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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1439**

City of St. Paul,  
Appellant,

vs.

MGM Properties, LLC,  
Respondent.

**Filed June 2, 2009  
Affirmed as modified in part and reversed in part  
Shumaker, Judge**

Ramsey County District Court  
File No. CV-07-6007

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Considered and decided by Shumaker, Presiding Judge; Bjorkman, Judge; and  
Collins, Judge.\*

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals  
by appointment pursuant to Minn. Const. art. VI, § 10.

## **UNPUBLISHED OPINION**

**SHUMAKER**, Judge

This declaratory-judgment action involves a dispute about a municipality's authority to regulate land use in such a manner as to prevent a corporate landowner from access to its commercial property through a public alley.

Appellant municipality challenges the district court's summary judgment determinations that the city's regulation of alley access to respondent's business constituted a taking of respondent's property and that respondent had satisfied an ordinance requiring visual screening between respondent's commercial property and residential property across the alley. We affirm as modified in part and reverse in part.

### **FACTS**

Respondent MGM Properties, LLC owns a retail liquor store and a contiguous customer parking lot located on the corner of Larpenteur Avenue and Lexington Parkway in St. Paul. Behind this property is a public alley with one of its outlets on Lexington. The alley parallels Larpenteur and abuts the entire south property line of the MGM site. The land across the alley to the south is zoned as residential property.

In 1980, MGM erected an eight-foot fence along its south property line in the alley. The fence provided a visual screen of MGM's commercial property from the residences across the alley, and it prevented vehicle access to the MGM parking lot from the alley, leaving Larpenteur as the only ingress to and egress from the lot. It appears from the record that MGM's erection of the fence was in accord with a site plan the city

required and was in response to concerns of some neighbors about the location of the liquor store.

MGM maintained its fence until sometime in 2007. In November of that year, an area resident complained to the city that MGM had removed the fence. An inspector for appellant City of St. Paul confirmed the allegation and then informed MGM that the removal of the fence was a violation of city ordinances. The city demanded that MGM restore the fence, but MGM declined to do so.

The city then brought this action to obtain the district court's declaration that, by removing the fence, MGM was in violation of various ordinances. MGM pointed out that there were fences on the residential side of the alley that provided adequate screening and thus MGM argued that it was not in violation of any ordinance. MGM also argued that the city has no authority to prevent alley access to MGM's property and its attempt to do so constituted an unconstitutional taking of MGM's land. Upon these contentions, MGM moved for summary judgment. The city countered that it is vested with the authority to regulate land use within its boundaries, that it has not deprived MGM of any lawful interest in or use of its land, and that MGM's claim of "taking" is premature because MGM had not yet exhausted its administrative remedies.

The district court granted MGM's motion for summary judgment and dismissed the city's claims with prejudice, ruling that (1) because there is screening on the south side of the alley, MGM did not violate any ordinance by removing the fence; (2) "it would have been futile" for MGM to use the city's administrative process to resolve the dispute; and (3) "under the guise of regulation," the city impermissibly interfered with

MGM's use of its land and such action constituted a taking of the property. This appeal followed.

## DECISION

On appeal from summary judgment, we must determine whether (1) there are any genuine issues of material fact that are appropriately resolved only by the trier of fact, and (2) whether either party is entitled to judgment as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

We hold that the district court erred by deciding material facts in issue and by concluding that, on this record, MGM is entitled to judgment as a matter of law.

MGM concedes that the city "is correct that it can regulate access to the alleyway . . . ." The city concedes that "Minnesota law has long recognized that an abutting owner's right to reasonable access to a street or highway is a property right." Neither a property owner's right of access nor a municipality's power to regulate access is absolute. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 606-07 (Minn. 1978). Thus, in the abstract, MGM is entitled to access to its property through the public alley unless that access "may produce injurious consequences." *Id.* at 607. And, in the abstract, the city may prohibit, or limit, or restrict MGM's alley access if such usage would cause harm to the public or infringe the rights of other property owners. *Id.*

The district court held that the city's action of requiring a fence that prevents MGM from alley access to its property is an unconstitutional taking of that property under the guise of regulation. In reaching that conclusion, the district court also addressed the city's contention that administrative remedies had not been exhausted, or

even tried, stating that “it would have been futile to even initiate this [administrative] process.”

Generally, in matters of the regulation of the use of land, administrative remedies must be pursued and exhausted before judicial review is appropriate. *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 71 (Minn. 1984) (citation omitted). But administrative remedies need not be pursued if it would be futile to do so. *McShane v. City of Faribault*, 292 N.W.2d 253, 256 (Minn. 1980) (citation omitted). MGM indicated to the district court its belief that the city would be intractable in its insistence that the fence be rebuilt and maintained and, thus, it would be futile to pursue any remedy through the city’s processes. The “futility” exception to the exhaustion rule does not “permit a party to rely on its personal belief that it would not have been successful if it had followed the [administrative] procedures.” *Kells v. City of Rochester*, 597 N.W.2d 332, 339 (Minn. App. 1999) (citation omitted).

Although we appreciate the procedural posture of this case, namely, that it was the city and not the property owner who brought the action, it nevertheless was MGM who moved for summary judgment. The district court was then required to decide that motion in the light of applicable law. Applicable law requires a showing that there is no fact issue as to the exhaustion of administrative remedies or as to the futility of a pursuit of such remedies. *See, e.g., Uckun v. Minn. State Bd. of Med. Practice*, 733 N.W.2d 778, 787 (Minn. App. 2007) (concluding that party asserting futility failed to provide sufficient evidence in support of the claim). A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact for trial and that

the moving party is entitled to judgment as a matter of law. *Bennett v. Storz Broad. Co.*, 270 Minn. 525, 531, 134 N.W.2d 892, 897 (1965). It is indisputable that there has been no exhaustion of administrative remedies here, and MGM has failed to point to any evidence that would demonstrate that there is no fact issue regarding the futility of pursuing the administrative process. MGM and the district court have merely relied on the speculation that an engagement in an administrative process with the city would be futile. Such speculation does not satisfy MGM's burden on summary judgment and the district court impermissibly decided a fact issue in ruling that the futility exception applied.

Additionally, the district court determined that the city's action of requiring a fence that prevents alley access to MGM's property is in effect a taking and that MGM is entitled to judgment as a matter of law. Considering the fundamental principles of law discussed above, this record neither supports nor negates that conclusion. Rather, further factual development is necessary before the reasonableness of the city's action can be assessed. The Minnesota Supreme Court has acknowledged that summary judgment is not appropriate when a factual context is necessary to the proper application of the law:

Summary judgment is a "blunt instrument" and should not be employed to determine issues which suggest that questions be answered before the rights of the parties can be fairly passed upon. It should be employed only where it is perfectly clear that no issue of fact is involved, and that it is neither desirable nor necessary to inquire into facts which might clarify the application of the law.

*Donnay v. Boulware*, 275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966) (citation omitted).

On this issue, we note that the district court considered the ordinance that the city cited as its authority for regulating alley access. St. Paul, Minn., Legislative Code § 63.310(f) (2008) provides various conditions for alley access to a business’s off-street parking lot. The district court did not hold the ordinance invalid but ruled only that the city’s application of the ordinance was impermissible. We need not, therefore, address the question of the validity of the ordinance itself.

The district court also ruled that MGM did not violate a city ordinance by removing the fence and thereby eliminating the screening of its property because adequate screening exists on the residential side of the alley.

The St. Paul ordinances require that a “visual screen” must be maintained for off-street parking facilities that “adjoin or abut across an alley” bordering a residential district. St. Paul, Minn., Legislative Code §§ 63.114, .313 (2008). That screen may be located “on the opposite side of an alley,” or on the residential side, “[w]hen mutually agreeable to all property owners involved . . . .” St. Paul, Minn., Legislative Code § 63.114(b)(4).

Five parcels of residential property are affected by the visual screen. MGM owns four of those properties and has indicated that opposite-side screening is acceptable to it. As to the fifth parcel, the district court noted that “[t]here is no record that [the owner of that parcel] has ever complained or disagreed about the manner in which [MGM] screened her property from its parking lot.” The court then concluded that MGM has satisfied the requirements of the ordinance permitting opposite-side screening. In reaching that conclusion, the court impermissibly drew a factual inference. Because the

ordinance permits opposite-side screening only if agreeable to “all” property owners, MGM had the burden on summary judgment of showing that there is no genuine fact issue as to whether the fifth owner agrees to opposite-side screening. MGM offered no evidence of the fifth owner’s agreement and thereby failed to carry that burden. The court erred by inferring that the fifth property owner agreed to opposite-side screening.

Because of the unusual procedural posture of this case, the appropriate relief on appeal is as follows: (1) The district court’s dismissal of the action is affirmed but is modified in two respects. First, the proper reason for the dismissal is that judicial review is premature because administrative remedies have not been exhausted nor has it been shown that it would be futile to pursue such remedies. Second, the dismissal is without prejudice, rather than with prejudice as the court ruled. (2) The district court’s determinations that the city’s action is in effect a taking of MGM’s property and that MGM has satisfied the screening requirement of the applicable ordinance are reversed because there are genuine questions of material fact as to each of those issues. (3) Remand to the district court is neither necessary nor appropriate because, on this record, there has been no showing that either party is entitled to judicial review at this time.

**Affirmed as modified in part and reversed in part.**