-state-aid highway 12 (CSAH 12). At the time, appellants' property was comprised of two adjacent, rectangular parcels forming an L-shape. The petition provided for the division of appellants' property into five parcels, and CSAH 12, designated as a controlled-access highway at most points along appellants' property, would run through or adjacent to appellants' parcels.

The district court held a hearing on the petition, which appellants did not attend. After the hearing, the district court granted the petition, ordered that title would transfer on January 17, 2017, unless the parties otherwise agreed, and ordered the appointment of commissioners for the purpose of awarding damages to appellants associated with the taking.

The commissioners awarded appellants $1,081,500 in damages for the taking of their property. Appellants appealed the damages award to the district court.

The parties filed cross-motions in limine regarding the admission of evidence related to appellants' access to CSAH 12. Appellants sought to preclude the county from introducing evidence, argument, or suggestion that (1) after the taking, certain parcels had access to CSAH 12, and (2) the jury may not consider appellants' loss of access to CSAH 12 as an element of just compensation. The county sought to preclude appellants from introducing evidence, argument, or suggestion that (1) after the taking, certain parcels did not have access to CSAH 12, and (2) the jury may consider appellants' loss of access to CSAH 12 as an element of just compensation. The district court granted the county's motion in limine and denied appellants' motion in limine.

The county later moved to exclude evidence of the valuation of the property based on the development cost approach that appellants intended to offer.[1] The district court granted the county's motion.

In light of these rulings, appellants elected to stipulate to a judgment in the amount of the commissioners' damages award of $1,081,500 to preserve their right to appeal the evidentiary rulings. The district court ordered judgment based on the stipulation, and the judgment was entered.

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[1] The development cost approach uses "cash flow analysis," which is also known as "subdivision development analysis." *Ramsey County v. Miller*, 316 N.W.2d 917, 920 (Minn. 1982); Appraisal Inst., *The Appraisal of Real Estate* 340 tbl. 19.1 (15th ed. 2020) (hereinafter *The Appraisal of Real Estate*). The development cost approach is a land valuation method where "[d]irect and indirect costs and entrepreneurial incentive are deducted from an estimate of the anticipated gross sales price of the finished lots or units, and the net sales proceeds are discounted to present value at a market-derived rate over the development and absorption period." *The Appraisal of Real Estate*, *supra*, 340 tbl. 19.1 (referring to subdivision development analysis).

This appeal follows.

DECISION

Appellants argue that the district court abused its discretion by excluding evidence regarding their claimed loss of access to the newly constructed CSAH 12 and by precluding evidence using the development cost approach. We address each argument in turn.

We review the evidentiary rulings of the district court for an abuse of discretion. *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015). A district court abuses its discretion if its findings of fact are unsupported by the record, if it improperly applies the law, or if it resolves the question in a manner that is contrary to logic and the facts on record. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n.3 (Minn. 1997).

I. The district court did not abuse its discretion by excluding access evidence.

Appellants argue that the district court abused its discretion by effectively excluding any evidence of appellants' claimed loss of access to CSAH 12. Appellants claim that, because they had a statutory right of access to CSAH 12 as abutting owners and the taking for the construction of a controlled-access highway deprived appellants of that statutory right of access, the district court necessarily abused its discretion by excluding evidence of appellants' lack of access to CSAH 12.

The petition did not seek to take appellants' right of access, and appellants did not object to the petition before the district court appointed commissioners to determine damages. Appellants did not preserve their objection related to access to CSAH 12, depriving the district court of jurisdiction to consider this issue. "If a property owner believes the right of access is impeded the owner *must* object to the petition before the trial

court submits the damage question to the commissioners." *State by Comm'r of Transp. v. Elbert*, 942 N.W.2d 182, 191 (Minn. 2020) (emphasis added) (quotation omitted). If there is no objection to the taking before the question of damages is submitted to the commissioners, the district court's jurisdiction on appeal is limited to the question of damages. *Id.*

The record on appeal does not reflect that appellants objected to the petition before the trial court submitted the damage question to the commissioners. The record on appeal shows that appellants did not appear at the hearing on the condemnation petition. Given the mandatory directive as set forth by the supreme court in *Elbert*, the district court was deprived of jurisdiction to consider appellants' access-related objection.

To escape this jurisdictional bar, appellants now argue that their objection to the district court's ruling on access evidence relates not to the petition but only to the award of damages from the taking and that the county agrees that the taking included appellants' access rights because the condemnation petition designated most of the portion of CSAH 12 that would abut appellants' property as a controlled-access highway. We disagree.

First, we see no principled basis to separate the scope of the taking from appellants' damages claim. There is no distinction between appellants' unstated objection to the alleged deprivation of highway access caused by the taking identified in the petition and their argument that they were undercompensated for the taking because the damages award did not consider or include access limitations. Indeed, the foundation of this action is appellants' argument that the scope of the county's taking deprived appellants of their right

of access to CSAH 12, and appellants seek damages from the county related to the claimed loss of access. Stated differently, appellants' access-damages theory is necessarily premised on a taking of access. Appellants' damages claim for loss of access depends on whether a compensable taking of appellants' access rights occurred. *See Johnson v. City of Plymouth*, 263 N.W.2d 603, 605-07 (Minn. 1978) (reasoning that whether an abutting property owner was deprived of reasonable access is dependent on whether the government unduly restricted vehicular access to the property).

Second, we decline to assume that a taking to facilitate the construction of a controlled-access highway *always* amounts to a taking of an abutting owner's access rights. *See* Minn. Stat. § 160.18, subd. 2 (2020) (granting abutting owners a qualified right to a reasonable means of access to a newly constructed highway).[2] We can conceive of a circumstance, for example, where access to a newly constructed highway or extension of a highway may exist notwithstanding a taking of property. It is the appellants' burden to demonstrate an unconstitutional taking. *Elbert*, 942 N.W.2d at 191. To that end, the county did not concede that it deprived appellants of a right of access to the highway and argues that it did not do so. Regardless of whether appellants disagree with that position on appeal, appellants were obligated to raise that issue as part of an objection to the petition and before the commissioners awarded damages. Instead of raising an objection, appellants did not

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[2] We cite the most recent version of Minn. Stat. § 160.18 because it has not been amended in relevant part. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, "appellate courts apply the law as it exists at the time they rule on a case").

appear at the hearing on the petition and waited to lodge any objection until after the commissioners awarded damages. That procedure is not permitted under *Elbert*.

Because appellants did not object to the taking of access before the commissioners were tasked with awarding damages, the district court did not have jurisdiction to consider whether the scope of the taking included loss of access for determining just compensation. We see no abuse of discretion by the district court in denying appellants' motion in limine and granting the county's motion in limine on the issue of appellants' access to CSAH 12.

II. The district court did not abuse its discretion by excluding valuation evidence based on the development cost approach.

Appellants argue that the district court abused its discretion in excluding evidence to calculate damages based on the development cost approach. Specifically, appellants argue that the district court misapplied the law by requiring proof that (1) other methods of valuation were wholly unreliable and (2) development was imminent. We address each argument in turn.

A. The district court did not abuse its discretion by determining that appellants failed to meet the fundamental requirement to introduce development-cost-approach evidence.

Appellants argue that the district court abused its discretion by excluding their valuation evidence based on a development cost approach in the absence of evidence that other methods of valuation were "wholly unreliable." Appellants specifically contend that the district court misapplied the law because no such fundamental admissibility requirement exists in condemnation cases and, even if such a requirement exists, the test for admissibility is whether other valuation methods were "not wholly reliable."

Appellants further contend that they in fact satisfied the requirement to show that other methods of valuation were not wholly reliable. We are not persuaded.

First, the district court properly applied the law by enforcing the fundamental evidentiary requirement for admission of development-cost-approach evidence. A party proffering such evidence must show that other methods of valuation are not wholly reliable. *Hansen v. County of Hennepin*, 527 N.W.2d 89, 94 (Minn. 1995). This fundamental admissibility requirement exists because the development cost approach is "complex" and "susceptible to manipulation," and "therefore, it should be employed judiciously, when other traditional methods for valuing property are not wholly reliable and only after proper foundation has been laid." *Id.* We read *Hansen* as a directive to trial courts that a party seeking to introduce evidence of the development cost approach must make the threshold showing that other methods for valuing property are not wholly reliable.

We are unpersuaded by appellants' assertion that the rule in *Hansen* is limited to tax-assessment cases. The concerns expressed in *Hansen* about the reliability of this valuation approach are not dependent upon the type of case in which the approach may be used.[3] The use of the development cost approach to value property occurs in both tax-assessment and condemnation cases, among other possible contexts. *See Buzick v. City of Blaine*, 505 N.W.2d 51, 54 (Minn. 1993) (reasoning in a tax-assessment case that foundational requirements for the admission of development-cost-approach evidence that

[3] We note that in *Hansen*, a tax-assessment case, the supreme court applied foundational evidentiary requirements for admission of development-cost-approach evidence that originated in *Miller*, 316 N.W.2d at 922, a condemnation case. *Id*. at 93-94.

apply in condemnation cases should also apply in tax cases because, in both types of proceedings, foundational requirements prevent the admission of highly speculative evidence with limited probative value). We see no basis to restrict the fundamental admissibility requirement set forth in *Hansen* to a particular class of cases and discern no abuse of discretion by the district court in enforcing the *Hansen* requirement.

Second, the district court did not abuse its discretion in its application of the "not wholly reliable" requirement. Appellants point to the *county's repeated use* and the *district court's singular use* of the phrase "wholly unreliable" as opposed to the phrase "not wholly reliable" in arguing that the district court misapplied the test. But our review of the entire district court order makes clear that it in fact applied the correct standard, "not wholly reliable," throughout its opinion and as the basis for its evidentiary ruling. We are not persuaded that the district court misapplied the law.

Third, the district court did not abuse its discretion by determining that appellant failed to show that other methods of valuation were not wholly reliable. The district court pointed to the fact that appraisers for both parties used the sales comparison method in their valuation analyses.[4] The record reflects that appraisers employed the sales comparison method to estimate the value of the property. One of the county's appraisal experts used the sales comparison method and declined to use the development cost approach to value the property before and after the taking because the expert viewed the property as not ready

[4] The sales comparison method is a method of land valuation where "[s]ales of similar, vacant parcels are analyzed, compared, and adjusted to provide a value indication for the land being appraised." *The Appraisal of Real Estate*, *supra*, 340 tbl. 19.1. It is the preferred method of valuing land when comparisons are available. *Id.*

for development in either condition. Appellants' earlier appraisal expert, who prepared an appraisal before appellants appealed the commissioner's damages award to the district court, used the sales comparison method to create a valuation of the property before and after the taking, despite determining that the property was ready for development before the taking. They wrote that there was "adequate data to develop a value estimate" using the sales comparison method and that it "reflects the market behavior for this property type." Appellants' later appraisal expert, who would have testified about the development cost approach, also used the sales comparison method to confirm the valuation they arrived at using the development cost approach.

Appellants argue that, although their later appraisal expert used the sales comparison method to confirm their development cost analysis, the later appraisal expert's explanation as to why they used the development cost approach shows that the sales comparison method was not wholly reliable. In their report, the later appraisal expert asserted that the development cost approach was most applicable, looked to it as the primary method for valuation, and weighed the development cost analysis more heavily. They cautioned that the utility of the sales comparison method was limited because of the complexity of residential development, the changes that occurred before and after condemnation, and the unique characteristics of the property. But the later appraisal expert still turned to the sales comparison method to confirm their development cost analysis, signifying the expert's belief that this valuation method was reliable enough to use in some capacity, or, stated differently, that other methods were not "not wholly reliable."

Appellants point to the fact that the county's expert appraiser made adjustments in their sales comparison analysis to argue that the district court abused its discretion in its conclusion that other valuation methods were sufficiently reliable. In *Hansen*, the tax court reasoned that the use of the development cost approach would be helpful in determining market value because the appraisers had to make "major adjustments" to the sale prices of comparable properties. 527 N.W.2d at 92-93. But the fact that adjustments were made to the sale prices of comparable properties merely supported the use of the development cost approach there. *See id.* at 93-94 (holding that development-cost-approach evidence is available to value property in tax-assessment cases and affirming the tax court's decision to admit such evidence). We do not read *Hansen* to compel a conclusion that an expert's adjustment to a sales comparison analysis renders the analysis not wholly reliable. We therefore see no abuse of discretion by the district court in its conclusion that such adjustments did not materially diminish the reliability of the use of the sales comparison method.

Because the district court properly applied the "not wholly reliable" test in excluding development-cost-approach evidence and the record supports the conclusion of the district court, we see no abuse of discretion in the exclusion of development-cost-approach evidence.

B. The district court did not abuse its discretion by determining that development was too remote.

Even if the district court abused its discretion with respect to its conclusion that other valuation methods were sufficiently reliable, we conclude that the development-cost-

approach evidence did not meet foundational reliability requirements because appellants failed to show that development was not too remote.

Appellants argue that the district court abused its discretion by determining that they failed to establish a proper foundation for their development-cost-approach evidence because development was not "imminent" following the taking. Appellants also assert that it was an abuse of discretion for the district court to make this evidentiary ruling before hearing live testimony. We see no abuse of discretion by the district court.

In addition to the fundamental evidentiary requirement that other methods of valuation are not wholly reliable, a party seeking to introduce development-cost-approach evidence must show that "(a) the land is ripe for development; (b) the owner can reasonably expect to secure the necessary zoning and other permits required for the development to take place; and (c) the development will not take place at too remote a time." *Miller*, 316 N.W.2d at 922 (*Miller* test). We have previously interpreted the third prong of the *Miller* test—that development is not too remote—to require a showing that development is imminent. *Port Auth. of City of St. Paul v. Englund*, 464 N.W.2d 745, 749 (Minn. App. 1991).

We read the entirety of the district court's order as concluding that appellants failed to meet the third prong of the *Miller* test because development was not imminent *and* because development was too remote. We specifically note that in its reasoning, the district court pointed out that appellants' expert described development of the property after the taking as "not imminent" *and* that "other evidence in the record that development of the subject property would likely not occur for at least five-plus years." These separate

findings by the district court support its conclusion that the proffered evidence did not meet the third prong of the *Miller* test.

Appellants contend that the district court abused its discretion by ruling on this issue without first hearing live testimony.[5] The district court was not obligated to hold a hearing before making this ruling because the development-cost-approach method is not new, and the district court evaluated foundational reliability using the *Miller* test. *Cf. State v. Garland*, 942 N.W.2d 732, 747 (Minn. 2020) (holding that a hearing on the reliability of a scientific technique is not necessary when the technique is not new, and the district court considers relevant foundational reliability factors under the rules of evidence).[6]

The record supports the district court's conclusion that development was too remote. One of the county's appraisal experts noted that the property was zoned for agricultural use and was located outside of the City of Mankato but had the potential for development. In analyzing the financial feasibility and maximum profitability of the property, they reasoned that before development could occur, the property would need to be annexed into Mankato, Mankato would have to approve of the development plans, and infrastructure improvements would be required. They estimated that as of January 2017, development

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[5] Appellants do not argue on appeal that the district court abused its discretion by failing to conduct such a hearing with respect to the fundamental evidentiary requirement set forth in *Hansen*.

[6] We question appellants' characterization that they were deprived of the opportunity to present live testimony. Appellants argued that the district court did not need to conduct a hearing outside of the presence of the jury because the jury would hear relevant foundational testimony at trial. And, rather than making an offer of proof as to the substance of the proffered testimony, appellants elected to stipulate to the judgment of the commissioners for purposes of appeal rather than proceeding to trial.

was years away. Moreover, as the district court noted, the county's appraisal review expert estimated that development would not occur for at least five or more years. Thus, multiple expert opinions supported the conclusion that development was too remote.

Ultimately, because the district court did not misapply the law and its conclusions are supported by the record, we see no abuse of discretion in its determination that development of the property was too remote. And because appellants could not satisfy the *Miller* test, the district court did not abuse its discretion by granting the county's motion to exclude appellants' development-cost-approach evidence.

Affirmed.