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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1625

McNulty Construction Company,
Appellant,

vs.

City of Deephaven,
Respondent.

Filed July 27, 2010
Affirmed
Willis, Judge[*]

Hennepin County District Court
File No. 27-CV-08-17989

Joseph A. Nilan, Siira B. Gunderson, Gregerson, Rosow, Johnson & Nilan, Ltd., Minneapolis, Minnesota (for appellant)

Kimberly B. Kozar, George C. Hoff, Hoff, Barry & Kozar, P.A., Eden Prairie, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Wright, Judge; and Willis, Judge.

[*]Retired judge of the Minnesota Court of Appeals, serving 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

WILLIS, Judge

Appellant challenges the district court's dismissal of its takings, equal-protection, and other claims arising from respondent city's denial of appellant's application to subdivide a parcel of land. Because we conclude that the district court did not err in granting summary judgment to respondent and did not abuse its discretion by denying appellant's request to amend its complaint, we affirm.

FACTS

In 1981, appellant McNulty Construction Company acquired an 88-acre parcel of land in Deephaven that contained an 8.6-acre parcel known as "McNulty Manor." In 2001, McNulty obtained approval from respondent City of Deephaven to divide McNulty Manor into three lots—two buildable lots and "outlot A." In 2002, McNulty sought to further subdivide outlot A to create a third buildable lot. A large portion of outlot A is designated wetland, and the non-wetland areas are generally very steep.

Deephaven denied the 2002 application. McNulty sued Deephaven, claiming that the denial was arbitrary, and the district court awarded summary judgment to Deephaven. McNulty appealed, and this court agreed with McNulty that "although the city has a lawful subdivision regulation requiring respect to the city's comprehensive plan on slopes, the regulation relates only to streets and not the building pad itself." *McNulty Contsr. Co. v. City of Deephaven*, No. A03-889, 2004 WL 78046, at *1 (Minn. App. Jan. 20, 2004). This court remanded for the determination of two issues of fact: the extent to which the proposed driveway construction interfered with severe slopes and the

rationality of driveway-safety concerns expressed by the city relating to emergency-vehicle access. *Id.* at *3.

After rehearing on remand, Deephaven again denied the application, and McNulty again sued. The district court again awarded summary judgment to Deephaven, and McNulty again appealed. This court affirmed the district court's decision. *McNulty Contsr. Co. v. City of Deephaven*, No. A05-1648, 2006 WL 1738171 (Minn. App. June 27, 2006), *review denied* (Minn. Sept. 19, 2006). This court found that the city council's denial was not arbitrary and capricious because "[t]he record contains evidence that driveway access in McNulty's application, originally proposing a 12-foot-wide driving surface, was not wide enough to permit safe and satisfactory access" and because "the proposed driveway . . . will require the alteration of slopes in excess of 30 percent," in violation of Deephaven's ordinance. *Id.* at *6.

Shortly after the second appellate opinion was filed in 2006, McNulty submitted another subdivision application. Ten days after McNulty submitted this application, Deephaven voted to amend its ordinance. The amendments prohibit the alteration of steep slopes for the construction of any structure—not just streets. The parties do not dispute that under the amended ordinance McNulty needed a variance to build on the proposed new lot. McNulty applied for a variance shortly after the amendments became effective.

The planning commission considered McNulty's subdivision application and request for a variance at a public hearing and voted to recommend denial of both. The city council then considered the application and request for a variance. McNulty

attempted to present additional documents to the city council that it had not presented to the planning commission, but the council declined to accept the new evidence, claiming that the public hearing had been closed and the record was therefore complete. The new documents included an engineer's report and information on other properties that McNulty claimed had received treatment different from that being given to McNulty's property. After hearing comments from representatives of McNulty, the city council denied McNulty's application and request for a variance.

McNulty again sued, claiming that the city council's denial was arbitrary and capricious, that the denial violated McNulty's right to equal protection, and that the denial of the application resulted in a regulatory taking entitling McNulty to compensation. McNulty subsequently moved to amend its complaint to add a claim for a violation of 42 U.S.C. § 1983 and for tortious interference with prospective business relationships. The district court denied the motion to amend. The parties filed cross-motions for summary judgment, and in its reply brief, McNulty argued that its application had been approved by operation of law because of the city council's failure to deny the application within the statutory time period.

The district court granted Deephaven's motion for summary judgment, denied McNulty's motion, and declined to address McNulty's argument regarding the application being approved by operation of law because McNulty failed to plead the claim in its complaint. This appeal follows.

D E C I S I O N

When there are no material facts in dispute and either party is entitled to judgment as a matter of law, summary judgment is appropriate. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). On appeal from summary judgment, we review the record to determine whether there is any genuine issue of material fact for trial and whether, in granting summary judgment, the district court committed an error of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In conducting our review, we view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio*, 504 N.W.2d at 761.

I. McNulty did not properly plead a claim that its development application was approved by operation of law.

McNulty did not plead in its complaint that its application had been approved by operation of law. Instead, it made this claim in its reply brief on a cross-motion for summary judgment. At oral argument before the district court, Deephaven argued that the claim had not been properly pleaded; but the district court nevertheless requested supplemental memoranda, and the parties briefed the issue. Ultimately, because this claim was raised outside the scope of the complaint, the district court declined to consider the argument.

McNulty argues that the district court erred by not considering the unpleaded claim. But "relief cannot be based on issues that are neither pleaded nor voluntarily litigated." *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954). McNulty attempted in its reply brief to assert an unpleaded statutory

basis for the approval of its application. A reply brief is limited in scope to "new legal or factual matters raised by an opposing party's response to a motion." Minn. R. Gen. Pract. 115.03(c). McNulty's addition of a new claim went beyond this limited scope, and McNulty did not move to amend its complaint to add the claim. Because the claim was neither pleaded nor voluntarily litigated, we conclude that the district court did not err by declining to address it.

McNulty also argues the merits of this unpleaded claim on appeal. In general, appellate courts need not consider issues not raised and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). McNulty argues that a well-established exception allows the court to consider an issue when it is plainly decisive of the entire controversy and the absence of a district-court ruling causes no possible advantage or disadvantage to either party, citing *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683 (Minn. 1997). But in *Watson*, an appellant argued a properly pleaded claim under a new theory on appeal—it did not involve an attempt to present a new claim on appeal. 566 N.W.2d at 687-88. We therefore find *Watson* to be inapposite, and we decline to consider the merits of McNulty's claim of approval of its application by operation of law.

II. Deephaven's amendment to its ordinance did not constitute a regulatory taking.

Whether a governmental entity's action constitutes a taking is a question of law, which we review de novo. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007). But the district court's findings of fact with regard to a takings claim

will be upheld unless clearly erroneous and unsupported by the record. *Parranto Bros. Inc. v. City of New Brighton*, 425 N.W.2d 585, 591 (Minn. App. 1988), *review denied* (Minn. July 28, 1988).

The Fifth Amendment to the United States Constitution states that private property shall not be taken "for public use without just compensation." U.S. Const. amend. V; *see* Minn. Const. art. I, § 13. A property owner may believe that the government has unconstitutionally taken its property by enacting a land-use regulation that interferes with the property owner's right to use its property. *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998). But not all regulations that affect a property's value constitute a regulatory taking. Only if regulation goes too far will it be considered a taking. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160 (1922).

The United States Supreme Court has recognized two distinct classes of regulatory takings: (1) categorical takings, in which the regulation "denies all economically beneficial or productive use of land," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893 (1992); and (2) case-specific takings, which involve consideration of the economic impact of the regulation, the interference with reasonable investment-backed expectations, and the character of the regulation, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978). The parties agree that a categorical taking has not occurred but dispute whether a taking under *Penn Central* has occurred. Minnesota courts apply the *Penn Central* factors to determine if a case-specific taking has occurred. *Wensmann*, 734 N.W.2d at 632-33.

The first two factors of the *Penn Central* analysis involve the economic value of the property. To determine whether the amendments to Deephaven's ordinance caused any change in the economic value of outlot A or any possible interference with investment-backed expectations, it is necessary first to consider whether outlot A was developable before the amendments. The 1999 comprehensive plan states that "[n]o structure will be allowed on slopes which are susceptible to severe erosion (>30%): These slopes shall be maintained in a natural state and regulations shall require the preservation of vegetative cover to minimize erosion problems." And the pre-2006 ordinance states that "[t]he arrangement, character, extent, width, grade, and location of all streets shall conform to a Comprehensive Plan." *See* Minn. Stat. § 462.358, subd. 2a (2004) (stating that a municipality's ordinances "may require consistency with . . . the comprehensive plan"). Accordingly, even before Deephaven amended its ordinance, streets were not allowed on slopes greater than 30%. The question, therefore, is whether McNulty's 2006 application proposed a street on a slope greater than 30%.

The city council found that "[t]he proposed access and required turnaround require the alteration of slopes greater than 30%." Similarly, the district court found that "[t]he construction of the access and turnaround on proposed Lot 1, McNulty Manor 2nd Addition, will require the alteration of slopes greater than 30%." McNulty, on the other hand, argues that its 2006 application proposed a driveway that avoided the alteration of such slopes. But to avoid submitting an application that showed a street requiring the alteration of slopes greater than 30%, McNulty submitted a preliminary plat that showed the driveway ending at the lot line with no turnaround as required for emergency

vehicles. But McNulty also submitted a model to the planning commission and city council that showed a proposed turnaround, which McNulty admitted would require the alteration of slopes greater than 30%. Based on this model, the district court's finding that the proposed turnaround would require the alteration of slopes greater than 30% was not clearly erroneous. As we noted, the regulatory scheme in place before 2006 prohibited streets on slopes greater than 30%. The parties do not dispute that a driveway is considered a street, and we conclude that the required turnaround is part of the driveway and therefore also considered to be a street. Accordingly, we conclude that McNulty's 2006 application was in conflict with the regulatory scheme in place before the 2006 ordinance amendments. With this conclusion in mind, we turn to the consideration of the three *Penn-Central* factors.

Economic impact

"The inquiry under this factor turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 634 (quotation omitted). McNulty argues that the value of outlot A decreased from $340,000 before the 2006 ordinance amendments to $20,000 after the amendments. But because McNulty's economic analysis assumes that outlot A was buildable before the amendments, its conclusion rests on a faulty assumption. Because outlot A was undevelopable before 2006, it is unclear what economic impact, if any, the amendments to Deephaven's ordinance had on the lot's value. Accordingly, this factor favors Deephaven.

Reasonable investment-backed expectations

Similarly, McNulty's assumption that outlot A was buildable before the amendments to the ordinance underlies its conclusion that the amended ordinance interfered with its reasonable investment-backed expectations. "In examining a property owner's investment-backed expectations, the existing and permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Id.* at 637 (quoting *Penn Central*, 438 U.S. at 136, 98 S. Ct. at 2666). Because McNulty's assumption that the property was buildable before the 2006 amendments is erroneous, we conclude that its "primary expectation" was that it could not develop outlot A. This is supported by the fact that McNulty proposed only two lots in its initial application in 2001 to subdivide the entire 8.6-acre parcel, suggesting that it at least questioned its ability to fit another buildable lot into that parcel.

McNulty also argues that "[i]t was reasonable . . . to expect that [outlot A] could be developed similarly to other properties within [Deephaven]." Although it may be true that Deephaven has allowed some slopes greater than 30% to be altered in the course of development over the years, the weight of the evidence suggests that McNulty's investment-backed expectations have been met. Accordingly, we conclude that the amendments to the ordinance did not interfere with McNulty's reasonable investment-backed expectations, and this factor also weighs in favor of Deephaven.

Character of the regulation

Although McNulty argues that this factor "weighs strongly in favor of McNulty" because the "ordinance was enacted specifically to prevent McNulty from developing the

property," there is nothing on the face of the ordinance to indicate that it has anything less than broad application. It is true that this court must look not only at the face of the regulation, but also must determine "whether the burden of the regulation falls disproportionately on relatively few property owners." *Id.* at 639. But McNulty has failed to offer sufficient evidence that it has been disproportionately burdened by the amended ordinance. It has presented only one other application for comparison (the Bowman property), which, as discussed below, is not similarly situated. Accordingly, this factor weighs in favor of Deephaven as well.

Because all three *Penn Central* factors weigh in favor of Deephaven, the district court did not err by granting summary judgment to Deephaven on McNulty's claim that there has been a regulatory taking of outlot A.

III. Deephaven did not violate McNulty's right to equal protection.

McNulty claims that several applicants have had their subdivision applications approved despite issues relating to slopes and emergency access similar to those here and that therefore McNulty's right to equal protection has been violated. The equal-protection clauses of the Minnesota Constitution and the United States Constitution have been interpreted to require that "one applicant not be preferred over another" for impermissible reasons. *Nw. Coll. v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979) (quotation omitted). "Equal protection requires that persons similarly situated be treated similarly." *Lidberg v. Steffen*, 514 N.W.2d 779, 784 (Minn. 1994). Being similarly situated to those allegedly receiving disparate treatment is "an essential element" of any equal-protection claim. *In re Welfare of M.L.M.*, 781 N.W.2d 381, 389

(Minn. App. 2010). A person is not similarly situated to another person unless they are alike in all relevant respects. *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996), *review denied* (Minn. Jan. 7, 1997). Equal-protection claims are subject to de novo review. *Thul v. State*, 657 N.W.2d 611, 616 (Minn. App. 2003), *review denied* (Minn. May 28, 2003).

Three of the four subdivision applications that McNulty compares itself to were made several years earlier than the application at issue here, so that only one of the four was subject to the 2006 ordinance. We agree with the district court that the three earlier applications are not similarly situated for equal-protection purposes. With respect to the fourth property—the Bowman subdivision—the district court found that the property was not similarly situated because, despite the fact that both properties were subject to the amended 2006 ordinance, the part of the Bowman property containing steep slopes is in the City of Shorewood, not Deephaven and was thereby subject to whatever regulation, if any, Shorewood had regarding the alteration of slopes. We agree with the district court that the Bowman property is not similarly situated for purposes of an equal-protection analysis. Because McNulty failed to present evidence that similarly situated properties were treated differently from its own, the district court did not err by granting summary judgment to Deephaven on McNulty's equal-protection claim.

IV. Deephaven was not required to accept the evidence that McNulty offered at the city council meeting of January 3, 2007.

Although McNulty argues that Deephaven wrongfully excluded evidence it presented at the city council meeting, the district court concluded that the proceedings

were fair and that the record was complete. The district court therefore declined to consider the evidence that McNulty had attempted to introduce before the city council when addressing McNulty's claim that the city council's denial was arbitrary or capricious, and the district court made its decision based on the record that was before the council. The admission of evidence is within the discretion of the district court, but its decision can be reversed if it is based on an erroneous view of the law. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997).

The city council's basis for rejecting the documents offered was that the council meeting was not a public hearing; the public hearing had already occurred before the planning commission. We find it unnecessary to reach McNulty's argument that the council erred by not accepting the evidence because McNulty has failed to establish any prejudice that it incurred as a result of this alleged error.

To prevail, an appellant must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *see Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993). McNulty does not explain how the outcome of the proceedings would have been different if the proffered evidence had been accepted by the city council. McNulty had the opportunity to submit relevant, admissible evidence to the district court in support of its takings and equal-protection claims. Accordingly, we conclude that McNulty has not identified any prejudice from the city council's allegedly

erroneous rejection of the proffered evidence, and the district court did not err by denying summary judgment to McNulty on this issue.

V. The district court's denial of McNulty's motion to amend its complaint was not an abuse of discretion.

The district court denied McNulty's motion to amend its complaint to add a claim under 42 U.S.C. § 1983 and a claim for tortious interference with prospective business relationships. The district court gave two bases for its denial of McNulty's motion to amend. First, it determined that adding the additional claims "would require additional discovery and would require the [district court] to postpone the trial, thus prejudicing [Deephaven]." Second, the district court determined that McNulty would not be able to survive summary judgment on either of the claims. McNulty asserts that the denial of its motion to amend was an abuse of discretion. We disagree.

"The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Fabio*, 504 N.W.2d at 761). The district court should liberally grant motions to amend when justice requires and doing so will not result in prejudice to the adverse party. Minn. R. Civ. P. 15.01; *Fabio*, 504 N.W.2d at 761. Generally, causing a party to defend an additional claim does not establish prejudice sufficient to deny an opportunity to amend. *Bridgewater Tel. Co. v. City of Monticello*, 765 N.W.2d 905, 916 (Minn. App. 2009). But if the amendment will produce prejudicial delay, it may be denied. *Hughes v. Micka*, 269 Minn. 268, 275, 130 N.W.2d 505, 510–11 (1964). In addition, a district court properly denies a motion to

amend when "the proposed claim could not withstand summary judgment." *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004); *see also Davis v. Midwest Disc. Sec., Inc.*, 439 N.W.2d 383, 388 (Minn. App. 1989) ("A denial of a motion to amend is proper when the movant fails to establish evidence to support the allegations the movant seeks to amend.").

McNulty argues that no additional discovery would have been necessary on its proposed section 1983 claim because it was "intricately tied" to its state equal-protection claim. But McNulty does not address the district court's finding that the section 1983 claim could not withstand summary judgment. By failing to assert that the district court erred in its conclusion that McNulty's proposed section 1983 claim could not survive summary judgment, McNulty's allegation that the district court abused its discretion by denying its motion to add this claim also fails. *See White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997) (stating that error is never presumed on appeal), *review denied* (Minn. Oct. 31, 1997).

McNulty also claims that the district court erred by determining that because Deephaven is entitled to official immunity for discretionary acts, the tortious-interference claim could not withstand summary judgment. But McNulty ignores the fact that the district court also denied McNulty's motion to add this claim because additional discovery would have been required for the tortious-interference claim, and this additional discovery would cause Deephaven prejudicial delay. Again, McNulty fails to address both bases for the district court's denial, and it cannot show an abuse of discretion. *See id.*

Because McNulty fails to allege error with respect to the district court's finding that the section 1983 claim could not withstand summary judgment and that the tortious-interference claim would require additional discovery leading to prejudicial delay, we conclude that the district court did not abuse its discretion by denying McNulty's motion to amend its complaint.

Affirmed.