

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP256

Cir. Ct. No. 2012CV12639

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**NORTH MAYFAIR 1 LLC, NORTH MAYFAIR 2 LLC, NORTH MAYFAIR 3
LLC, NORTH MAYFAIR 4 LLC, NORTH MAYFAIR 5 LLC, NORTH
MAYFAIR 6 LLC, NORTH MAYFAIR 7 LLC, NORTH MAYFAIR 8 LLC
AND NORTH MAYFAIR 9 LLC,**

PLAINTIFFS-APPELLANTS,

v.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MARSHALL B. MURRAY, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 KESSLER, J. North Mayfair¹ appeals an order of the trial court excluding evidence of damages resulting from a change in road access stemming from a Department of Transportation (DOT) construction project. We affirm.

BACKGROUND

¶2 The underlying facts are not in dispute. North Mayfair owns a 10.02 acre parcel located at the northeast corner of North Mayfair Road and West Watertown Plank Road in the City of Wauwatosa. The property contains a four-story Class A office building known as “High Point.” The western and southern edges of North Mayfair’s property abutted the intersection of North Mayfair Road and West Watertown Plank Road. The eastern edge of the property previously abutted Underwood Creek Parkway (the Parkway). The property had an access point to the Parkway. The Parkway intersected with West Watertown Plank Road near the southeast corner of the property.

Property Acquired by the DOT

¶3 In 2009, the DOT embarked on a freeway improvement project in Milwaukee County known as the Zoo Interchange Project. The Zoo Interchange is a large freeway interchange in Milwaukee County at the junction of Interstate 94, Interstate 894 and U.S. Highway 45. The Zoo Interchange Project involved thirty-six distinct construction projects and thirty-six smaller traffic mitigation projects. One of the Zoo Interchange projects affected North Mayfair’s property. The project involved widening North Mayfair Road and West Watertown Plank Road and adding new turn lanes. In connection with this project, the DOT acquired three portions of North Mayfair’s property: (1) .801 acre in fee title; (2) .041 acre

¹ We refer to the appealing parties collectively as “North Mayfair.”

as a permanent limited easement; and (3) 2.4 acres as a temporary limited easement. All three pieces of affected land stretched along the western and southern lengths of North Mayfair's property where it abutted North Mayfair Road or West Watertown Plank Road. None of the DOT acquired land on the southern or western sides of North Mayfair's property contained an access point connecting North Mayfair's property to adjacent roads.

Road Relocation

¶4 Another component of the Zoo Interchange Project affected the eastern edge of North Mayfair's property which abutted Underwood Creek Parkway. The Parkway intersected with West Watertown Plank Road on the south, providing an access point to North Mayfair's property. The project involved relocation of nearby Swan Boulevard, elimination of the intersection of the Parkway and Watertown Plank Road, and building a roundabout which connected the Parkway with Swan Boulevard near the northeast corner of North Mayfair's property. The project also changed North Mayfair's old point of access from the Parkway to the new Swan Boulevard roundabout. After the Parkway was modified, North Mayfair also obtained part of the Parkway as a private driveway which connected to West Watertown Plank Road. The DOT did not take any of North Mayfair's property as a part of the Swan Boulevard project. The Swan Boulevard project was near, but separate from, North Mayfair's property. The DOT did not compensate North Mayfair for the Swan Boulevard project.

Disputed Compensation

¶5 Because the Mayfair Road project involved three takings,² the DOT compensated North Mayfair as required by WIS. STAT. ch. 32 (2015-16).³ The DOT entered an award of damages on October 24, 2012.⁴ On November 16, 2012, North Mayfair filed a notice of appeal in Milwaukee County pursuant to WIS. STAT. § 32.05(11) challenging the amount of compensation received under the award of damages. North Mayfair also alleged access damages caused by the DOT's Swan Boulevard project.

¶6 The DOT filed a motion in limine to exclude evidence related to access damages. Relying on *118th Street Kenosha, LLC v. DOT*, 2014 WI 125, 359 Wis. 2d 30, 856 N.W.2d 486, the trial court granted the DOT's motion, finding that the DOT did not actually take any of North Mayfair's property for the Swan Boulevard project and that access to the property was diverted, not eliminated. The trial court found that North Mayfair was thus not entitled to damages stemming from the Swan Boulevard project.

¶7 North Mayfair now appeals the trial court's ruling on the DOT's motion in limine.⁵

² The acquisition and the easements on the west and south sides of the property.

³ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

⁴ The amount of damages has been redacted from the record.

⁵ The parties settled claims unrelated to access damages, but reserved the right to appeal the trial court's order granting the DOT's motion in limine to exclude evidence of access damages.

DISCUSSION

¶8 On appeal, North Mayfair argues that: (1) the trial court erred in relying on *118th Street Kenosha*; (2) the trial court erred in differentiating between the Zoo Interchange subprojects; (3) the trial court failed to apply the statutory protections of WIS. STAT. §§ 66.1035 and 32.09(6)(b); and (4) a jury must determine just compensation for access damages. All of North Mayfair’s arguments are based on its contention that the trial court erred in limiting evidence of the changed highway access to its property pursuant to WIS. STAT. § 32.09(6g). We disagree and conclude that the trial court properly excluded the evidence.

Standard of Review

¶9 We “will not disturb a [trial] court’s decision to admit or exclude evidence unless the [trial] court erroneously exercised its discretion.” *118th Street Kenosha*, 359 Wis. 2d 30, ¶18 (citation omitted). “A [trial] court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.” *Id.* (citation omitted).

¶10 “To determine whether evidence was admissible under WIS. STAT. § 32.09(6g), we must interpret and apply that statute.” *118th Street Kenosha*, 359 Wis. 2d 30, ¶19. “Statutory interpretation and application present questions of law that we review *de novo* while benefiting from the analys[is] of the ... [trial] court.” *Id.*, ¶19 (citation omitted; italics added). “[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Id.*, ¶20 (citation and one set of quotation marks omitted; brackets in *118th Street Kenosha*). “We give statutory language ‘its common, ordinary, and accepted meaning, except that technical or specially-

defined words or phrases are given their technical or special definitional meaning.” *Id.* (citation omitted). “We interpret statutory language in the context of the statute in which it is used and in relation to closely-related statutes.” *Id.*

¶11 We decide this appeal on the narrow question of whether the trial court erroneously excluded evidence of access damages from the relocation of Swan Boulevard.

Relevant Statutes

¶12 As relevant to this appeal, WIS. STAT. § 32.09 (6) and (6g) provide:

In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

(6) In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

....

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

....

(6g) In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the

whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in sub. (6)(a) to (g) where shown to exist.

¶13 There must be a governmental taking before a party can make a claim for just compensation. See *Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis. 2d 74, 80, 284 N.W.2d 887 (1979). When the government relocates a road, it is not always required to compensate all who are adversely affected by the relocation. See *Surety Sav. & Loan Ass'n v. DOT*, 54 Wis. 2d 438, 444, 195 N.W.2d 464 (1972).

¶14 With these statutes and principles in mind, the Wisconsin Supreme Court addressed a situation similar to the instant appeal when it decided *118th Street Kenosha*. In that case, 118th Street Kenosha, LLC (the LLC) owned 1.83 acres of land that had direct access to two adjacent streets—118th Avenue and 74th Place. *Id.*, 359 Wis. 2d 30, ¶9. The DOT acquired a temporary limited easement of a portion of the LLC's property as a part of a highway reconstruction project. *Id.*, ¶10. The easement was acquired for the purpose of building a driveway from the property to 74th Place. *Id.* A separate component of the reconstruction project relocated 118th Avenue so that the property no longer abutted the avenue, thus causing the LLC's property to lose direct access to 118th Avenue. *Id.*, ¶11. The DOT awarded the LLC damages for the 74th Place limited easement, but not for the loss of direct access to 118th Avenue. *Id.*, ¶¶10-11. The LLC appealed the DOT's compensation award, in part, due to the loss of direct access to 118th Avenue. *Id.*, ¶12. The DOT filed a motion in limine seeking to

exclude evidence of damages caused by the loss of direct access and proximity to 118th Avenue. *Id.*, ¶13. The trial court granted the motion. *Id.*

¶15 In affirming the trial court’s decision, the supreme court rejected the same arguments North Mayfair makes now. The court distinguished between the 74th Place and the 118th Avenue projects, noting “that WIS. STAT. § 32.09(6g) allows for recovery of damages enumerated in § 32.09(6)(a) to (6)(g), but compensation is due for ‘the taking of an easement.’” *118th Street Kenosha*, 359 Wis. 2d 30, ¶36. The supreme court explained: “[h]ere, the temporary limited easement provided the LLC with additional access to 74th Place, but the easement did not cause the LLC to lose direct access and proximity to 118th Avenue.” *Id.*

¶16 North Mayfair, like the LLC, relies on *National Auto Truckstops v. DOT*, 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198, to support its position that the value of its property diminished when it lost its original access. *See 118th Street Kenosha*, 359 Wis. 2d 30, ¶51. The *118th Street Kenosha* court rejected the LLC’s reliance on *National Auto Truckstops*, explaining *National Auto Truckstops*’s background and holding as follows:

In *National Auto Truckstops* the truckstop’s strip of land, which contained the only points of direct access to the highway, was taken.... Because the truckstop’s only two points of direct access to the highway were actually located on the portion of land taken, the partial taking resulted in the truckstop losing its only points of direct access to the highway. National Auto’s new access to the highway was via the new frontage road. At trial over compensation due for the partial taking of land, the circuit court excluded evidence that the truckstop declined in value because of its loss of two points of direct access to the highway.

... *National Auto Truckstops* does not stand for the proposition that compensation for an easement includes damages for a commercial property’s diminution in value

caused by a highway relocation project when no property was taken.

118th Street Kenosha, 359 Wis. 2d 30, ¶¶52-53 (internal citations omitted).

¶17 The *118th Street Kenosha* court distinguished *National Auto Truckstops* by noting that “[u]nlike the taking in *National Auto Truckstops*, the temporary limited easement ... did not cause the LLC to lose direct access and proximity to 118th Avenue.... [N]ot only was no land taken, but by providing the LLC with a permanent additional driveway pursuant to the temporary limited easement, the LLC gained more, not less, access to 74th Place.” *118th Street Kenosha*, 359 Wis. 2d 30, ¶55. Relying on previous case law, the court ultimately concluded that

damages for a partial taking cannot include damages for the impact caused by loss of access to a highway if the loss of access resulted from the relocation of the highway, rather than from the taking. *National Auto Truckstops* recognized that there are circumstances under which damages for loss of direct access to a highway could be recoverable. However, those circumstances are glaringly absent in the case at issue.

118th Street Kenosha, 359 Wis. 2d 30, ¶57.

¶18 Like the court in *118th Street Kenosha*, we also observe that the facts noted in *National Auto Truckstops* are “glaringly absent” here. North Mayfair did not lose a direct access point because of a DOT taking. Two separate acts occurred. First, the Mayfair Road project involved a partial taking of North Mayfair’s property along its southern and western edges. The DOT compensated North Mayfair for the taking. Second, the Swan Boulevard project involved the DOT relocation of Swan Boulevard. This occurred on the eastern side of North Mayfair’s property, but not on North Mayfair’s property. The DOT did not take any property from North Mayfair along the eastern side of North Mayfair’s

property. The Swan Boulevard project changed access to North Mayfair's property from the Parkway to the new Swan Boulevard roundabout. In addition, North Mayfair obtained a portion of the Parkway, thus also maintaining direct access to West Watertown Plank Road. Any damages North Mayfair believes it sustained from the Swan Boulevard project did not stem from a taking in accordance with WIS. STAT. §§ 32.06(6) or (6g). There was no taking at all on the eastern side of North Mayfair's property. North Mayfair maintained a direct access point to the property by not one, but two routes. The original access point simply changed from the Parkway to Swan Boulevard. Therefore, based on *118th Street Kenosha*, we conclude that the trial court property excluded evidence related to access damages.

CONCLUSION

¶19 For the foregoing reasons, we affirm the trial court.⁶

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁶ Because our narrow holding is dispositive of this appeal, we need not address North Mayfair's other arguments. See *Miesen v. DOT*, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999).

