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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0915**

Joseph Roach, et al.,
Appellants,

vs.

County of Becker,
Respondent,

Thomas Alinder, et al.,
Respondents,

Gary Heitkamp Construction, Inc., et al.,
Respondents,

and

Thomas Alinder, et al.,
third party plaintiffs,
Respondents,

vs.

Luxury Landscaping and Lawn Care, L. L. P.,
third party defendant,
Respondent.

**Filed April 10, 2017
Affirmed as modified
Worke, Judge**

Becker County District Court
File Nos. 03-C5-05-000667, 03-CV-09-1799

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Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

WORKE, Judge

In this declaratory-judgment action arising from a lengthy neighbor dispute over altered property elevation, appellants challenge the district court's factual finding regarding the amount of fill placed on respondent landowners' property, its determination that incidental fill could remain on respondents' property, and its plan to restore the properties to preconstruction elevation. We affirm as modified.

FACTS

This is the third time that this dispute is before this court. As such, the historical facts are found in the two earlier opinions from this court and summarized below. See *Roach v. County of Becker*, No. A12-0132, 2012 WL 6097133 (Minn. App. Dec. 10, 2012)

(*Roach II*), review denied (Minn. Feb. 19, 2013); *In re Decision of Becker Cty. Zoning Adm'r*, No. A07-1580, 2008 WL 4224508 (Minn. App. Sept. 16, 2008) (*Roach I*).

Respondents Thomas and Sandra Alinder own property on the shoreline of Lake Melissa, near Detroit Lakes. Appellants Joseph and Jennifer Roach own adjacent shoreline property north of the Alinders.

In 2003, the Alinders applied for and received a permit to construct a new house. During construction, the Roaches complained to the county zoning office that the Alinders used fill to elevate their property higher than adjoining properties, whereas it had been the lowest lot prior to construction. Invoices produced by the Alinders showed that they brought in 846 cubic yards, or 85 truckloads, of fill that raised their property an average of 1.8 feet and in some places 2 feet. In September 2004, the Roaches filed a zoning complaint, asserting that the elevation of the Alinders' lot caused runoff to their property.

Following a county inspection, the Alinders were advised that a zoning ordinance required that water runoff be retained on their property. In October 2004, the zoning administrator advised the Alinders that a land alteration permit (LAP) was required for the land alterations that had already occurred. The Alinders were warned that a LAP would not be granted if runoff was increased to adjacent properties and were directed to submit a water-management plan.

The Alinders' first water-management plan recommended addressing the problem on a neighborhood level. The Roaches opposed the plan because it involved taking a portion of their property and burdening the property with an easement for water flow. The Alinders were required to commission a second plan limited to their property. Among

other things, the second plan called for building a retaining wall between the properties, adding retention areas, and regrading the driveway to direct runoff to the retention areas. The Roaches objected to the plan, claiming that it would create a dam between the properties that would cause water to collect on their property.

In May 2006, the Alinders applied for and were granted a LAP based on the second plan. The Alinders built the retaining wall after the Roaches were denied a restraining order in district court. In June 2006, the Roaches appealed the grant of the LAP to the Becker County Board of Adjustment (BOA), contending that the land alteration violated zoning ordinances because it caused runoff that adversely affected their property.

At a hearing before the BOA, the Roaches' expert testified that, historically, water drained across the Roaches' property and collected on the Alinders' property. After the Alinders brought in what the expert estimated to be at least 850 cubic yards of fill, the Alinders' property was raised almost two feet, disrupting the natural flow of surface water and resulting in water collecting on the Roaches' property. The Roaches' expert opined that the retaining wall likely made matters worse and that the increased moisture could lead to mold, warped floors in the Roaches' home, and damage to the foundation and concrete slab. The Alinders did not present any evidence.

The BOA affirmed the grant of the LAP because the zoning administrator "issued the permit in good faith and based on professional information." A district court affirmed the BOA's decision, and the Roaches appealed to this court. This court concluded that neither "good faith" nor "professional information" are standards found in the ordinances for consideration of whether to grant a LAP. *Roach I*, 2008 WL 4224508, at *4. This court

remanded to the BOA to apply the standards of the ordinance to the facts to determine whether to affirm the grant of the LAP. *Id.* at *6.

On remand, notices were sent to the parties instructing them that they would be allowed to state their positions at two BOA hearings, but that no new evidence would be considered. At the second hearing, in June 2009, the BOA's attorney stated that the issue related only to the alterations that were undertaken pursuant to the LAP, including the construction of the retaining wall and water-retention areas. Thus, the issue was limited to whether "there was increased runoff from the 2006 storm water improvements," despite the Roaches arguing at the first hearing that the elevation of the Alinders' property, and accompanying runoff issues, occurred *before* the LAP was granted.

The BOA voted to approve the findings of fact presented by its attorney, which were based primarily on site visits. These findings stated that the alterations made pursuant to the LAP did not increase runoff to the Roaches' property because the water was contained on the Alinders' property and there was no indication that the retaining wall was having a damming effect. The BOA found that the improvements did not adversely affect the Roaches' property and granted the LAP. A district court affirmed the BOA's decision, and the Roaches, again, appealed to this court.

This court concluded that the BOA erred by failing to follow this court's instructions on remand and by refusing to consider the effect of the original fill of the site for construction of the home. *Roach II*, 2012 WL 6097133, at *6. This court further stated that the BOA's site visits were not fact-finding missions because no new evidence was to be considered. *Id.*, at *7. This court stated that the BOA's reasons for issuing the LAP

failed to account for the initial alterations requiring the LAP and concluded that even if there was no evidence that the 2006 alterations were detrimental to the Roaches' property, there was significant evidence that the changes to the Alinder property as a whole increased runoff to the Roaches' property. *Id.*, at *8. This court reversed the BOA's decision to grant the LAP because the BOA relied on improper evidence and failed to consider the effect of all of the land alterations. *Id.*, at *9. But this court did not remand to the BOA; instead, it reversed so that the BOA could remedy the situation unfettered by an attachment to its previous decision, noting that the zoning administrator must enforce the zoning ordinances. *Id.*

Following this court's reversal, the planning and zoning administrator advised the Alinders in a July 2013 letter that "all fill [must] be removed" from their property, acknowledging that there was "a dispute on the amount of fill to be removed." The Alinders replied, seeking clarification and noting that some fill was brought in to replace soil removed during construction of the home.

In November 2013, the administrator sent the Alinders a second letter, stating that "all fill placed originally[] upon house construction and with the 2006 [LAP] [must] be removed from the property. Enforcement action will commence if this order is not complied with." The Alinders responded, stating that they would not remove the fill because some of it was permitted for the home and septic system and noting that they had not yet had a hearing on the original lawsuit.

In July 2015, the Roaches moved for partial summary judgment seeking a writ of mandamus to enforce the ordinance by requiring removal of all fill from the Alinders'

property. The district court determined that two trials were potentially necessary; the first on declaratory relief and the second on damages “if necessary.” The district court stated:

[T]he Court of Appeals did make findings that 846 cubic yards of fill were placed on the property, raising the property from 1.8 feet to 2.0 feet. It is uncertain . . . whether the Court of Appeals believed all the 846 cubic yards of material affected the amount of water cast upon the [Roaches’] property. The Court of Appeals did not appear to be definitively stating that any and all [LAPs] could not be approved. The Court of Appeals decision only stated that the cumulative effect of all fill placed on the Alinder[s’] [p]roperty, including fill prior to the [LAP] process, must be considered as it affects [the Roaches’] property. Also, the Court of Appeals’ decision does not reflect how much of the 846 yards were used to construct the driveway and other portions of the property and the effect . . . those alterations have on the [Roaches’] property. Therefore, . . . it is necessary to first determine where the fill was placed on the property and the effect on the [Roaches’] property and then determine what fill must be removed.

On April 8, 2016, following a trial, the district court issued an order for restoration. While the district court found the evidence insufficient to determine the exact amount of fill placed on the Alinders’ property, it found that substantial quantities of fill were removed from the property during construction and that additional fill was added. The district court concluded that the cumulative effect changed the natural flow of water and increased pooling on the Roaches’ property.

The district court concluded that the fill placed under the structure and surrounding foundation and required for the installation of the septic system and mound system was allowed as “incidental to the site permit.” The district court did not specify the amount of fill to be removed from the Alinders’ property, but devised a restoration plan that would conceivably return the properties to preconstruction elevation. This appeal followed.

DECISION

Amount of fill placed on property

The Roaches first argue that because this court previously determined that 846 cubic yards of fill were placed on the Alinders' property, the district court clearly erred in finding that it could not determine the exact amount of fill placed on the property. This court reviews the district court's findings of fact for clear error. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). This court "examine[s] the record to see if there is reasonable evidence . . . to support the [district] court's findings." *Id.* (quotation omitted). This court will not conclude that the district court's findings of fact are clearly erroneous unless "left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted). Questions of statutory interpretation are reviewed de novo. *Great River Energy v. Swedzinski*, 860 N.W.2d 362, 364 (Minn. 2015). If the meaning of a statute is unambiguous, the plain language of the statute controls. Minn. Stat. § 645.16 (2016).

Respondent Becker County argues that the Roaches' reliance on this court's opinion is improper because an appellate court does not engage in fact-finding. Respondents Gary Heitkamp Construction Inc. and Gary Heitkamp, who performed the construction work on the Alinders' property, argue that this court's decision is not binding on them because they were not a party to the previous matters and because the statement regarding 846 cubic yards of fill is dicta.

We stated in our 2008 decision that the Roaches' expert testified at a hearing before the BOA that the Alinders brought in approximately "850 cubic yards of fill," elevating their property nearly two feet. *Roach I*, 2008 WL 4224508, at *2. We also noted that the

Alinders did not present any conflicting evidence. *Id.* In 2012 we stated: “Invoices produced by the Alinders showed that they had brought in 846 cubic yards or 85 truckloads of fill, causing their property to be raised an average of 1.8 feet and in some places, as high as 2 feet.” *Roach II*, 2012 WL 6097133, at *1.

While these statements were included in the “Facts” section of the opinions, they were recitations of evidence presented by the Roaches’ expert, not findings of fact. Robert Wahlstrom created a report of the results of an engineering review of the altered surface drainage conditions on the Roaches’ property. Wahlstrom reviewed the invoices paid by the Alinders for regrading of their property that showed the amount of fill brought onto the property.

None of the respondents cite Minn. Stat. § 480A.08, subd. 3 (2016). Unpublished opinions “must not be cited as precedent, except as law of the case, res judicata, or collateral estoppel.” Minn. Stat. § 480A.08, subd. 3(b); *see also* Minn. R. Civ. App. P. 136.01, subd. 1(b) (“Unpublished opinions . . . are not precedential except as law of the case, res judicata or collateral estoppel . . .”). Thus, the previous opinions from this court are to be relied on as “law of the case, res judicata, or collateral estoppel.”

“Collateral estoppel, also known as issue preclusion, prohibits a party from relitigating issues that have been previously adjudicated.” *Barth v. Stenwick*, 761 N.W.2d 502, 507 (Minn. App. 2009). “Collateral estoppel precludes the relitigation of issues which are both identical to those issues already litigated by the parties in a prior action and necessary and essential to the resulting judgment.” *Ellis v. Minneapolis Comm’n on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982). Collateral estoppel bars the relitigation of an

issue when: (1) the issue is identical to one in a previous adjudication; (2) there was a final judgment on the merits in the previous proceeding; (3) the estopped party was a party or in privity with a party to the previous adjudication; and (4) the estopped party was provided a full and fair opportunity to be heard on the issue. *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984).

The issue of the quantity of fill moved onto the Alinders' property has been decided. It was identical to the issue decided during the BOA proceedings. The Roaches presented evidence to show the quantity of fill moved onto the property, relying on the Alinders' invoices. The invoices were paid to Heitkamp, thus Heitkamp was a party in privity with the Alinders. Although given a full opportunity to be heard on the issue, the Alinders did not present any evidence.

The district court acknowledged this court's decisions, stating that they were the "law of the case." The district court also acknowledged that this court stated that "846 cubic yards of fill were placed on the property," but left unanswered how much fill was used in areas of the property that did not increase runoff to the Roaches' property. The district court stated that it would determine "where the fill was placed," "the effect on the [Roaches'] property," and "what fill must be removed." Therefore, it is established that 846 cubic yards of fill were moved onto the property. Accordingly, the district court clearly erred in finding that it could not determine the exact amount of fill placed on the property. The issue remains as to how much fill must be removed.

Amount of fill to be removed

The Roaches argue that the district court clearly erred in finding that less than 846 cubic yards of fill must be removed from the property.

First, the Roaches assert that our 2012 decision required the county to enforce the ordinance by requiring removal of all fill from the Alinders' property. This court reversed the decision to grant the LAP and stated that the BOA "may exercise its authority to remedy this situation." *Roach II*, 2012 WL 6097133, at *9. We also noted that the county had "a duty to enforce and administer the zoning ordinance," but we did not remand with instructions to have all fill removed from the property. *Id.*

In July 2013, the planning and zoning administrator sent the Alinders a letter stating that the county had a duty to enforce the ordinance and requiring that all fill be removed from the Alinders' property but recognizing that there was a dispute regarding the amount of fill to be removed. In November 2013, the planning and zoning administrator sent the Alinders a letter threatening enforcement action if the Alinders refused to remove the fill brought onto their property. Thus, the county followed our directive and attempted to enforce the ordinance; there remained, however, resistance on the part of the Alinders.

Next, the Roaches claim that because the Alinders did not appeal the county's letters, they became final orders, and, as such, the Alinders must remove all the fill brought onto their property. While the November 2013 letter threatens enforcement action, it provided the Alinders with no instructions on how to appeal. The Alinders also responded to both letters; thus, if it were the county's intent that the letters would become final orders

if not appealed, and had the county made that clear to the Alinders, the Alinders would have appealed.

The Roaches also argue that the district court erred by interpreting the ordinance and shoreland rules to allow “incidental” fill to remain on the property without a LAP.

Interpretation of a zoning ordinance is a question of law reviewed de novo. *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). This court interprets an ordinance in the same manner as a statute. *In re Haslund*, 781 N.W.2d 349, 354 (Minn. 2010). In doing so, this court’s “primary objective” is “to ascertain and give effect to the intention” of those who enacted the ordinance. *See Greene v. Comm’r of Minn. Dep’t of Human Servs.*, 755 N.W.2d 713, 721 (Minn. 2008). “The principal method of determining” intent is “to rely on the plain meaning” of an ordinance, which may be discerned by reference to the ordinary meaning of words in the ordinance as well as rules of grammar and syntax and the structure of the ordinance. *See State v. Thompson*, 754 N.W.2d 352, 355 (Minn. 2008); *Occhino v. Grover*, 640 N.W.2d 357, 359-60 (Minn. App. 2002), *review denied* (Minn. May 28, 2002).

The ordinance provides:

A. Except for public roads, public ditches or public parking areas no land alterations shall be made in a shoreland area until a [LAP] has been obtained from the Becker County Zoning Administrator unless the changes will result in the movement of less than 10 cubic yards of material on steep slopes or within shore or bluff impact zones or the movement of less than 50 cubic yards of material in other areas; or unless exempted by reasons listed in Section 18. No [LAP] will be granted for any land alteration that will result in:

....

4. Increased runoff to adjacent properties

....

B. A separate [LAP] is not required if a permit has been granted for construction of a structure or sewer system unless the information required for the [LAP] was not included in the application for the permit.

Becker County, Minn., Zoning Ordinance § 12, subd. 7 (2002).

The district court concluded that fill under the structure and surrounding foundation and required for the installation of the septic system and mound system was allowed without a LAP under section 12, subdivision 7(B) of the ordinance “as incidental to the site permit.”

The ordinance provides that a LAP is not required if a permit has been granted for construction of a structure “unless the information required for the [LAP] was not included in the application for the permit.” *Id.*, subd. 7(B). The site application/permit for construction of the home is different from the land alteration application/permit in several ways. For example, the land alteration application/permit identifies the project type as “grading & filling” and includes the “area of disturbed ground” and “volume of fill.” This information is not included in the site application/permit.

Further, this court already determined that a LAP was required. *See Roach I*, 2008 WL 4224508, at *6 (“[W]e remand this matter to the BOA to apply the standards of the ordinance as discussed in this opinion to the facts it finds in order to determine whether to affirm the grant of permit and to provide specific reasons for its decision.”); *Roach II*, 2012 WL 6097133, at *7 (“Having determined that the LAP was meant to address all land alterations to the site made by the Alinders, this court inquires as to whether the reasons

stated by the BOA support the decision to grant the permit.”). Accordingly, this issue has been decided and the determination was made that a LAP was required. *See* Minn. Stat. § 480A.08, subd. 3(b) (stating that decisions from this court are precedential as “law of the case”). Because the site application/permit did not contain all of the information that was included in the land alteration application/permit and because this court already determined that a LAP was required, the district court erred in determining that a LAP was not required and “incidental” fill was allowed without a LAP.

The Roaches argue that the Alinders must remove all fill brought onto their property. The district court found that substantial quantities of fill were removed from the Alinders’ property during construction.

Heitkamp testified that he believed he brought in 790 yards of fill, which is not significantly less than Wahlstrom’s estimate of 846 yards. Heitkamp testified that existing fill was removed because it could not withstand the weight of the new house. He testified that the net fill brought onto the property was approximately 220 yards. Heitkamp based his calculations on invoices for fill he purchased from an excavation company. The invoices have handwritten notations. For example, one invoice dated September 29, 2003, notes “100 yards,” “420 yards,” “40 yards,” “40 yards,” and “30 yards.” Heitkamp testified that the notations showed “in-and-out calculations.” But he admitted that they were created in connection with the litigation one week before trial in November 2015, and not during the project in 2003. While the record is unclear as to how much fill was removed from the property, fill was removed and replaced with some of the 846 yards of fill.

The district court recognized that the net fill on the property changed the natural flow of water and increased the temporary pooling on the Roaches' property. The district court stated: "The Alinders, without a permit and in disregard of the rights and warnings of the Roach[es], have elevated the lot in the historically basin area and increased the water burden on the Roach property." The district court found that the Alinders' property should be restored to its preconstruction depth and designed a restoration plan that did not require the Alinders to remove all of the fill brought onto their property. Because the district designed a solution to restore the Alinders' property to preconstruction elevation, which was lower than adjacent properties, including the Roaches' property, we affirm the district court's order.

Damages

While we affirm the district court's restoration plan, we modify the district court's order as it relates to the issue of damages. The district court decided to bifurcate the trials; the first on declaratory relief and the second on damages "if necessary." We conclude that a trial on damages is necessary, and moreover, that it is not to be limited to damages that may result following implementation of the ordered restoration plan.

While the district court concluded that the Alinders increased "pooling and ponding" on the Roaches' property, it reserved claims for liability and damages, *if any*. This is error because the Roaches have been damaged. The fill remaining after restoration may cause *additional* damages to the Roaches, but the Roaches were damaged as soon as the Alinders altered their property in a way that increased runoff to the Roaches' property. Therefore, we affirm the district court's restoration plan, but we do so as modified to

specifically permit the Roaches to seek damages incurred since the Alinders altered their property. The past damage cannot be ignored, and the postrestoration condition of the Roaches' property is not the starting point for damage calculation. If it is ultimately determined by the finder of fact that monetary damages are inadequate, then the Alinders must move their home.

In sum, the Alinders shall follow the district court's ordered restoration plan, and the Roaches may present evidence of incurred damages and damages that may exist following implementation of the restoration plan.

Affirmed as modified.