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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1211**

State of Minnesota,
by its Commissioner of Transportation, petitioner,
Respondent,

vs.

Lee Thomas Boril, et al.,
Respondents Below,
Boundary Waters Land & Timber, Ltd.,
Appellant.

**Filed March 26, 2018
Affirmed
Florey, Judge**

St. Louis County District Court
File No. 69DU-CV-11-946

Lori Swanson, Attorney General, Jeffery S. Thompson, Mathew A. Ferche, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

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Considered and decided by Larkin, Presiding Judge; Reilly, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In this condemnation appeal, appellant landowner challenges the district court's grant of partial summary judgment in favor of respondent on appellant's claim of damage

to a noncontiguous parcel. Appellant argues that the district court (1) applied the wrong procedural standard in ruling on a summary judgment motion in a takings case; (2) applied the wrong substantive standard applicable to noncontiguous parcels; (3) erred in finding no unity between noncontiguous tracts under Minn. Stat. § 117.086 (2016); and (4) improperly excluded evidence related to damages. We affirm.

FACTS

In March 2011, respondent State of Minnesota, by its commissioner of transportation, filed a quick-take petition¹ seeking to condemn several parcels of land for purposes of highway construction. Among those parcels was a 5.02-acre portion of a 17-acre property owned by Bruce Lavigne, the principal of appellant Boundary Waters Land & Timber Ltd. The 17-acre property is hereafter referred to as the gravel parcel.²

Lavigne bought the gravel parcel in 1996 and simultaneously purchased an approximately 640-acre property, hereafter referred to as the development parcel. The development parcel is not physically connected to the gravel parcel; the two parcels are approximately three miles apart. According to Lavigne, the development parcel was purchased for the purpose of constructing residential building sites, and the gravel parcel was included in the deal because Lavigne required road material necessary to complete a

¹ “A quick-take proceeding allows a condemning authority to take title to and possession of property more quickly than it would in a standard eminent domain proceeding.” *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 868 (Minn. 2010).

² It appears that the gravel parcel may actually be somewhat larger than 17 acres, but the additional acreage constitutes an existing highway right-of-way easement.

road system on the development parcel. The gravel parcel contains gravel and other aggregate.

After the land purchase in 1996, Lavigne used some of the limited on-site gravel from the development parcel to construct an all-season road for the purpose of “testing of soils, determining hydrology,” and “investigating potential building sites.” In 1997 and 1998, he cut aspen from the development parcel, but retained pine, maple, and elm patches. In 2003, he tested soils and did some investigative digging on the development parcel. He also had culverts installed on the development parcel. All of the timber was harvested from the gravel parcel in 2009 in preparation of harvesting aggregate. Further, in 2009, according to Lavigne, “large-scale gravel exploration was undertaken on the [gravel parcel] and some of the gravel was hauled to the [d]evelopment [p]arcel.”

In June 2011, the district court granted respondent’s condemnation petition and awarded to respondent, effective July 12, 2011, title to and possession of the 5.02-acre portion of the gravel parcel. Commissioners were appointed to ascertain and report the amount of damages sustained as a result of the taking.³ Appellant took steps to have the gravel parcel appraised. In 2012, appellant also took steps to develop a concept plan for the development parcel, which was to be named Rice River Retreats.

In July 2014, the commissioners determined that \$12,900 was appropriate compensation for the taking. Appellant appealed the \$12,900 award. Appellant’s appraiser determined that the total damages were \$491,245 based on an analysis of the additional

³ “Under the quick-take procedure, the court-appointed commissioners file their award after the transfer of title to and possession of the property.” *Id.*

costs to appellant for obtaining gravel for the development parcel from a source other than the gravel parcel. Although only 5.02 acres were taken from the gravel parcel, appellant's appraiser opined that "it is no longer economically viable to mine the remaining 12 acres" of the gravel parcel.

Although appellant's compensation appeal was premised on the contention that the gravel lost from the condemnation had damaged the development parcel, a noncontiguous property, appellant failed to give proper notice that damages were being sought for a noncontiguous property.⁴

In February 2017, respondent moved for partial summary judgment, arguing that appellant failed to give notice of the claim for damages to a noncontiguous property, appellant's claim failed as a matter of law, appellant used an improper "development cost approach" to calculate damages, and appellant improperly valued gravel on the gravel parcel. Appellant subsequently moved for permission to amend the notice of appeal to include the noncontiguous-property claim.

On April 24, 2017, the district court issued an order granting appellant permission to amend the notice of appeal and granting respondent's motion for partial summary judgment. The court concluded, as a matter of law, that there was insufficient unity of use between the gravel and development parcels to justify compensation for damage to the noncontiguous development parcel. The court also concluded that portions of appellant's

⁴ Such notice is required by statute. See Minn. Stat. § 117.086, subd. 2 (stating that "[i]n the event that an appeal is taken, a party claiming a unity in noncontiguous tracts shall give notice thereof in the notice of appeal).

appraisal report were inadmissible because the appraisal utilized an improper method for determining damages and improperly valued the gravel on the gravel parcel.

Following the order for partial summary judgment, the parties stipulated to a valuation of \$9,325 for the condemned portion of the gravel parcel, and final judgment was subsequently entered. This appeal followed.

D E C I S I O N

We first address the law concerning recovery of damages for a noncontiguous parcel affected by a taking. As stated in *City of Minneapolis v. Yale*:

Noncontiguous parcels of land may be “so connected” in use that the taking of one parcel will damage the remaining parcels. In such a case the noncontiguous parcels are to be considered as a unit for the assessment of damages in the taking of one of the parcels. The damages for this partial taking are measured by the difference between the value of the entire tract before the taking and the value after the taking.

269 N.W.2d 754, 754 (Minn. 1978).

The standard for determining whether noncontiguous properties are sufficiently connected is set forth in Minn. Stat. § 117.086, subd. 1, which states:

In all eminent domain proceedings brought under this chapter noncontiguous tracts of land may be considered as a unit for the purpose of the assessment of the damages for a taking from only one of such tracts, provided that the use to which the tracts are applied is so connected, that the taking from one in fact damages the other.

Appellant argues that the district court applied the wrong procedural and substantive standards in determining as a matter of law that the gravel and development parcels were not sufficiently connected. The district court, though acknowledging that the matter was

before it on a motion for partial summary judgment, chose to address respondent's motion as a motion "for determination of [a] taking as a matter of law, under Minn. Stat. § 117.086, subd. 3," which allows a district court to decide, as a matter of law, whether a "landowner has suffered a taking of, or damage to, noncontiguous tracts." Viewing the issue through that lens, the district court weighed evidence and departed from the standards applicable to summary judgment. At the summary judgment stage, a district court may not weigh evidence or make factual determinations. *State by Hatch v. Allina Health Sys.*, 679 N.W.2d 400, 406 (Minn. App. 2004).

The district court's decision to view the issue as a purely legal one is not surprising given the seeming conflict between two subdivisions of section 117.086. Subdivision 1 requires that tracts be "so connected, that the taking from one *in fact* damages the other," while subdivision 3 allows a court to decide "*as a matter of law*" if there has been "a taking of, or damage to," a noncontiguous parcel. Minn. Stat. § 117.086, subds. 1, 3 (emphases added). The language contained in these subdivisions appears consistent with caselaw.

Regarding section 117.086, subdivision 1, whether two noncontiguous properties are "so connected" is a fact question. As stated in *Victor Co. v. State by Head*, "[w]hether physically distinct tracts are adaptable to, and actually and permanently used as, a single unitary tract is a question for the jury unless the evidence is conclusive." 290 Minn. 40, 45, 186 N.W.2d 168, 172 (1971) (applying Minn. Stat. § 117.08 (1969), *repealed by* 1971 Minn. Laws ch. 595, § 29, at 1112, a predecessor statute which provides that, in a taking, the landowner is to be reimbursed "for the value of the land taken" and for "damages, if any . . . to other property involved"); see *Peck v. Superior Short Line Ry. Co.*, 36 Minn.

343, 345, 31 N.W. 217, 218 (1887) (stating that determining whether two noncontiguous properties are sufficiently connected “is probably so much [a question] of fact as to make it impracticable to lay down any such rule which will not be a hindrance, rather than a help”).

Regarding section 117.086, subdivision 3, it is established in Minnesota that “the power to determine whether there has been a taking is vested in the court and is not within the purview of the jury.” *Hous. & Redevelopment Auth. v. Lambrecht*, 663 N.W.2d 541, 548 (Minn. 2003). And “[t]he question of whether land has been damaged so as to require condemnation is a question of law which the trial court must decide before submitting the damage question to the commissioners in the first instance.” *City of Mankato v. Hilgers*, 313 N.W.2d 610, 612-13 (Minn. 1981).

In this case, the parties agreed that a compensable taking from the gravel parcel occurred. The issue then was not whether a taking occurred, but whether damages to the development parcel could be considered because of a functional connection to the gravel parcel. The district court, though nominally claiming that the issue was a legal one under section 117.086, subdivision 3, decided the matter based on a lack of “unity of use,” effectively concluding that the parcels were not “so connected.” *See* Minn. Stat. § 117.086, subd. 1. In addressing this issue, the district court erred by weighing evidence and departing from a summary-judgment standard.

However, any failure of the district court to apply the correct standard is of no consequence because we review a grant of summary judgment de novo, *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015), and “[w]e will affirm the

judgment if it can be sustained on any grounds,” *Myers through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991). See *Northway v. Whiting*, 436 N.W.2d 796, 798 (Minn. App. 1989) (“[W]e may affirm a summary judgment if there are no genuine issues of material fact and if the decision is correct on other grounds.”). We conclude that appellant failed to proffer sufficient evidence of a connection between the parcels to create a genuine issue of material fact.

The relevant inquiry concerns how connected the parcels were at the time of the taking. *Yale*, 269 N.W.2d at 757; see *Anda*, 789 N.W.2d at 874 (“[W]e hold that in a quick-take proceeding, the date of valuation is the date when title and possession of the condemned property are transferred from the owner to the condemning authority.”). Appellant, using a development-cost approach, seeks compensation for increased road construction costs for a planned residential development. But, at the time of the taking, despite owning the properties for approximately 15 years, there was no planned development, and no construction of a planned development was underway. Such construction was not possible because there was no development plan, and no plan had been accepted by the county. Nothing in the record suggests that permits had been applied for or obtained at the time of the taking. As late as 2015, appellant was purchasing additional acreage for the development parcel. There is evidence that appellant had the intention to develop the development parcel and utilize gravel from the gravel parcel, but there is no evidence that at the time of the taking there were actualized and “close functional relationships” between the two parcels of the kind for which appellant seeks damages.

Yale, 269 N.W.2d at 755; see Minn. Stat. § 117.086, subd. 1 (requiring an analysis of the proffered “use to which the tracts are applied”).

No genuine issue of material fact exists for trial “when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Such is the case here. Given the dearth of evidence of any *functional* relationships between the parcels at the time of the taking, appellant’s mere assertion that such relationships would eventually develop is insufficient to create a genuine issue of material fact.⁵

Affirmed.

⁵ Because we conclude that there is no genuine issue of fact over whether the parcels were “so connected,” we do not address appellant’s other arguments.