STATE OF MINNESOTA
IN COURT OF APPEALS
A10-100

Helgeson Brothers Partnership,
Appellant,

vs.

County of Douglas,
Respondent,

City of Alexandria, et al.,
Respondents

Alexandria Airports Commission,
Defendant.

Filed September 21, 2010
Affirmed
Minge, Judge

Douglas County District Court
File No. 21-CV-08-2585

Bradley J. Gunn, Howard A. Roston, Malkerson Gunn Martin LLP, Minneapolis, Minnesota (for appellant)

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Considered and decided by Minge, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

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

MINGE, Judge

Appellant Helgeson Brothers Partnership challenges the district court's rulings that its claims of a regulatory taking under the airport-zoning ordinance as adopted and as applied are barred by the six-year statute of limitations and that its equal protection claim both is barred by collateral estoppel and is not meritorious. We affirm.

FACTS

In 1977, the Alexandria Joint Airport Zoning Board adopted the Alexandria Airport Zoning Ordinance to regulate and restrict the height of structures and the use of the property to "prevent the creation or establishment of airport hazards." The ordinance identified areas with varying degrees of restrictions, designated, in relevant part, as Safety Zones A and B.

In Safety Zone A, "buildings, temporary structures, exposed transmission lines, or other similar above-ground land use structural hazards" are prohibited, land is "restricted to those uses which will not create, attract, or bring together an assembly of persons thereon," and permitted uses include "agriculture, light outdoor recreation (non-spectator), cemeteries and auto parking." Helgeson owns 52 acres located primarily within Safety Zone A.

The land-use regulations in Safety Zone B are less restrictive. Parcels in Zone B may not be smaller than three acres and may not have more than one building. Uses in Zone B must not result in a site population exceeding 15 times the site acreage, and "churches, hospitals, schools, theaters, stadiums, hotels and motels, trailer courts, camp

grounds, and other places of public or semi-public assembly" are prohibited. Helgeson owns 49 acres located primarily within Safety Zone B.

Over the years, Helgeson attempted to obtain approval for various projects on its land. In 1996, respondent Douglas County awarded a contract to Tri-City Paving to pave a new county road through the middle of Helgeson's property. In a March 18, 1996 letter, Helgeson offered to sell Tri-City sand and gravel excavated from its land within Safety Zone A. Noting that the location of the road precluded agricultural use of the land and that its location within Safety Zone A precluded residential development or any other foreseeable productive use, Helgeson expressed the hope that the sale of gravel would help compensate for damages caused by the new road crossing its property.

On March 19, 1996, Helgeson submitted an application to the Douglas County Board of Commissioners for a conditional use permit (CUP). This supported a request by Tri-City for county approval of a temporary gravel-mining and crushing operation and a temporary hot-mix plant on Helgeson's land within Safety Zone A. The county board denied the requests due to the restrictions applicable to land within Safety Zone A. Tri-City then applied to the Alexandria Airport Zoning Board of Adjustment. After holding a meeting, the board of adjustment denied the request due to a variety of considerations, including the fact that the hot-mix plant would require a temporary structure and structures are prohibited in Zone A. There is no showing that further review of the decisions was sought.

In 1997, Helgeson obtained an appraisal of its property located within Safety Zone A. Based on the appraisal, on December 12, 1997, Helgeson wrote a letter to the

Alexandria city administrator asking the city for compensation of $305,000 on the ground that the restrictions imposed by the airport-zoning ordinance on land use in Safety Zone A constituted a taking of its property in that zone.

In 2002, Helgeson sought approval from the county for a residential development within Safety Zone A. The county directed Helgeson to seek a variance from the airport-zoning board. Helgeson applied for a variance. The board denied the request, and a district court affirmed the denial in August 2003.

In May 2005, Helgeson sought approval from the county for a residential development plan for land within Safety Zones A and B. The county board initially denied the proposal on August 16, 2005, because it found that the provisions of the airport-zoning ordinance prohibited the development and because it determined that the county planning advisory commission should initially hear the request. After the proposal was submitted to the advisory commission on August 31, 2005, Helgeson was advised that it needed to first obtain a variance from the Alexandria Joint Airport Zoning Board. The county board of commissioners again considered Helgeson's request in August 2006 and in September 2006 "denied the applications because (1) the housing density exceeded the safety-zone limitations under the airport zoning ordinance; (2) the airport could lose state and federal funding; and (3) the proposed development was in conflict with the county's comprehensive plan." *Helgeson Bros. P'ship v. Douglas Cnty. Bd. of Comm'rs*, No. A06-2128, 2007 WL 4633395, at *1 (Minn. App. Jan. 8, 2008) (*Helgeson I)*.

Helgeson brought a certiorari appeal of the decision, and this court affirmed, holding that the county board did not err in interpreting the airport-zoning ordinance; the county board's reasons for its denials were supported by the record and were reasonable; and Helgeson failed to demonstrate unequal treatment constituting an equal protection violation under the state or federal constitution. *Id.* at *2-3.

In July 2008, Helgeson initiated the present action in district court, alleging, in relevant part, two takings claims and an equal protection violation. Respondents moved for summary judgment. The district court granted summary judgment in part as to these claims, ruling that Helgeson's as-adopted takings claim for all of its property was barred by the statute of limitations; that its as-applied takings claim was likewise barred by the six-year statute of limitations as to the property located within Safety Zone A, but not as to the property located within Safety Zone B; that the equal protection claim was barred by collateral estoppel; and that, in any event, Helgeson could not prevail on the merits of the equal protection claim. This appeal from a final partial judgment entered pursuant to Minn. R. Civ. P. 54.02 followed.

D E C I S I O N

In an appeal from summary judgment, this court must determine whether there are any genuine issues of material fact and whether the district court erred in its application of law. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The evidence will be viewed in the light most favorable to the party against whom summary judgment was granted. *Id.* "The construction and applicability of statutes of limitations are questions of law that this court reviews de novo." *Benigni v.*

Cnty. of St. Louis, 585 N.W.2d 51, 54 (Minn. 1998). "Whether collateral estoppel is available presents a mixed question of law and fact that we review de novo." *Heine v. Simon*, 702 N.W.2d 752, 761 (Minn. 2005). But once it is determined that collateral estoppel is available, the decision is left to the district court's discretion, which will not be reversed absent an abuse of that discretion. *Pope Cnty. Bd. of Comm'rs v. Pryzmus*, 682 N.W.2d 666, 669 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). A claim of an equal protection violation under an ordinance is a question of law also reviewed de novo. *Thul v. State*, 657 N.W.2d 611, 616 (Minn. App. 2003), *review denied* (Minn. May 28, 2003).

I.

The first issue raised by Helgeson is whether the district court erred in ruling that Helgeson's as-applied takings claim for land located within Safety Zone A accrued in 1996 and is therefore time-barred by the six-year statute of limitations.

In Minnesota, the six-year general statute of limitations found at Minn. Stat. § 541.05, subd. 1 (2008) applies to a claim for compensation for the taking of private property for public use. *Beer v. Minn. Power & Light Co.*, 400 N.W.2d 732, 736 (Minn. 1987). Minnesota has adopted the rule that the six-year period begins when there is a final governmental determination regarding land use as defined in *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116 (1985). *Kottschade v. City of Rochester*, 760 N.W.2d 342, 348 (Minn. App. 2009), *review denied* (Minn. Apr. 29, 2009). The finality rule establishes that "a takings claim 'is not ripe until the government entity charged with implementing the regulations has reached a final

decision regarding the application of the regulations to the property at issue.'" *Id.* (quoting *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3116). A final decision is required so that the court that reviews the takings claim can determine "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Id.* (quoting *Williamson*, 473 U.S. at 191, 105 S. Ct. at 3119). "Therefore, to satisfy finality under *Williamson*, a landowner must pursue all available local avenues for determining the scope of what the county will let him build before his claim is ripe." *Id.* For this analysis, the concepts of ripeness and finality are interchangeable. The statute of limitations does not begin to run until the claim is ripe, which is when there is a final decision regarding development.

Here, the district court ruled that Helgeson's as-applied takings claim for its property in Zone A accrued as of 1996 and was therefore time-barred under the six-year statute of limitations. Helgeson argues that the district court erred as a matter of law, and that its takings claim did not accrue until September 12, 2006, when it received its final decision from the Douglas County Board of Commissioners denying its applications for a CUP for preliminary plats to allow residential development. It argues that the 1996 hot-mix plant denial was not a final decision regarding the application of the zoning ordinance because it involved only a temporary use, which was prohibited by the ordinance. It contends that because at that time it had not submitted development plans, no final decision as to any development plans existed in 1996.

The airport-zoning ordinance provides that land within Safety Zone A may not contain any "buildings, temporary structures, exposed transmission lines, or other similar

above-ground land use structural hazards, and shall be restricted to those uses which will not create, attract, or bring together an assembly of persons thereon." This makes it clear that in Safety Zone A, virtually no development is allowed. The restrictions of Safety Zone A prohibit new temporary structures and new permanent structures alike. Contrary to Helgeson's argument, the fact that the proposed hot-mix plant would have been a temporary structure is not significant. If anything, a temporary structure is a lesser offending use and would have a better chance for a variance or an exception to the land-use restriction.

Caselaw establishes that the critical date occurs when the "government entity charged with implementing the regulations . . . reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3116. Here, that date was 1996, when the county board and the Alexandria Airport Zoning Board of Adjustment refused to allow the temporary hot-mix plant. As indicated by Helgeson's 1997 letter seeking compensation, Helgeson clearly understood that the ordinance precluded development on its land located within Safety Zone A. Because the six-year statute of limitation had run by the time Helgeson brought this takings claim in 2008, we conclude that the district court did not err in determining that its claim is barred.

II.

The next issue that we address is whether the district court erred in ruling that Helgeson's as-adopted or facial-takings claim as to all of its property was also barred by a six-year statute of limitations.

An as-adopted or facial-takings challenge involves "a claim that the mere enactment of a statute constitutes a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494, 107 S. Ct. 1232, 1246 (1987). "Such facial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an uphill battle, since it is difficult to demonstrate that mere enactment of a piece of legislation deprived the owner of economically viable use of his property." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10, 117 S. Ct. 1659, 1666 n.10 (1997) (citations and quotations omitted).

Helgeson recognizes that its as-adopted takings claim faces a statute-of-limitations defense. However, it asserts that if there is a "continuing violation," the statute of limitations does not begin to run as of the date of adoption of the regulation, but rather a claim remains actionable so long as the regulation remains in effect. Helgeson contends that "the reality is that the Airport Zoning Ordinance at issue in this case is indeed a continuing interference or restriction on the use of" its property.

A federal district court in Minnesota stated:

> A continuing violation is occasioned by continual unlawful acts, not continued ill effects or harm from an original violation. Thus, to demonstrate a continuing violation, a plaintiff must establish that the unconstitutional or unlawful conduct was a continuing practice. Some type of continuing violative *action or conduct* within the statutory period therefore is required.

Superior-FCR Landfill, Inc. v. Cnty. of Wright, 59 F. Supp. 2d 929, 935-36 (D. Minn. 1999) (citations and quotations omitted). Where there is no evidence of additional and varying affirmative acts by the government under the challenged law, the claim of a

continuing violation cannot survive. *Id.* at 936. Otherwise, "there effectively would be no statute of limitations because the injury would always be ongoing." *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008). We conclude that this formulation of the continuing violation concept is persuasive and follow it.

Here, Helgeson does not point to and we cannot identify continual unlawful acts by the government. There is only the denial of permits. But such denials are simply the continuation of the original prohibition. Accordingly, we conclude that Helgeson's situation does not constitute a continuing violation, that the statute of limitations on the as-adopted takings claim began running in 1977 when the ordinance was adopted, and that Helgeson's 2008 as-adopted takings claim is barred by the six-year statute of limitations.

III.

The final issue is whether the district court erred in granting summary judgment on Helgeson's claim of an equal protection violation. The district court ruled that the challenge is barred by the doctrine of collateral estoppel based on this court's decision in *Helgeson I* and that regardless the claim is not meritorious.

"A fundamental rule embodied in the related doctrines of res judicata and collateral estoppel is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies." *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984) (quotations omitted). While under the doctrine of res judicata, "a final judgment on the merits bars a second suit for the same claim by parties or their

privies," under collateral estoppel, "once an issue is determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Id.*

A four-prong test is used to determine whether a party is collaterally estopped from raising an issue in a subsequent case. *Heine*, 702 N.W.2d at 761.

> All four prongs of the test must be met and they are as follows: (1) the issues in the prior and present adjudication must be identical; (2) there must have been a final adjudication on the merits; (3) the estopped party must have been a party or in privity with a party to the prior adjudication; (4) and the estopped party must have been given a fair and full opportunity to be heard on the adjudicated issue.

Id. (quotation omitted).

The district court ruled that Helgeson was collaterally estopped from raising the equal protection issue because it was identical to that raised in *Helgeson I*; there was a final adjudication on the merits; Helgeson was a party in the previous case; and it had a full and fair opportunity to be heard. Helgeson challenges the determinations that the issues were identical and that the privity requirement was met.

First, we consider the equal protection issue in the two cases. In *Helgeson I*, Helgeson argued that the county's denial of its CUP and plat applications constituted an equal protection violation. 2007 WL 4633395, at *3. In the present case, Helgeson argues that the denial of its CUP and plat applications constituted an equal protection violation, in the context of its takings claim. We acknowledge that *Helgeson I* was an appeal on the merits, challenging the underlying land-use decision, and that now

Helgeson seeks compensation. But collateral estoppel requires only that the underlying issues are identical, not that the causes of action are identical. *Kaiser*, 353 N.W.2d at 902 (stating that under collateral estoppel, "once an issue is determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation"). Because the underlying basis for these claims in both of Helgeson's lawsuits is equal protection, we conclude that the identical-issue requirement of collateral estoppel is met.

Helgeson's second challenge concerns the requirement that before a party can be collaterally estopped from raising an issue in a subsequent case, "the estopped party must have been a party or in privity with a party to the prior adjudication." *Heine*, 702 N.W.2d at 761 (quotation omitted). In other words, Helgeson, the party to be estopped, must have been a party or in privity with a party to the prior adjudication. The district court ruled that this prong was met because Helgeson was a party in the prior adjudication. Helgeson argues that there is a fundamental difference between the parties involved in these two cases because in *Helgeson I*, it alleged that only the county violated its equal protection rights in the denial of its variance, while in the present action, it is seeking compensation from the collective group of government entities—the city, the Alexandria Joint Airport Zoning Board, and the county—that together diminished the value of its property. Res judicata applies when "the earlier claim involved the same parties or their privies," but collateral estoppel applies, as here, when the estopped party—Helgeson—was a party to the prior adjudication. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004).

Helgeson has not shown that the district court erred in ruling that collateral estoppel applies.

Even assuming that there is no collateral estoppel problem, we note that Helgeson's equal protection claim is not persuasive. We agree that "[a] zoning ordinance must operate uniformly on those similarly situated." *Northwestern Coll. v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979). But the party challenging the enforcement of regulations must show discriminatory enforcement by a clear preponderance of the evidence. *Kottschade*, 537 N.W.2d at 310. As a result, when other claimed events cited to show an equal protection violation are separated in time, or they involve consideration of different forms of rights, or the challenger does not provide sufficient information to assess whether they are similarly situated, the standards for showing a violation are not met. *Id.* at 310 n.5. Thus, we note our agreement with the district court's rulings that the variance requests Helgeson submitted for Safety Zone A were neither proximate nor concurrent with the two unrelated developments allowed by the county in Safety Zone B identified by Helgeson in making its equal protection claim. Accordingly, we conclude that the district court did not err in determining Helgeson did not demonstrate discriminatory enforcement, and that its equal protection claim is not meritorious.

Affirmed.

Dated: