

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Donald Robert Cossette, individually, and)
Donald Robert Cossette and Marjorie)
Cossette as Co-Trustees of the Angela R.)
Cossette Revocable Living Trust Dated)
November 21, 2002,)

Supreme Court No. 20160311

Appellants,)

District Court No.
09-2016-CV-01391

vs.)

Cass County Joint Water Resource District,)

Appellee.)
_____)

Appeal from Memorandum Opinion and Order of the
District Court Entered on July 22, 2016

County of Cass, East Central Judicial District
Honorable Steven L. Marquart, Presiding

APPELLEE’S BRIEF

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STATEMENT OF THE ISSUES

[¶1] Whether the district court erred as a matter of law when it dismissed the Appellants' claim for declaratory judgment because a declaratory judgment action challenging the decision of a governmental entity may not be brought when an appeal to the district court is authorized by statute.

[¶2] Whether the district court erred when it determined the Appellants are not aggrieved persons as required to appeal the Appellee's Resolution of Necessity.

STATEMENT OF THE CASE

[¶3] The Cass County Joint Water Resource District (hereinafter referred to as the "Joint Board") is a joint water resource district and political subdivision. The Joint Board enjoys unique and specific statutory authorities to develop, construct, establish, and maintain flood control and protection projects. Included in those statutory powers is the right to acquire real property through eminent domain, if necessary. The Joint Board determined on May 18, 2016, that it is necessary to acquire certain property owned by the Appellants (hereinafter referred to as the "Cossettes") for purposes of constructing, operating, and maintaining a flood control project in Cass County, North Dakota. Doc. ID# 17, APP 250-261. The May 18, 2016, determination was memorialized in the form of a Resolution of Necessity (hereinafter the "Resolution of Necessity"). *Id.* At the same time the Joint Board determined it was necessary to acquire the Cossettes' land for the flood control project, the Joint Board resolved it would make a final written offer to the Cossettes to acquire the land. Doc. ID# 17, APP 263-265.

[¶4] The Cossettes filed an action with the district court on May 20, 2016, seeking a declaratory judgment and appealing the decisions of the Joint Board made on May 18, 2016.

[¶5] The Joint Board filed a Motion to Dismiss the declaratory judgment action and administrative appeal of the Cossettes. Following a hearing, the district court granted the Joint Board's Motion to Dismiss when it entered its Memorandum Opinion and Order on July 22, 2016. Doc. ID# 39, APP 556-558.

[¶6] The Cossettes timely appealed the Memorandum Opinion and Order on September 19, 2016. Doc ID# 45, APP 559-562. In the appeal to this Court, the Cossettes have only challenged the Resolution of Necessity, not the May 18, 2016, decision of the Joint Board to make a final written offer to the Cossettes.

STATEMENT OF THE FACTS

[¶7] The facts, as they relate to this appeal, are limited. To alleviate flooding in the Red River Valley, a flood control project has been designed in conjunction with the United States Army Corps of Engineers (hereinafter "USACE"). Doc. ID# 17, APP 250-262. The flood control project is commonly referred to as the "Diversion Project." The Joint Board is the local entity in charge of obtaining the property rights in North Dakota necessary for the Diversion Project. The USACE has designed an inlet structure for the Diversion Project. The inlet structure is a necessary component of the Diversion Project, and it is located within Cass County, North Dakota. Id. The USACE advised the Joint Board that it is necessary to acquire certain property rights in Cass County for the construction, operation, and maintenance of the inlet structure.

[¶8] On May 18, 2016, the Joint Board - with guidance from USACE, the Cass County engineer, and the Joint Board's engineers - concluded it is necessary for the public benefit to acquire a Permanent Right of Way Easement over, across, and through certain property located in Cass County, North Dakota, for the inlet structure. Id. The Cossettes own a parcel of property that is necessary for the inlet structure. On May 18, 2016, the Joint Board made a final offer to the Cossettes to purchase the property rights necessary to construct, operate, and maintain the Inlet Structure. Id.

[¶9] Before the time expired to respond to the offer to purchase, the Cossettes filed and served a Complaint seeking a declaratory judgment and appealing the decisions of the Joint Board. Doc. ID#2, APP 3-534. Following the expiration of the time to respond to the offer to purchase the property rights necessary from the Cossettes, the Joint Board filed and served a separate eminent domain action seeking to acquire the property rights from the Cossettes necessary for the inlet structure. Cass County Joint Water Resource District, a North Dakota Political Subdivision vs. Donald Robert Cossette, et al., 09-2016-CV-01510.

ARGUMENT

I. Only the Issues Before the District Court, and Actually Ruled upon by the District Court, Are Appropriate for Appeal to the Supreme Court.

[¶10] The Cossettes appeal includes a multitude of alleged errors that were not raised before the district court, and were certainly not addressed by the district court in its decision to dismiss the Cossettes' Complaint. The district court granted the Joint Board's Motion to Dismiss because it was improper to bring a request for an equitable remedy attacking the decision of a governmental entity when statutes

provide an administrative appeal, and because the Cossettes were not aggrieved persons for purposes of the administrative appeal they brought. For purposes of the appeal to this Court, it is not relevant whether or not the Joint Board filed the record on appeal with the district court, whether the Joint Board had authority to pass its Resolution of Necessity on May 18, 2016, whether the Joint Board has legal authority to use eminent domain and quick take eminent domain, or whether the Joint Board was required to file a compulsory counterclaim of eminent domain in response to the action of the Cossettes alleging an administrative appeal and declaratory judgment.

[¶11] The scope of review on appeal is limited to the decision the appeal is taken from. If an issue is not raised before the district court, it may not be considered on appeal. Arndt v. Maki, 2012 ND 55, ¶16, 813 N.W. 2d 564. Likewise, issues that were raised, but were not relied upon in the decision being appealed are also not appropriate for review on appeal. Shughnessy v. Bohnet, 303 N.W. 2d 337, 342 (ND 1981) (“We express no opinion on these contentions ... because the district court did not decide these questions, but, instead, chose to base its decision on [different grounds].”).

[¶12] The district court made its decision to dismiss the Cossette Complaint and Appeal based upon two findings: 1) a declaratory judgment action seeking an equitable remedy may not be brought challenging a decision for which an administrative appeal is available; and 2) the Cossettes are not aggrieved persons that are allowed by statute to appeal the Resolution of Necessity passed by the Joint Board. Memorandum Opinion and Order, Doc. ID# 39, APP 556-558. The remaining issues raised by the Cossettes in this appeal have no bearing on the decision

the Cossettes are appealing. All of the extra issues raised by the Cossettes - except whether eminent domain was a compulsory counterclaim to the action brought by the Cossettes - have been raised as a defense in the ongoing eminent domain case. Transcript of Motion to Dismiss Hearing 20:20-25. As the district court accurately recognized, “Whoever hears that other case can decide that.” *Id.* 22:25 - 23:1.

II. The District Court Properly Concluded a Declaratory Judgment Action Is Not Appropriate When an Administrative Appeal Is Authorized by Statute.

A. *Standard of Review for dismissal of declaratory judgment action.*

[¶13] The district court determined the Cossettes’ declaratory judgment action must be dismissed because such an equitable remedy may not be brought challenging a decision for which an administrative appeal is available. Memorandum Opinion and Order, Doc. ID# 39, APP 556-558. This ruling by the district court is a question of law. Questions of law are to be reviewed de novo on appeal.

B. *A declaratory judgment action is not appropriate when an appeal of the decision of a governmental body is allowed by statute.*

[¶14] When the law provides a right of appeal from the decision of a local governing body, as is the case with N.D.C.C. §§ 61-16.1-54 and 28-34-01, a party cannot disregard the statutory right of appeal and file an action attacking the decision. Chester v. Einarson, 34 N.W.2d 418, 427-28 (N.D. 1948); see also Hector v. City of Fargo, 2014 ND 53, ¶ 23, 844 N.W.2d 542 (noting an action for equitable relief is generally not available when a statute provides a right of appeal for reviewing a local governing body’s decision).

[¶15] The declaratory judgment action brought by the Cossettes is analogous to the declaratory judgment action brought by landowners in Anderson v. Richland County Water Resource Board, 506 N.W.2d 362 (N.D. 1993). In Anderson, the landowners objected to a water resource board’s reapportionment of benefits and assessments related to a drain. Id at 364. The North Dakota Supreme Court held the “landowners’ declaratory judgment was inappropriate because N.D.C.C. § 28-34-01 governs an appeal from the board’s decision.” Id. at 365.

[¶16] Like Anderson, the Cossettes’ declaratory judgment action is improper because a statutory right of appeal exists to review the decisions of the Joint Board. N.D.C.C. § 61-16.1-54 allows an aggrieved person to appeal any order or decision of a water resource district, including the Joint Board. “The appeal must be taken to the district court of the county in which the land claimed to be affected adversely by the order or decision appealed from is located and is governed by the procedure provided in section 28-34-01.” N.D.C.C. § 61-16.1-54. The North Dakota Legislature enacted these statutes to provide a method for an aggrieved person to challenge the correctness of the Joint Board’s decisions. In North Dakota, a declaratory judgment action is not cumulative with the statutorily authorized appeal process, it is prohibited by that remedy.

[¶17] At the hearing on the Motion to Dismiss, Judge Marquart probed this issue with Cossettes’ counsel as follows:

Mr. Garaas: No, the cases do not say that you can’t combine them. The cases talk in terms of their - - if there is an appeal possible, then that’s your process. But it doesn’t say - -

The Court: So you're saying that your appeal is futile? That I can dismiss your appeal?

Mr. Garaas: No.

The Court: Well, then you do have an appeal available.

Mr. Garaas: I do have an appeal, but only for the issue of whether or not they could do that taking, re-do that, pass that resolution of necessity.

Transcript of Motion to Dismiss Hearing 13:4-15.

[¶18] The Cossettes chose to challenge the Resolution of Necessity of the Joint Board through the administrative appeal allowed by N.D.C.C. §§ 61-16.1-54 and 28-34-01. When challenged on the matter, the Cossettes would not concede the appeal. The district court correctly determined the Cossettes cannot disregard the appeal statutes and collaterally attack the Joint Board's decision through a declaratory judgment action.

C. The Cossettes' preemptive collateral attack of the Joint Board's eminent domain authority was not proper.

[¶19] The Joint Board started an eminent domain action to acquire property from the Cossettes, the same property which was the subject of the declaratory judgment action brought by the Cossettes. The eminent domain action was brought after the Cossettes commenced their proceeding but before the Joint Board made its Motion to Dismiss. The Cossettes acknowledge the declaratory judgment action, and the appeal of the Resolution of Necessity, is an attempt to block the Joint Board's use of eminent domain. Brief of Appellants, ¶74. They further acknowledge the Resolution of Necessity is one of several elements necessary for the Joint Board to

use eminent domain to acquire the Cossettes' property. Transcript of Motion to Dismiss Hearing 16:20 - 17:4.

[¶20] In their appeal, the Cossettes raise a completely new argument that the declaratory judgment action should not have been dismissed because the court first acquiring jurisdiction should retain it to the end. First, this argument was not raised at the district court, and should not be considered on appeal. Hill v. Lindner, 2009 ND 132, ¶16, 769 N.W.2d 427. Second, this argument is an admission the issues raised in the declaratory judgment action brought by the Cossettes could have been (and actually have been) raised in the eminent domain action.

[¶21] As the district court recognized in its decision, "The potential to be aggrieved is not the equivalent of being in fact aggrieved." Memorandum Opinion and Order, Doc. ID# 39, APP 557, citing Vickery v. ND Workers Comp. Bureau, 545 N.W.2d 781, 783, (ND 1996). In their declaratory judgment action, the Cossettes argue there was a justiciable controversy when they filed their Complaint on May 20, 2016, and the controversy was ripe for judicial determination at that time. With their declaratory judgment action, the Cossettes seek to attack the eminent domain authority of the Joint Board. As of May 20, 2016, the Joint Board had not initiated eminent domain proceedings seeking property rights from the Cossettes. As such, there was no justiciable controversy. No controversy was ripe for review until the Joint Board commenced eminent domain proceedings against the Cossettes on June 1, 2016. The Cossettes are free to raise all of the issues raised in their declaratory judgment action in response to the eminent domain proceedings, and they admitted they have done so. Transcript of Motion to Dismiss Hearing 20:20-25.

[¶22] The district court properly dismissed the Cossettes' declaratory judgment action because such a declaratory judgment action is not proper when an appeal from the decisions of the Joint Board is available to aggrieved parties, and no justiciable controversy existed at the time the Cossettes filed their declaratory judgment action. The issue the Cossettes seek a declaratory judgment on was not a justiciable controversy until the Joint Board began its eminent domain action seeking acquisition of property rights from the Cossettes through the judicial process. At that point, the eminent domain proceeding became the proper venue for raising the objections brought forth by the Cossettes in this action - and repeated by the Cossettes in the eminent domain action.

III. The District Court Properly Ruled the Cossettes are not Aggrieved Parties as Required by N.D.C.C. §61-16.1-54.

A. Standard of review for dismissal of appeal of governing body.

[¶23] In dismissing the Cossettes' appeal of the Resolution of Necessity, the district court concluded as a matter of law that an appeal is only available to persons aggrieved by the decision. The district court then determined the Cossettes were not aggrieved persons. This situation is analogous to the appeal involving the subject matter jurisdiction challenge in Schirado v. Foote. When analyzing a question of whether the district court properly determined the question of subject matter jurisdiction, the Court recognized, "Under this standard, we review the 'questions of law subject to the de novo standard of review [and the] findings of fact subject to the clearly erroneous standard of review.'" Schirado v. Foote, 2010 ND 136, ¶ 7, 785 N.W.2d 235; citing Wigginton v. Wigginton, 2005 ND 31, ¶ 13, 692 N.W.2d 108.

[¶24] The legal determination made by the district court - only aggrieved persons have standing to appeal the Joint Board's decisions - is to be reviewed on a de novo standard of review. The factual decision of the district court - the Cossettes are not aggrieved persons - is to be reviewed on a clearly erroneous standard of review. A factual determination by the district court will only be overturned if no evidence supports it, it is induced by an erroneous view of the law or there is a definite and firm conviction a mistake has been made. Adams v. Adams, 2016 ND 169, ¶ 6, 883 N.W.2d 864, reh'g denied. When evaluating findings of fact by the district court, "This Court views the evidence in the light most favorable to the findings, and the district court's findings of fact are presumptively correct." Id., quoting Gabaldon-Cochran v. Cochran, 2015 ND 214, ¶ 5, 868 N.W.2d 501).

B. Only aggrieved persons are entitled to appeal the decisions of a water resource district.

[¶25] The Cossettes appealed the Resolution of Necessity passed by the Joint Board. The Joint Board is a joint water resource district governed by Chapter 61-16.1 of the North Dakota Century Code. N.D.C.C. § 61-16.1-54 provides for an appeal of decisions of a water resource district. N.D.C.C. §61-16.1-54 states, "An appeal may be taken to the district court from any order or decision of the water resource board by any person aggrieved." The district court cited this statute and made the legal conclusion the Cossettes only have the right to appeal the May 18, 2016, Resolution of Necessity if they are aggrieved by the Resolution of Necessity. Doc. ID# 39, APP 557, ¶ 6. The Cossettes do not challenge this conclusion of law.

C. The district court properly determined the Cossettes were not aggrieved by the Resolution of Necessity.

[¶26] In order to be considered an “aggrieved person,” the individual “must have some legal interest that may be enlarged or diminished by the decision to be appealed from.” Hagerott v. Morton County Bd. of Comm’rs, 2010 ND 32, ¶ 9, 778 N.W.2d 813 (internal quotation marks and citation omitted). “In other words, such party must be injuriously affected by the decision.” Id. (internal quotation marks and citation omitted); see also King v. Stark County, 10 N.W.2d 877, 878 (N.D. 1943) (“Only a party who is directly and adversely affected by a judgment or order is aggrieved thereby.”).

[¶27] As the district court recognized when citing Vickery v. N.D. Workers Compensation Bureau, 545 N.W.2d 781, 783 (N.D. 1996), “The potential to be aggrieved is not the equivalent of being aggrieved in fact.” Doc. ID# 39. “The right invaded must be immediate, not merely some possible, remote consequence.” King, 10 N.W.2d at 878.

[¶28] The district court determined the Cossettes were not “aggrieved persons” under N.D.C.C. § 61-16.1-54 because they were not injuriously affected by the Resolution of Necessity they sought to appeal. The Resolution of Necessity did not invade the Plaintiffs’ rights or adversely affect them. During the hearing on the matter, and again in its order, the district court recognized the Resolution of Necessity is a preliminary step that must be taken in advance of an eminent domain proceeding. Counsel for the Cossettes acknowledged at the hearing the Resolution of Necessity is only one of the required steps to acquire property through eminent domain.

Transcript of Motion to Dismiss Hearing 16:20 - 17:4. Counsel for the Cossettes also admitted at the hearing that all issues raised by the Cossettes in this case were raised in the subsequent eminent domain action. Id at 20:20 - 21:3.

[¶29] By appealing the Resolution of Necessity, the Cossettes hoped to stop the Joint Board from taking their property through eminent domain. When the Cossettes started their action appealing the Resolution of Necessity, no property rights had been taken from the Cossettes. As the district court correctly determined:

Here, eminent domain proceedings were initiated after this lawsuit. If the Plaintiffs are aggrieved by a taking, the issues that they raise here may be raised in that proceeding.

Memorandum Opinion and Order, Doc. ID# 37, APP 557, ¶8.

[¶30] The district court properly concluded the Plaintiffs are not “aggrieved” as required by N.D.C.C. §61-16.1-54, because they have no legal interest that was enlarged or diminished by the Resolution of Necessity. Furthermore, the district court correctly determined the Cossettes would have the right to raise any of the issues raised in their appeal in an actual controversy where their property rights may be taken.

[¶31] In their briefing to this Court, the Cossettes say they are aggrieved persons, but they do not say how they are aggrieved. They simply ask to be “free of any claimed eminent domain authority.” Brief of Appellants at ¶ 82. Every landowner in North Dakota is subject to eminent domain by a host of statutorily authorized entities. A determination by the Joint Board that it will need to use eminent domain to acquire the property rights necessary for the inlet structure if the Cossettes do not agree to sell them has no impact on a legal interest of the Cossettes.

As the Cossettes are not persons aggrieved by the Resolution of Necessity, the district court properly dismissed the appeal.

[¶32] In their appeal of the district court's decision, the Cossettes reach beyond the district court's decision by arguing the district court should have addressed the Cossettes' arguments against eminent domain in their appeal of the Resolution of Necessity. As previously indicated, issues not ruled upon by the district court are not appropriate for review by this Court. Even if the Cossettes were "aggrieved persons" who could appeal, the eminent domain issues they raised cannot be considered by the district court in an appeal from a decision of a governing body. The North Dakota Supreme Court has ruled it is improper to consider whether a taking exists when the matter before the court is an appeal of a local governing body's decision. Gowan v. Ward County Comm'n, 2009 ND 72, ¶ 11, 764 N.W.2d 425 (declining to address the issue of whether the county effectuated an unconstitutional taking of the landowner's property because the matter was an appeal under N.D.C.C. § 28-34-01). As discussed above, the Cossettes' challenge to the Joint Board's ability to use eminent domain must be raised in the eminent domain proceeding itself. The Cossettes cannot raise those issues in an appeal of the Resolution of Necessity.

CONCLUSION

[¶33] The district court properly dismissed the Cossettes' Complaint and Appeal. Therefore, the Joint Board respectfully requests the decision of the district court be affirmed in its entirety.

Dated: November 28, 2016.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellee in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 3,542 words (excluding words contained in (1) the table of contents, (2) the table of authorities, and (3) this certificate), which is within the limit of 8,000 words.

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