STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1034

Franklin P. Kottschade, et al.,
Appellants,

vs.

State of Minnesota,
Department of Transportation,
Respondent.

Filed December 23, 2013
Reversed and remanded
Halbrooks, Judge

Olmsted County District Court
File No. 55-CV-12-5761

Gary A. Van Cleve, Julie N. Nagorski, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota (for appellants)

Lori Swanson, Attorney General, Richard L. Varco, Jr., Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Huspeni, Judge.*

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

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellants challenge the district court's order sustaining respondent's demurrer to a petition for a writ of mandamus, arguing that their driveway-access permit application was deemed approved under Minn. Stat. § 15.99, subd. 2(a) (2012), because their application was "a written request relating to zoning" and respondent failed to respond to it within 60 days. Because we conclude that appellants' application was "a written request relating to zoning" and it is undisputed that respondent failed to respond to the application within 60 days, we reverse and remand for the district court to issue the writ of mandamus.

FACTS

On May 26, 2010, appellants Franklin P. and Bonnie R. Kottschade submitted an application for an "access driveway permit" to respondent State of Minnesota, Department of Transportation (MnDOT). The Kottschades sought to build a driveway connecting land they own in Rochester to the abutting Trunk Highway 52 East Frontage Road. The application consisted of a one-page preprinted form from MnDOT. The form included spaces for applicants to provide the purpose of the driveway, whether a building would be constructed, and, if so, what type of building. The Kottschades indicated that their proposed driveway is for "Right-in/Right-out" access to commercial property. They also stated that a 36,000-square-foot retail building would be constructed on the property. The Kottschades attached a legal description of the property, a site plan, a topographic survey, and a concept layout.

MnDOT denied the Kottschades' request for a driveway-access permit in a letter dated July 28. The letter stated that the requested driveway access "will not be allowed due to public safety concerns." The Kottschades petitioned the district court to issue a peremptory writ of mandamus to compel MnDOT to grant their driveway-access permit application, or an alternative writ of mandamus to show cause why a "writ of mandamus should not issue directing MnDOT to grant the [a]pplication immediately." The Kottschades alleged that they are entitled to relief because MnDOT did not approve or deny the application within 60 days as required by Minn. Stat. § 15.99, subd. 2(a), and that if an agency "fails to deny a request within [60] days, the request is automatically approved." The district court issued an order allowing an alternative writ of mandamus, with a September 28, 2012 hearing date.

MnDOT appeared at the September 28 hearing and submitted a demurrer to the petition for the writs of mandamus, contending that the Kottschades' petition did not state facts sufficient to constitute a cause of action. In a written order dated January 4, 2013, the district court concluded "that under the plain language of [Minn. Stat. § 15.99, subd. 2(a)], the 60 day deadline for agency action does not apply to the Frontage Road access application at issue herein." The district court sustained the state's demurrer and dismissed the Kottschades' petition for writs of mandamus. This appeal follows.

D E C I S I O N

This is an appeal from a district court order sustaining a demurrer to a petition for a writ of mandamus. A demurrer asks the district court, in relevant part, to decide whether the allegations in the complaint, "even if found to be true upon trial, would

entitle plaintiff to judgment as a matter of substantive law." *Hoppe v. Klapperich*, 224 Minn. 224, 227, 28 N.W.2d 780, 784 (1947).

> A demurrer raises an issue of law only and is for the court's determination. No fact question is involved, nor does it include a mixed question of law and fact. A demurrer admits all material facts well pleaded, including all necessary inferences or conclusions of law which follow from such facts. The complaint is to be liberally construed, and if by such construction it can be shown that facts are stated entitling plaintiff to any relief, whether legal or equitable, the complaint is not subject to demurrer.

Nostdal v. Watonwan Cnty., 221 Minn. 376, 381, 22 N.W.2d 461, 464 (1946). "No deference is given to a lower court on questions of law." *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

The Kottschades argue that the district court erred in its interpretation of Minn. Stat. § 15.99, subd. 2(a), which led to its erroneous conclusion "that the 60 day rule does not apply to a MnDOT driveway access permit application." The statutory language at issue states:

> Except as otherwise provided in this section, section 462.358, subdivision 3b, or 473.175, or chapter 505, and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning, septic systems, watershed district review, soil and water conservation district review, or expansion of the metropolitan urban service area for a permit, license, or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request. If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.

Minn. Stat. § 15.99, subd. 2(a). "We review questions of statutory interpretation de novo." *Johnson v. Cook Cnty.*, 786 N.W.2d 291, 293 (Minn. 2010).

The district court concluded that the Kottschades' driveway-access permit application is not "a written request relating to zoning" under the meaning of section 15.99, subdivision 2(a). In doing so, the district court relied on *Advantage Capital Mgmt. v. City of Northfield*, in which this court stated: "In light of the legislative history, purpose, and effect of the competing interpretations, we conclude that 'a written request relating to zoning' is a request to conduct a specific use of land within the framework of the regulatory structure relating to zoning or, in other words, a zoning application." 664 N.W.2d 421, 427 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). The district court reasoned that the Kottschades "did not file a zoning application; make a request to 'conduct a specific use of the land'; or seek a special-use permit, conditional-use permit, variance, site-plan approval, or similar agency action within the framework established in *Advantage Capital*." The Kottschades contend that the district court's interpretation of the phrase "request relating to zoning" is impermissibly narrow.

After the district court made its decision—and after the parties submitted their appellate briefs—the supreme court adopted a much broader definition of the phrase "a written request relating to zoning." In *500, LLC v. City of Minneapolis*, the supreme court stated:

> [T]he phrase "a written request relating to zoning" is unambiguous and refers to a written request that has a connection, association, or logical relationship to the regulation of building development or the uses of property. If a written request has such a connection, association, or logical

> relationship, then the 60-day time limit in Minn. Stat. § 15.99, subd. 2(a), applies.

___ N.W.2d ___, ___, 2013 WL 5348308, at *3 (Minn. Sept. 25, 2013). Because our review is de novo, this court applies the supreme court's definition as articulated in *500, LLC*.

In *500, LLC*, the supreme court considered whether a real-estate firm's submission of an application for a "certificate of appropriateness" to the Minneapolis Heritage Preservation Commission—which, if approved, would allow the firm to destroy or alter an otherwise protected building nominated as a historic landmark—"'relates to zoning' under Minn. Stat. § 15.99, subd. 2(a)." *Id.* at *1-3. In its analysis, the supreme court considered whether the "heritage-preservation proceedings," the "historic-preservation-enabling laws," and the "[c]ity's heritage-preservation ordinances" related to zoning. *Id.* at *4-5.

First, the supreme court concluded that the "heritage-preservation proceedings have a connection, association, or logical relationship to zoning" because "[l]ike a conditional-use permit, a certificate of appropriateness involves a particular property and affects specific property rights." *Id.* at *4. Specifically, the process "affects 500 LLC's specific rights to alter and use its property—which is typical of a zoning restriction." *Id.* Second, the supreme court concluded that "the state's historic-preservation-enabling laws recognize a connection, association, or logical relationship between heritage preservation and zoning" in that the laws allow for the creation of boards or commissions that can "provide special zoning conditions," "amend zoning ordinances," and "approve use

variations to a zoning ordinance" to protect historic districts and sites. *Id*. (quotations omitted). And third, the supreme court concluded that "the [c]ity's heritage-preservation ordinances identify a connection, association, or logical relationship between an application for a certificate of appropriateness and zoning" because under city ordinance, the commission "must find that any proposed alteration is consistent with the applicable policies of the comprehensive plan" before granting a certificate of appropriateness and zoning ordinances, in turn, "implement the policies and goals of the comprehensive plan." *Id*. at *5 (quotation omitted).

Under the reasoning set forth in *500, LLC*, we conclude that the Kottschades' driveway-access permit application has an "association . . . or logical relationship to the regulation of building development or the uses of property." *See id*. at *3. First, the process MnDOT uses to grant or deny driveway-access permits takes into account the use to which the property will be put, including the type of business that is being proposed and the site plan, so that MnDOT can determine how much traffic the proposed driveway might generate. In this case, the Kottschades included a site plan and informed MnDOT that the proposed driveway was to provide access to a 36,000-square-foot retail building. The Kottschades also indicated that there were presently no other driveways to the property. By denying the permit, MnDOT effectively foreclosed the possibility of using the property for the proposed purpose, at least in its proposed form. Hence, the process "affect[ed]" the Kottschades' "specific rights to alter and use its property." *See id*. at *4.

Second, the law that MnDOT claims controls in this case, Minn. Stat. § 160.18, subd. 3 (2012), provides that a landowner's "right of direct private access" to a public

highway is limited to access that "will facilitate the efficient *use* of the property for a particular *lawful purpose*, subject to reasonable regulation by and permit from the road authority." (Emphasis added.)[1] Assuming, without deciding, that section 160.18, subdivision 3 controls, the statute recognizes a "connection" between the permit for private access to a public highway and the lawful "use" of the property. *See 500, LLC*, 2013 WL 5348308, at *3 (defining zoning "as the regulation of building development and uses of property" (quotation omitted)).

Third, the Minnesota rules governing MnDOT's issuance of driveway permits provide, in relevant part, that "[i]n the event of a change in land use . . . existing driveways are not automatically perpetuated and new driveway access applications shall be submitted." Minn. R. 8810.5200 (2011). Thus, the applicable state-agency rules recognize at least a "connection, association, or logical relationship" between the driveway-access permit and "the regulation of . . . the uses of property." *See 500, LLC*, 2013 WL 5348308, at *3.

In sum, under the definition and analysis set forth in *500, LLC*, the Kottschades' driveway-access permit application was "a written request relating to zoning" under the meaning of section 15.99, subdivision 2(a). Therefore, section 15.99, subdivision 2(a), applies. Under subdivision 2(a), the failure of an agency to deny the request within 60 days is deemed an approval of the request. Minn. Stat. § 15.99, subd. 2(a). The district

[1] In their reply brief, the Kottschades argue that Trunk Highway 52 East Frontage Road is not a public highway within the meaning of the statute and that Minn. Stat. § 160.18, subd. 3, therefore does not govern their driveway-access permit application. Resolution of this issue is not necessary to our decision. We assume, for the sake of argument, that section 160.18, subdivision 3, controls.

court found that MnDOT is an agency within the meaning of section 15.99 and that MnDOT did not respond to the Kottschades' permit application within 60 days. MnDOT does not contest these facts. We therefore reverse and remand for the district court to issue the peremptory writ of mandamus directing MnDOT to grant the Kottschades' driveway-access permit. *See* Minn. Stat. § 586.04 (2012) ("When the right to require the performance of the act is clear, and it is apparent that no valid excuse for nonperformance can be given, a peremptory writ may be allowed in the first instance.").

Reversed and remanded.