STATE OF MINNESOTA
IN COURT OF APPEALS
A09-230

James P. Nelson, et al.,
Appellants,

vs.

City of Birchwood,
Respondent,

White Bear Lake Conservation District,
Respondent.

Filed October 27, 2009
Affirmed
Ross, Judge

Washington County District Court
File No. 82-C5-07-006481

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Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

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

ROSS, Judge

This dispute requires us to decide whether the City of Birchwood has the authority to regulate the location of docks on a two-lot lakeshore parcel that serves the public as a park. To do so, we must also decide whether the city's regulatory authority supersedes the alleged riparian rights of easement holders who possess a "right of way" over one of the lots "for the purposes of boating and bathing." After an advisory committee to the White Bear Lake Conservation District informed appellant James Nelson that the district would likely reject his application to install a dock on that lot, he and other easement holders brought this action against the district and City of Birchwood, seeking damages and a declaration that the easement entitles them to install the dock in the city park for their use. They brought their suit seeking to quiet title, but they also founded their claims on federal constitutional theory, asserting that the city and district violated their rights to due process and equal protection. Based on its conclusion that the city's statutory authority to regulate docks supersedes the appellants' alleged deed-based riparian rights to install a dock, the district court granted summary judgment to the city. The district court's assessment is sound, and we affirm.

FACTS

The dispute centers on a small lakeshore park in Birchwood. Appellants own non-lakeshore property near Birch Beach Park, controlled and maintained by the city. The park covers about half an acre with 125 feet of shoreline. It consists of two separate platted lots. The southeastern segment is a rectangular lot with 50 feet of shoreline, and

the northwestern segment is a triangular lot with 75 feet of shoreline. The rectangular lot was originally platted to be a street, but it was never developed as such and was conveyed to the city. The Birch Beach Dock Association maintains a 10-boat dock on the southeastern lot under a permit issued by the White Bear Lake Conservation District. The triangular lot has no dock, and the governmental prohibition of a dock on the triangular lot is the flashpoint of this controversy.

Original Conveyances

The appellants received their various lots in a line of succession that started when the original joint owners divided and then conveyed the land, beginning in 1907. In 1906, Nellie M. McMurran, William T. McMurran, Elizabeth Lockwood,[1] Louis Lockwood, Cora A. Taylor, and Charles H. Taylor (the grantors) owned much of the property involved in this dispute. The grantors platted it as Lakewood Park First Division and Lakewood Park Second Division.

In deeds executed and recorded in 1907, the grantors transferred 38 lots in Lakewood Park First Division, none on the lakeshore. The deeds contains the following grant: "Also a 'Right of Way' (in common with other persons to whom similar rights may be granted) over [the triangular parcel]. Said 'Right of Way' being granted for the purposes of boating and bathing." The property transferred in these deeds included the lots that would eventually be owned by appellants James Nelson and Margaret Kronschnabel, Eugene and Shirley Ruehle, James Simning, Joseph Choulock, Jean and

[1] The 1906 plats indicate that Louis Lockwood was unmarried when the property was surveyed and platted, but conveyances recorded in December 1906 and thereafter indicate that Louis Lockwood was married to Elizabeth Lockwood.

Susan Kodadek, Beverly Rod, Lewis Schnellman, Donna Divine Johnson, Jennifer Vannelli, and Bart and Carol Crockett.

In deeds recorded in 1908, the grantors transferred two lots in Lakewood Park Second Division, also not on the lakeshore. The deeds contain the same grant: "Also a 'Right of Way' (in common with other persons to whom similar rights may be granted) over [the triangular parcel], said 'right of way' being granted for the purpose of giving said grantee access to the shore of White Bear Lake for the purposes of boating and bathing." The property transferred in these deeds included the lots that would eventually be owned by appellants Peter and Michelle Atakpu, Lori Carter and Richard Wigg, and Don Hunt. Appellant Wayne Dressler's property is an abandoned parcel that was formerly occupied by the Minneapolis & St. Paul Suburban Railway Company.

In total, from 1907 to 1910, the grantors conveyed at least 76 lots in the two Lakewood Park subdivisions, all by deeds that contained grants of a right of way across the triangular lot to the shore of White Bear Lake for the purposes of "boating and bathing."

In a deed executed in 1916 and later recorded, the grantors dedicated the triangular lot to the public to be used as a park. The deed states, "[The grantors] do hereby dedicate to the public use forever, for the purpose of a Park [the triangular lot]." The triangular lot's only abutment to a public roadway was to the part of Birch Street that was later abandoned and conveyed to the city, now constituting the rectangular lot. This rectangular lot, together with the triangular lot, constitutes the parcel that the city

recognizes as Birch Beach Park. Land access to Birch Beach Park is only through the rectangular lot, which abuts Wildwood Avenue.

The Nelson Dock

The dispute arose recently, a century after the grantors' original subdivision. By 2006, the Birch Beach Dock Association had been using a dock that it built on the rectangular lot. In 2006, it applied to the district to renew its dock permit for the following year. The application, like its previous applications, included the entire 125 feet of shoreline of Birch Beach Park. The district granted the application.

In the spring of 2007, however, James Nelson also installed a dock along the shoreline of Birch Beach Park, but on the triangular parcel. This sparked the conflict. According to district rules, which the district imposes by statutory authority, the district will authorize only one dock for any single public parcel. So when the district considered the two Birch Beach Park docks, it concluded that the city was not compliant because two docks now existed in its park. The district sent the city a letter stating that it would be fined if it did not bring the site into compliance within ten days. The city council ordered Nelson to remove his dock, and Nelson complied.

Nelson took his challenge to the district, contending that his easement entitled him to construct his dock. District officials explained that permission is necessary whenever a dock is placed on public property, like Birch Beach Park. So Nelson presented to the Lake Utilization Committee a dock permit application in his purported capacity as president of the "Triangle Dock Association." The Lake Utilization Committee makes recommendations to the district on various matters, including dock permit applications.

Nelson's application sought the district's permission to construct a new dock on the triangular lot, which he described as owned by the public pursuant to the 1916 park dedication. The committee informed Nelson that his application was likely to be rejected because the district had already granted permission for a dock in Birch Beach Park, so Nelson withdrew his application.

Appellants then brought this quiet-title action against the city and the district, seeking a declaration that their deeds entitle them to erect a dock on the triangular lot. They also sought damages, claiming that the city and the district violated their due process and equal protection rights. Appellants advised the district court that their litigation objective was to erect a single dock.

The parties filed cross-motions for summary judgment. The district court concluded that the city had riparian rights over the triangular lot and municipal authority to regulate the installation of docks on public property. It granted summary judgment to the city and the district. The district court noted that it was troubled by the seemingly preferred status of the dock association and suggested that the city "look hard at the appearance of favoritism or prioritizing a few residents' desires over the needs or desires of the many other residents." The appellants agreed that the district court could dismiss their claims against the district. This appeal follows.

D E C I S I O N

The appellant neighboring land owners challenge the district court's grant of summary judgment. This court reviews a district court's grant of summary judgment to determine whether genuine issues of material fact exist and whether the district court

erred in applying the law. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). We review the evidence in the light most favorable to the party resisting summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Although the appellants framed their complaint principally as constitutional in nature, the Constitution does not get much discussion in their arguments on appeal. The appellants' initial reference to federal law is their opening brief's single statement that they "filed this lawsuit . . . under 42 U.S.C. § 1983," which permits recovery for constitutional deprivations. They make only general references to the Constitution, offer no citation to any other federal statute, and cite no federal caselaw that begins to shed light on the nature of their purported equal protection and due process constitutional rights to install the dock free of government intervention.

The district court similarly did not reference a single constitutional theory in analyzing the summary judgment issues, and the appellants do not argue on appeal that the district court acted errantly by its silence on their constitutional suppositions. The appellants do not explain what constitutional standard applies, or how it applies, to their general "equal protection" and "due process" theories, and we will not speculate. We address the constitutional argument in the same limited fashion, focusing mainly on the appellant's quiet title argument as framed in the district court and again on appeal. This argument sets the appellants' claimed riparian rights to construct a dock based on the easement against the city's claimed regulatory authority to control whether and where docks may be installed on the lot.

Appellants argue that the plain language of the easement permits them to install a dock and that, therefore, the district court erred by granting summary judgment to the city. When a right-of-way is created by express grant, "its extent depends entirely upon the construction of the terms of the grant." *Lien v. Loraus*, 403 N.W.2d 286, 288 (Minn. App. 1987), *review denied* (Minn. June 9, 1987). A court looks first to a deed's plain language when construing its meaning. *Danielson v. Danielson*, 721 N.W.2d 335, 338–39 (Minn. App. 2006). "Only when ambiguities exist may the circumstances surrounding the grant be considered." *Lien*, 403 N.W.2d at 288. Whether an ambiguity exists is a question of law subject to de novo review. *Murray v. Puls*, 690 N.W.2d 337, 343 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005).

The deeds expressly granted appellants "right of way" to the shoreline of White Bear Lake "for the purposes of boating and bathing." Read plainly, this language conveyed an easement to access the lake to boat and swim. Appellants insist that more must be inferred from this language. They urge that because a dock is necessary to boat, the plain language of the deeds authorizes them to install a dock on the lot.

The appellants criticize the district court's handling of the question of whether the right to boat necessarily implied the construction of a dock based on 1907 customs. The district court stated that "in 1907 'boating' often typically meant the use of hand-carried watercraft and not necessarily or implicitly the use of a dock," and it relied on that premise as support for its conclusion that the easement language was at least ambiguous. But at oral argument, counsel for the city conceded that no evidence in the record supports the statement and explained that the only reference to turn-of-the-century

watercraft was counsel's conclusory oral statement during the summary-judgment hearing about what may have been typical for the era. Given the publicly available evidence regarding the history of recreational boating on White Bear Lake, it is unlikely the appellants would concede this point if it becomes a material fact issue. Suffice it for now to say, the summary-judgment standard requires us to view the evidence in the light most favorable to the party opposing the motion for summary judgment, and no evidence in the record indicates that "boating" in 1907 was limited to "hand-carried watercraft." This is not to say that the district court erred by concluding that the easement language is ambiguous, only that the conclusion cannot rest on the unsupported factual representation of the city's counsel.

That the district court's conclusion relies on an unsupported fact does not necessarily render its summary-judgment decision infirm. The district court did not grant summary judgment to the city based on the easement language; rather, it granted summary judgment based on its conclusions that the city had municipal authority to regulate the installation of docks and that the city holds the riparian rights as trustee of the triangular lot. The reasoning is solid.

The city argues that the appellants conceded before the district court that they were not claiming any riparian rights and, therefore, that the issue of appellants' riparian rights is not properly before this court. The appellants' position before the district court was that neither party held riparian rights based on ownership of the triangular lot but that appellants held the riparian rights based on the language in the easement. We do not

think that the issue of which party holds the riparian rights has been conceded by the appellants. And resolving that issue is useful to our analysis.

We clarify what riparian rights are and what they allow. Riparian rights are the rights to reasonably use the surface of waters abutting a parcel of real property. *Johnson v. Seifert*, 257 Minn. 159, 168–69, 100 N.W.2d 689, 696–97 (1960). A riparian right-holder does not own the water; rather, a person who owns a lakeshore or lake bed has the riparian right to use and enjoy the water. *Pratt v. State, Dep't of Natural Res.*, 309 N.W.2d 767, 772 (Minn. 1981). Riparian rights include the right to build and maintain docks and landings that extend into the water from the property owner's land. *State by Head v. Slotness*, 289 Minn. 485, 487, 185 N.W.2d 530, 532–33 (1971); *Farnes v. Lane*, 281 Minn. 222, 224, 161 N.W.2d 297, 299 (1968). Without dispute, the riparian rights to the lot were held by the original owners, who first granted the easement that the appellants now hold and who then dedicated the lot to the city for use as a park. So the primary question is whether the riparian rights followed the dedicating of the land to the city or the granting of the easement to the appellants.

When a private party dedicates land to the public, the municipality holds the land in trust for the specific purpose stated by the dedicator. *Zumbrota v. Strafford W. Emigration Co.*, 290 N.W.2d 621, 622–23 (Minn. 1980). An owner of lakeshore property who divests himself of the right of possession by a dedication to a public entity thereby also grants the riparian rights. *Farnes*, 281 Minn. at 224–25, 161 N.W.2d at 300 (citing *Troska v. Brecht*, 140 Minn. 233, 238–39, 167 N.W. 1042, 1044 (1918); *Village of Wayzata v. Great N. Ry. Co.*, 50 Minn. 438, 442, 52 N.W. 913, 914 (1892); *Hanford v. St.*

Paul & Duluth R.R. Co., 43 Minn. 104, 108–10, 42 N.W. 596, 597–98 (1889)). Under this authority, unless the grantors divested themselves of the riparian rights between 1906 and 1910 by granting the "right-of-way" easement to the appellants' predecessors in interest, they conveyed their riparian rights to the city when they dedicated the triangular parcel in 1916 for use as a park.

The appellants argue that the 1906 owners conveyed the riparian rights to them when they granted the "right-of-way" easement to the appellants' predecessors in interest. But we conclude otherwise. The supreme court has established that a "private easement appurtenant affording access to a lake over land adjacent to the water does not make the grantee of the easement a riparian owner entitled to exercise riparian rights." *Farnes*, 281 Minn. at 224, 161 N.W.2d at 299. Here, therefore, the riparian rights remained vested in the fee holder unless the easement-creating deeds conveyed those rights. They did not.

The difference between a "right of way" to boat and swim and riparian rights is too significant to be confused by the grantors' language. Riparian rights "rest entirely upon the fact of title in the fee to the shore land," *Sanborn v. People's Ice Co*., 82 Minn. 43, 50, 84 N.W. 641, 642 (1900), and they are extensive, including the right to build and maintain for one's own use and for others, "wharves, docks, piers, and landing places on and in front of [one's] land" extending outward to the point of navigability. *Nelson v. DeLong*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942). The deeded "right of way" *to use* the land to access the lake for boating and swimming cannot be read to convey the broad riparian rights vested in the one who *owns* the land. If the grantors had intended to convey something more than a "right of way"—language customarily associated with a

mere easement to traverse from point to point over the servient property—they could have found the language to do so.

In addition to the restrained language in the deeds, the grantors demonstrated their intent to retain their ownership to the land, including the riparian rights associated with it, by making another conveyance in 1908 to two of the appellants' predecessors in interest identical to the one they had already made in 1907 to the owners of 38 other lots. Appellants fail to explain how the grantors could have twice divested themselves of all riparian rights to the triangular lot.

Even if appellants gained riparian dock-installation rights under the easement, those rights are "qualified, restricted, and subordinate to the paramount rights of the public." *Nelson*, 213 Minn. at 431, 7 N.W.2d at 346. A municipality may exercise its police power to regulate navigable waters in the public interest, and "riparian rights must yield to the governmental power to regulate." *Id.* at 438, 7 N.W.2d at 349. In *Nelson*, the supreme court upheld municipal authority to infringe on riparian rights that were much more clearly established than appellants' here. That case involved about 520 nonlakeshore lots near Lake Minnetonka, each with a deed containing "a provision that the conveyance included the use and enjoyment on equal terms with other vendees of the grantor of the riparian rights and privileges" to 373.7 feet of waterfront. *Id*. at 428, 7 N.W.2d at 345. The Village of Deephaven acquired title to the shoreline property for park purposes, expressly subject to the deed provision. *Id.* The dispute in *Nelson* was whether an ordinance that prohibited the installation and use of nonmunicipal docks impermissibly interfered with the riparian rights conveyed by the deed provision. The

court concluded that any riparian rights of the grantor and grantees were subject to municipal regulation. *Id.* at 433, 7 N.W.2d at 347.

The district court here relied on *Nelson* and held that regardless of whether the appellants retained any riparian rights, the city's authority to regulate coexists with the district's regulatory power and the city could use that authority to prohibit dock installation on the triangular lot. We agree with this reasoning.

Under *Nelson*, riparian rights are subject to governmental authority. The city and the district share the authority to regulate docks on the White Bear Lake shoreline. *See* Minn. Stat. § 103B.661, subd. 2 (2008) (authorizing the district generally to regulate construction and installation of docks and specifically to regulate public docks within municipalities); White Bear Lake Conservation District Ordinance #5, part IV, subd. 2 (requiring permit from district to install multiple user dock); City of Birchwood Village Mun. Code §§ 607.320 (requiring approval of docks by district), .325 (authorizing city council to adopt regulations governing "use of public beach easements by licensees, permittees, and dock associations and their members"). The district court properly concluded that even if riparian dock-installation rights arise from the easement that was conveyed by the deeds, those rights yield to the city's municipal authority to regulate the location of docks. We therefore reject the appellants' central argument "that the City of Birchwood has no statutory authority to regulate shoreline in White Bear Lake in its capacity of a public body."

This holding also disposes of the appellants' contention that, by virtue of the 1906-1910 deeds, the grantors actually conveyed to them the "ownership" of the triangular lot

with corresponding authority to construct and maintain a dock. We need not resolve the contention because even if the deeds conveyed not just an easement but ownership of the lot, "any grant by the riparian owner transfers only rights which are qualified, restricted, and subordinate to the paramount rights of the [governing body]." *Nelson*, 213 Minn. at 431–32, 7 N.W.2d at 347. We observe that the most active plaintiff, James Nelson, described the "owner" not as appellants but as the "public" when he applied for a permit to construct his dock on behalf of the "Triangle Dock Association." Owners or not, for the reasons explained, the appellants have no right to construct a dock that can override the city's and the district's authority to restrict dock location.

We turn to the constitutional argument. Again, the appellants barely indicate any basis to advance their constitutional theories. They make no due process argument and their equal protection claim makes only a brief appearance. We will not address the due process argument, deeming it waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (issues not briefed on appeal are waived). The appellants assert that the city has violated their right to equal protection because "no other Birchwood lakeshore owner's property is regulated by the City of Birchwood." Among the other elements of an equal protection claim that the appellants fail to discuss, a person claiming an equal protection violation must demonstrate unequal governmental treatment between similarly situated persons.

The appellants' equal protection argument sinks by virtue of their failure to identify any similarly situated persons. *See* U.S. Const. amend. XIV, § 1 (providing that "[n]o state shall . . . deny to any person . . . the equal protection of the laws"); *Village of*

Willowbrook v. Olech, 528 U.S. 562, 565, 120 S. Ct. 1073, 1075 (2000) (holding that property owner made a valid equal protection claim by alleging that city had treated her differently than similarly situated property owners). The record does not reveal that there is any other multiple-lot lakeshore park in the city, let alone one on which easement holders seek to install a dock.

We recognize, as did the district court, that the appellants' concern about fair treatment by the city is not without a basis. The appellants received a property interest from the original owners, who then dedicated the servient land to a municipality that has decided to regulate it in a manner that may inhibit the appellants' opportunity to benefit fully from their easement. But we are limited to the claims asserted and the arguments raised. This opinion therefore offers no view about whether the city's regulatory actions, although not prohibited by the legal theories asserted, may be subject to other challenges.

Because the grounds relied on by the district court support the grant of summary judgment for the city, we affirm.

Affirmed.