

SUPREME COURT OF NORTH DAKOTA

Cass County Joint Water Resource District v. Aaland

2020 ND 196 · No. 20200171 · Decided September 15, 2020

SUMMARY

The North Dakota Supreme Court denied landowners’ motion to stay district court orders granting the Cass County Joint Water Resource District a right of entry onto their properties for environmental monitoring related to the Fargo-Moorhead Flood Diversion Project. The court concluded the landowners would not suffer irreparable injury because they could pursue an inverse condemnation action, and that a stay could substantially delay the project.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Jerod E. Tufte; Lisa Fair McEvers; Daniel J. Crothers; Gerald W. VandeWalle; Jon J. Jensen, C.J.
JURISDICTION	North Dakota
DECIDED	September 15, 2020
DOCKET	20200171
DISPOSITION	writ_denied
PROCEDURAL POSTURE	Defendants appealed district court orders granting the Cass County Joint Water Resource District a right of entry onto their properties and moved in the North Dakota Supreme Court for a stay pending appeal.
STANDARD OF REVIEW	The Supreme Court applied the four-factor standard governing applications for a stay pending appeal under N.D.R.App.P. 8.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Cash H. Aaland, Larry W. Bakko, Penny Cirks v. Cass County Joint Water Resource District

TOPICS

[appellate procedure](#) [eminent domain](#) [real estate](#) [remedies](#) [environmental impact review](#)

PRACTICE AREAS

[appellate procedure](#) [eminent domain](#) [real estate](#) [remedies](#) [environmental law](#)

QUESTIONS PRESENTED

1. Whether the Landowners were entitled to a stay pending appeal of the district court orders granting the District a right of entry onto their properties.
2. Whether denial of a stay would cause the Landowners irreparable injury.
3. Whether issuance of a stay would cause substantial harm to the District.

HOLDINGS

1. A stay pending appeal was denied because the Landowners failed to establish the required absence of an adequate remedy and substantial harm to the District from issuance of a stay.
2. The Landowners did not demonstrate irreparable injury because they could pursue an inverse condemnation action for damages resulting from any temporary or permanent taking.
3. Issuance of a stay would likely cause substantial harm to the District by delaying surveys, examinations, and other work necessary to advance the project.

KEY QUOTATIONS

“We consider four criteria when deciding whether to grant an application for a stay: 1) a strong showing that the appellant is likely to succeed on appeal; 2) that unless the stay is granted, the appellant will suffer irreparable injury; 3) that no substantial harm will come to any party by reason of the issuance of the stay; and 4) that granting the stay will do no harm to the public interest.” (¶ 4)

FACTUAL BACKGROUND

The Cass County Joint Water Resource District sought easements from the Landowners to conduct long-term environmental monitoring for the Fargo-Moorhead Flood Diversion Project. When the District could not obtain the easements, it applied for a permit to enter the properties through December 2021 to conduct examinations, surveys, mapping, and related monitoring, including installation of survey monuments. The district court granted the application, and the Landowners sought a stay pending appeal.

PROCEDURAL HISTORY

The District sought access to the Landowners' properties to conduct examinations, surveys, mapping, and environmental monitoring for the Fargo-Moorhead Flood Diversion Project. After two hearings, the district court granted the application for entry through December 2021 and denied the Landowners' motion for a stay. The Landowners then sought a stay from the North Dakota Supreme Court, which denied the motion.

DISPOSITION

writ_denied

CASES CITED

- Bergstrom v. Bergstrom, 271 N.W.2d 546 (N.D. 1978)
- In re Estate of Shubert, 2013 ND 215, 839 N.W.2d 811

- Aasmundstad v. State, 2008 ND 206, 763 N.W.2d 748
- Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers, No. 13-cv-2262, 2019 WL 1516934, at *6 (D. Minn. Apr. 8, 2019)

OPINION

PER CURIAM.

Filed 09/15/2020 by Clerk of Supreme Court IN THE SUPREME COURT STATE OF NORTH DAKOTA 2020 ND 196 Cass County Joint Water Resource District, Plaintiff and Appellee v. Cash H. Aaland, Larry W. Bakko and Penny Cirks, Defendants and Appellants and Richard and Sandra Ihland, Stuart D. Boyer and Patricia J. Boyer, Vance G. Gylland, Thomas Jorgensen, Brent Larson and Timothy Larson, Mary Jo Schmid, Thomas R. Nelson and Michelle Nelson, Jeffrey C. Shipley and Maria Shipley, Patricia A. Rudnick, Dona L. Duffy, Myron Ihland, Carol Sheridan, Marjorie Rieger, Betty Jean Hulne (deceased), Gregory S. Hulne, Jack T. Hulne, Michael J. Hulne, David A. Hulne, Jean M. Johnson, Dorothy A. Stapleton and Laura Aaland, Defendants and Appellees No. 20200171 Motion for stay pending appeal from orders of the District Court of Richland County, Southeast Judicial District, the Honorable John A. Thelen, Judge.

MOTION DENIED. Opinion of the Court by Tufte, Justice. Rob A. Stefonowicz, Minneapolis, Minnesota, for plaintiff and appellee. Jennifer A. Braun, Fargo, North Dakota, for defendants and appellants. Cass County Joint Water Resource District v. Aaland No. 20200171 Tufte, Justice. [¶1] Cash Aaland, Larry Bakko, and Penny Cirks (the “Landowners”) move to stay, pending appeal, the district court’s orders granting the Cass County Joint Water Resource District (the “District”) a right of entry onto their properties.

The motion to stay is denied. I [¶2] In September and December 2019, the District contacted the Landowners seeking easements on their properties to conduct long-term monitoring for the Fargo-Moorhead Flood Diversion Project (the “Project”).

After the District failed to obtain these easements, it applied for a permit to enter the Landowners’ properties to monitor environmental impacts in connection with the Project through December 2021. The application provides that access to the Landowners’ properties is necessary to conduct examinations, surveys, and mapping, including geomorphic examinations requiring installation of survey monuments on certain properties.

The Landowners opposed the District’s application. [¶3] After two hearings, the district court granted the application allowing the District entry onto the Landowners’ properties through December 2021. Aaland and Bakko moved the district court for a stay pending appeal before this Court.

The district court denied their motion. II [¶4] Under Rule 8, N.D.R.App.P., we have the authority to grant a stay pending appeal. We consider four criteria when deciding whether to grant an

application for a stay: 1) a strong showing that the appellant is likely to succeed on appeal; 2) that unless the stay is granted, the appellant will suffer irreparable injury; 3) that no substantial harm will come to any party by reason of the issuance of the stay; and 4) that granting the stay will do no harm to the public interest.

Bergstrom v. Bergstrom, 271 N.W.2d 546, 549 (N.D. 1978). 1 [¶5] The Landowners argue that without a stay they will suffer irreparable injury. They contend a stay is necessary “to preserve the rights of the parties and to prevent the [District] from taking [their] property rights in the interim in an attempt to render the controversy moot.” Specifically, the Landowners claim the District will deprive them of their rights to possess, use, and dispose of their properties, and to exclude others from entering their properties.

The Landowners rely on *Estate of Shubert* for the proposition that we have “long recognized the failure to obtain a stay may moot issues raised on appeal.” See *In re Estate of Shubert*, 2013 ND 215, ¶ 17, 839 N.W.2d 811. But the Landowners are not without an adequate remedy. They could bring an inverse condemnation action against the District to obtain money damages for any temporary or permanent taking.

See *Aasmundstad v. State*, 2008 ND 206, ¶ 15, 763 N.W.2d 748 (stating that “[i]nverse condemnation actions are a property owner’s remedy, exercised when a public entity has taken or damaged the owner’s property for a public use without the public entity’s having brought an eminent domain proceeding”).

Thus, the Landowners will not suffer irreparable injury if a stay is denied. [¶6] The third criteria is whether substantial harm will come to any party by reason of the issuance of the stay. The Landowners argue that because the District is enjoined from beginning construction on the Project by the United States District Court for the District of Minnesota and it lacks certain permits to proceed with construction, no substantial harm will come to any party by granting a stay.

The District argues it would suffer substantial harm if a stay is granted because surveys must be completed to advance the Project, and the inability to enter the properties would delay this process. We agree with the District that a stay could delay the Project. Additionally, the United States District Court for the District of Minnesota modified the preliminary injunction, as the Landowners noted, to allow construction to continue in non- waterways in North Dakota, and non-construction design and mitigation work in North Dakota and Minnesota.

See *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, No. 13-cv-2262, 2019 WL 1516934, at 6 (D. Minn. Apr. 8, 2019). Although the Landowners advised the Court that the issuance of the permits is being litigated, we conclude that even if immediate construction is impractical, the District’s other project tasks of 2 surveys and examinations required for the project’s environmental impact statement may continue.

Thus, the likelihood that the District would suffer substantial harm in the form of project delays weighs against the issuance of a stay. [¶7] Because we have determined the Landowners have failed to satisfy the second and third criteria, we deem consideration of the remaining two criteria unnecessary. See *Bergstrom*, 271 N.W.2d at 554. III [¶8] The motion to stay the district court's orders granting the District a right of entry onto the Landowners' properties is denied. [¶9] Jerod E. Tufte Lisa Fair McEvers Daniel J. Crothers Gerald W. VandeWalle Jon J. Jensen, C.J. 3