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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0343**

County of Anoka, State of Minnesota, petitioner,
Respondent,

vs.

First Berkshire Properties, LLC, et al.,
Appellants,

Kmart Corporation,
Respondent,

Wells Fargo Bank, N. A., et al.,
Respondents Below.

**Filed September 23, 2013
Remanded
Hudson, Judge**

Anoka County District Court
File No. 02-CV-08-2116

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Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this eminent-domain proceeding, appellant landowners challenge the district court's summary judgment in favor of respondent county, arguing that the district court erred by concluding as a matter of law that appellants' property does not abut Highway 10, so that appellant is not entitled to compensation based on alleged impairment of reasonably convenient and suitable access from its property to that highway. Because the record on summary judgment is undeveloped on the issue of whether appellants' property abuts Highway 10 so as to entitle appellants to reasonable compensation for impairment of access, we remand for additional proceedings.

FACTS

In 2008, respondent Anoka County petitioned the district court to take certain property by eminent domain for a road construction project involving a .5-mile stretch of University Avenue in Blaine. Appellants First Berkshire Properties, LLC, and First Berkshire Business Trust (Berkshire) own commercial property located at the northeast intersection of University Avenue and 89th Avenue. A Kmart retail store is located on the property. The controlled intersection of CSAH 10 (Highway 10) and University Avenue is located a short distance to the southwest of the Kmart property.

The construction project included improvements to grading, roadway surface, drainage, curbs, gutters, sidewalks, signals, and trails. To improve safety and traffic flow, it also included closing an aperture in the median on University Avenue directly across from the Kmart parking lot, which would for the first time prevent southbound

traffic on University Avenue from turning into that lot and traffic exiting the lot from turning south onto University Avenue. The Kmart property would retain right-in, right-out access to the northbound lane of University Avenue, and the other entrance to the lot from 89th Avenue would remain unaffected. As part of the project, Anoka County sought to acquire fee title to a portion of Berkshire's property, "subject to existing highways, easements and right-of-way record." The district court ordered the transfer of title to Anoka County under the "quick-take" condemnation procedure, *see* Minn. Stat. § 117.042 (2012), and appointed commissioners to determine damages for the taking.

Berkshire moved for a temporary injunction to halt the project, arguing that eliminating the ability to make left turns between University Avenue and the Kmart property would cause irreparable harm by inconveniencing customers and forcing semitrailer delivery trucks to travel a circuitous route through the parking lot that was unsafe for store customers. After a hearing, the district court denied the motion, concluding that Berkshire failed to show that its legal remedies were inadequate and holding that an injunction was not necessary to prevent irreparable harm because Berkshire could pursue a claim for damages through the condemnation process.

The commissioners awarded damages of \$26,100 for taking a small portion of Berkshire's property but did not award damages for the loss of left-turn access to University Avenue. Berkshire challenged the award in district court, arguing that it was insufficient because the Kmart property abuts the right-of-way to Highway 10, which is the main thoroughfare, and the median closure deprives Berkshire's remaining property

of reasonably convenient and suitable access to and from that thoroughfare in at least one direction.

The parties filed cross-motions for partial summary judgment. Berkshire argued that the Kmart property abuts the highway right-of-way, which includes land acquired by the state for both University Avenue and Highway 10, so that it is entitled to have a jury determine damages resulting from impairment of its access to Highway 10. The county argued that University Avenue predates the current configuration of Highway 10, and that Berkshire's claim is flawed because it is premised only on the fact that "at some time, more than 20 years ago, the Kmart Property may have abutted [a] right of way acquired by the State of Minnesota, part of which was used to construct a relocated Highway 10." Therefore, the county argued, the property abuts only University Avenue and 89th Avenue, to which Berkshire retains reasonably convenient and suitable access.

In support of its motion, Berkshire submitted affidavits from David Hillert, a real estate attorney; Paul McGinley, a licensed land surveyor; and David Hodnefield, a historical property researcher. Hillert's affidavit contained exhibits of deeds and easements memorializing a series of transactions by which the state acquired interests in land for highway purposes from 1945 through 1991. McGinley's affidavit included exhibits of current maps labeled to correspond to those transactions but did not delineate separate rights-of-way of the current roadways. Hodnefield's affidavit included exhibits of aerial photographs taken from 1938 to 2010, which showed changes in the configuration of roadways in the vicinity during that period but did not label those roadways.

After a hearing, the district court issued an order granting the county's motion for partial summary judgment and denying Berkshire's motion. The district court concluded that no genuine issue of material fact exists as to whether the Kmart property abuts Highway 10. The district court noted, based on the affidavits and exhibits, that in 1945, the State of Minnesota acquired property by eminent domain for the construction of Highway 10; that in 1963 to 1964, the state acquired three more highway easements from individual landowners; and that in 1984, the state conveyed a portion of the right-of-way to Anoka County by quitclaim deed, which portion lies between the Kmart property and Highway 10 and contains University Avenue. The district court concluded that "the original right of way no longer physically abuts the Property, but instead is separated from the Property by the intervening right of way conveyed in 1984 by the State of Minnesota to Anoka County." The district court reasoned that because the Kmart property does not abut Highway 10, Berkshire has no right to damages as an abutting landowner for the denial of access to Highway 10, and that because the property retains access to University Avenue and 89th Avenue in at least one direction, Berkshire has reasonably convenient and suitable access to the roadways abutting the property.

The parties stipulated to entry of judgment for the commissioners' damages relating to land taken for the project but reserved the right to appeal the determination that the property does not abut Highway 10 and that reasonable access has not been impaired. This appeal follows.

DECISION

Appellate courts review a district court's summary judgment to determine whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 333 (Minn. 1997). In determining whether an issue of material fact exists, a reviewing court "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). There is no genuine issue of material fact for trial when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). This court reviews issues of law de novo. *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010).

Both the United States and Minnesota Constitutions require that the government provide just compensation for taking private property for a public use. U.S. Const. amend. V; Minn. Const. art. I, § 13. In determining whether a compensable interest has been taken by a traffic adjustment, Minnesota law distinguishes between the status of the general public and that of an abutting landowner. *Hendrickson v. State*, 267 Minn. 436, 441–43, 127 N.W.2d 165, 170–71 (1964). Through its police power, the state may, without compensation, regulate traffic by imposing restrictions governing all motorists, such as establishing one-way streets, placing median strips, and restricting U-turns and left and right turns. *Id.* at 441, 127 N.W.2d at 170. Thus, persons who are not abutting landowners have no right to damages "merely because access to a conveniently located

highway may be denied, causing them to use a more circuitous route.” *Id.* at 442, 127 N.W.2d at 170–71.

On the other hand, “property owners have a right of ‘reasonably convenient and suitable access’ to a public street or highway which abuts their property.” *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (1978); *see also Wendt v. Bd. of Supervisors*, 87 Minn. 403, 406, 92 N.W. 404, 405 (1902) (“[An abutting] owner occupies a different position from the people in general, whose lands do not come in contact with the road. There is a certain element of value attaching to the land itself by reason of the presence of the road.”). An abutting landowner’s right of access “is in the nature of a property right.” *Johnson*, 263 N.W.2d at 605. The state may extinguish an abutting landowner’s easement of access under the power of eminent domain, but just compensation must be paid. *Petition of Burnquist*, 220 Minn. 48, 57, 19 N.W.2d 394, 399 (1945).

Berkshire argues that the district court erred by concluding that the Kmart property does not abut Highway 10 or its right-of-way and that Berkshire is therefore entitled to a determination of whether, after the median closure on University Avenue, it retains reasonably convenient and suitable access to Highway 10. “An abutting owner under Minnesota statutes . . . is one whose property abuts the right of way, whether or not the edge of the traveled portion of the highway is also the right-of-way line.” *State by Spannaus v. Nw. Airlines, Inc.*, 413 N.W.2d 514, 518 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987). Berkshire argues that, even though the Kmart property does not abut the traveled portion of Highway 10, it does abut the Highway 10 right-of-way, so that it has an abutter’s easement of access to Highway 10. *See id.* Berkshire maintains

that the 1945 acquisition of a large area for a highway easement gave rise to an abutter's easement of access to any roadway that was constructed within that right-of-way. Berkshire argues that this case is similar to *Johnson Bros. Grocery, Inc. v. State*, 304 Minn. 75, 229 N.W.2d 504 (1975), in which the supreme court held that a two-stage highway project constituted a taking that denied reasonable access to a landowner whose property abutted Hudson Road, which was initially designated as temporary Highway 12. *Id.* The supreme court observed that when the lanes of Highway 12 were later relocated, and Hudson Road was included within the right-of-way of the reconfigured Highway 12, "a partial limitation of access . . . may have occurred." *Id.* at 78, 229 N.W.2d at 505. The county argues, however, that University Avenue was a preexisting county road, and the 1945 easement acquired by the state was taken subject to "the right of way of existing highways." Therefore the county argues that, even though the Kmart property abuts that easement, a portion of which may relate to a reconfigured Highway 10, this does not mean that the property has abutter's rights to Highway 10.

The district court, granting summary judgment to the county, concluded that no genuine issue of material fact exists as to whether the Kmart property abuts Highway 10. But fully addressing the parties' arguments relating to this issue requires an examination of the historical evolution of the University Avenue right-of-way and its relationship to the Highway 10 right-of-way, as well as a determination of the boundaries of the current rights-of-way of both roadways. We recognize that the district court received Berkshire's affidavits and supporting exhibits showing the dates and legal descriptions of property interests acquired by the state for highway purposes and the general configuration of

roadways in the vicinity, which changed over time. But even assuming this material is accurate, it does not specify the sequence of events creating University Avenue and Highway 10, nor does it specify the current or historical boundaries of the University Avenue and Highway 10 rights-of-way. As a result, it is not possible on this record to discern whether these respective rights-of-way are coextensive, separate and distinct, or overlapping. For instance, the county asserts that University Avenue predated Highway 10, and after Highway 10 was built, when University Avenue and Highway 10 were realigned (sometime between 1957 and 1964), Highway 10 was moved southwesterly from its original alignment. Berkshire, however, alleges that it was University Avenue, not Highway 10, that was relocated. Therefore we conclude that, considering the record created for the summary judgment proceedings, the district court was unable to fully analyze the issue of whether Berkshire's property abuts the Highway 10 right-of-way, so as to entitle Berkshire to an abutter's easement of access to that highway. *See* Minn. R. Civ. P. 56.03 (stating that the district court shall issue summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" demonstrate that no material factual issue exists, entitling one party to judgment as a matter of law).

Thus, on this record, summary judgment is premature, and we remand to the district court for reconsideration of the parties' motions after further development of the record. *See Brown v. Muetzel*, 358 N.W.2d 725, 728–29 (Minn. App. 1984) (remanding so that "the parties can supplement the record and the [district] court can consider its order in light of better-developed facts"). Should the district court conclude on a more

fully developed record that summary judgment is inappropriate on this issue, the district court will have an opportunity to address the additional question of whether Berkshire retains reasonably convenient and suitable access to Highway 10, given the closure of the University Avenue median. *See Johnson*, 263 N.W.2d at 607 (stating that the existence of reasonable access is a question of fact).

Remanded.