STATE OF MICHIGAN

COURT OF APPEALS

ANNE E. HEAPHY and WILLIAM J. HEAPHY,

Plaintiffs-Appellees/Cross-Appellants,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
April 18, 2006

No. 257941
Ottawa Circuit Court
LC No. 03-045407-AA

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant appeals as of right various orders of the circuit court, sitting as the Court of Claims, ultimately leading to the entry of judgment in plaintiffs' favor in the amount of $1,740,000. We affirm.

Plaintiffs Anne and William Heaphy own three parcels of land, known as Lots 1-3, on the Lake Michigan shoreline in Port Sheldon Township, Ottawa County. They also own other lots in the subdivision and an addition to the subdivision. In 2000, plaintiffs listed Lots 1-3, together with Lot 165 for sale. They received an offer to buy these lots and other lots owned by them, including Lots 15-17, for $1,050,000, conditioned on their ability to obtain a building permit for Lots 1-3, which are located in a critical dune area. Plaintiffs filed an application for a variance with the Port Sheldon Township Zoning Board of Appeals. The board denied the application, finding that the proposed building site violated several provisions of the township's critical dunes ordinance. Plaintiffs appealed this decision to the Ottawa Circuit Court; the circuit court agreed that the proposed building site violated several township ordinance provisions, but also ruled that the township's denial of the application for a variance to build on Lots 1-3 deprived plaintiffs of all economically beneficial use of their property and therefore was a compensable regulatory taking. To avoid compensating plaintiffs for the loss of all economically beneficial use of their land, the township repealed the provisions of its critical dunes ordinance.

Though the township repealed its critical dunes ordinance, plaintiffs still needed to receive a special exception permit from defendant, the Michigan Department of Environmental Quality (MDEQ), to build on Lots 1-3. Plaintiffs filed an application, which the MDEQ denied, on the basis that the proposed building site violated several provisions of the Sand Dune

Protection and Management Act (SDPMA), MCL 324.35301 *et seq*. Plaintiffs appealed the decision before an MDEQ hearing referee, who affirmed the MDEQ's decision to deny plaintiffs a special exception permit.

Plaintiffs appealed the decision to the Ottawa Circuit Court, and sought damages for a regulatory taking in the Court of Claims. The circuit court was assigned to sit as the Court of Claims. The court concluded that the MDEQ had properly denied the special exception pursuant to the provisions of the SDPMA, and also found the MDEQ's application of these regulations denied plaintiffs all economically beneficial use of Lots 1-3, and constituted a compensable regulatory taking. After a bench trial to determine damages, the circuit court ordered the MDEQ to compensate the Heaphys $1,740,000 for the lost value of their land, along with $115,183 in interest and $4,700 in costs. This appeal ensued.

We first address defendant MDEQ's argument that the circuit court improperly considered plaintiffs' regulatory takings claim before the MDEQ made a final decision regarding whether other possible building locations existed on any of plaintiffs' property. For a plaintiff to pursue an inverse condemnation claim or to otherwise receive judicial review of an administrative action, the administrative decision must be final; that is, "the initial decision maker [must have] arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . ." *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 80-81; 445 NW2d 61 (1989), quoting *Williamson Co Regional Planning Comm v Hamilton Bank of Jackson City*, 473 US 172, 192-193; 105 S Ct 3108; 87 L Ed 2d 126 (1985). Here, the MDEQ reached a final decision in the matter. MCL 324.35305(2) indicates that a ruling of a hearing referee is subject to immediate judicial review; by necessity this requires the referee's ruling to be treated as the MDEQ's definitive position on the issue. Further, when the MDEQ hearing referee reviewed the department's decision to deny the application for a special exception, he noted that the opinion and order constituted the final agency decision of the DEQ. As the ruling of the referee was the department's final, definitive decision regarding the question whether the special exception application should have been denied, the Ottawa Circuit Court had proper jurisdiction over this case.

Defendant MDEQ further argues the circuit court erred in concluding that, because Lots 1-3 do not touch any of plaintiffs' other property, Lots 1-3 constitute the proper denominator parcel for purposes of determining if a regulatory taking occurred. Defendant also asserts that Lots 15-17, located across Helena Avenue from Lots 1-3, are in fact contiguous to Lots 1-3 because plaintiffs own the land underneath Helena Avenue, and therefore Lots 1-3 and Lots 15-17 should be considered part of one denominator parcel. Defendant bases its argument that plaintiffs own the property underlying Helena Avenue on the fact that they were granted an easement to use Helena Avenue and on MCL 560.227a, which would give plaintiffs title to the land underlying Helena Avenue if a court decided to vacate the street.[1] We find no error.

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[1] MCL 560.227a states:

(continued…)

According to a principle of takings analysis known as the "nonsegmentation principle," "when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole," and not just to the portion of the property affected by a particular regulation. *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 578-579; 575 NW2d 531 (1998). This "property as a whole" is called the "denominator parcel." *Id.* at 577. Factors used to identify a denominator parcel include:

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment. [456 Mich at 580, quoting *Ciampitti v United States*, 22 Cl Ct 310, 318-319 (1991).]

In the instant case, Lots 1-3 are properly regarded as the denominator parcel. In applying for a permit, these lots were joined together as a single parcel. Lots 15-17 were treated by plaintiffs as a separate building site. There is no question that were it not for the SDPMA, Lots 1-3 would constitute a separate, suitable building site having no connection to the other lots owned by plaintiffs, including Lots 15-17. This conclusion is not altered by MCL 560.227a. Helena Avenue was never vacated, and the plat dedication grants an easement to all lot owners within the plat. This supports the circuit court's conclusion that Lots 15-17 are not part of the denominator parcel.

Defendant MDEQ also argues that the court erroneously granted plaintiffs $1,740,000, plus interest and costs, as just compensation for the MDEQ's regulatory taking of their land. Again, we disagree.

The amount of compensation awarded is based on the fair market value of the property in question at the time of the taking. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 633; 705 NW2d 549 (2005). "Where a court following a bench trial has determined the issue of damages," this Court reviews that award for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). This Court may not "set aside a nonjury award merely on the basis of a difference of opinion." *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, supra* at 110. This Court reviews the trial

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> (1) Title to any part of the plat vacated by the court's judgment, other than a street or alley, shall vest in the rightful proprietor of that part. *Title to a street or alley the full width of which is vacated by the court's judgment shall vest in the rightful proprietors of the lots, within the subdivision covered by the plat, abutting the street or alley*. . . . [Emphasis added.]

court's conclusions of law de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

Appraiser John Shea testified that he appraised Lots 1-3 to be worth approximately $12,000 per front foot, or $1,740,000 for the entire property. Chuck Posthumus described Lots 1-3 as a particularly good building site, and William Heaphy testified to his belief that Lots 1-3 had a value of $12,000 per linear foot. Real estate broker Tom Speet testified that he had conservatively listed Lots 1-3 and Lot 165 for sale in 2000 at $600,000, but he had recently seen comparative properties in the area listed for sale at $12,000 per front foot.

Defendant argues that Shea's appraisal was "riddled with mistakes" and that Speet's statement was "an unsupported statement of opinion or value by an unqualified person i.e., non-appraiser." Instead, defendant maintains the appraisal of its witness, Daryl Hassevoort, was the only credible evidence presented as to the value of Lots 1-3, and argues that the trial court should have relied on this testimony. This is clearly an argument based on the credibility of the witnesses, and this Court defers to the trial court's superior position to observe and evaluate witness credibility. *Marshall Lasser, supra* at 110. See also MCR 2.613(C). Each appraiser presented his appraised value of Lots 1-3, and explained the procedure he followed, the comparison properties he evaluated, and the variables he used to arrive at his conclusion. Three other witnesses testified in plaintiffs' behalf regarding the value of the land. The trial court's determination of the value of Lots 1-3 was supported by witness testimony on the record. Therefore, we find the trial court did not clearly err in determining the value of Lots 1-3 to be $11,600 per front foot, or $1,740,000 total.

Defendant also argues that the circuit court erroneously valued Lots 1-3 under the assumption that plaintiffs have enforceable easement rights to access Lots 1-3 from the plat of Port Sheldon Beach, when in fact they do not have access to Lots 1-3. We disagree.

MCL 566.106 provides:

> No estate or interest in lands . . . shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

While plaintiffs never attained their easement rights to Lot 3 in a formal deed, this is not necessary according to MCL 566.106, as long as the grant of the easement is conveyed in writing.

An easement is subject to the statute of frauds; therefore, "[i]n order to create an express easement, there must be language in the writing manifesting a clear intent to create a servitude." *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). However, a case-by-case approach applies to determine if an easement complies with the statute of frauds:

> [W]e affirm the standard espoused by Professor Corbin and adopted by this Court in *Goslin v Goslin* [369 Mich 372, 376; 120 NW2d 242 (1963)]: " . . . There are few, if any, specific and uniform requirements. The statute itself prescribes none;

> and a study of the existing thousands of cases does not justify us in asserting their existence. Some note or memorandum having substantial probative value in establishing the contract must exist; but its sufficiency in attaining the purpose of the statute depends in each case upon the setting in which it is found . . . ." [*Forge*, 458 Mich at 206.]

The minutes of the July 12, 1997 annual meeting of the Port Sheldon Beach Association (PSBA) shareholders is a "conveyance in writing" sufficient to satisfy the statute of frauds. The minutes, recorded and signed by the secretary of the corporation in her official capacity, indicate the PSBA membership officially voted to approve the WJH Pension Fund Proposal. The terms of the WJH Pension Fund Proposal specifically indicate that the PSBA promised to grant plaintiffs an easement from Montello Avenue to Michigan Avenue, abutting Lots 1-3. "Where one writing references another instrument for additional contract terms, the two writings should be read together." *Forge*, *supra* at 207. As the minutes of the annual meeting reference the terms of the WJH Pension Fund Proposal, the two writings should be read together; taken together, these writings indicate that the PSBA shareholders voted to grant the easement to plaintiffs. This satisfies the requirements of the statute of frauds.

Defendant argues that even if plaintiffs have an enforceable easement from the plat of Port Sheldon Beach to Lots 1-3, such an easement is worthless because the plat of Port Sheldon Beach restricts non-lot owners from using the roads within the plat. Defendant argues, "the exclusive means available when seeking to vacate, correct or revise the dedication in a recorded plat is a lawsuit filed pursuant to MCL 560.221-560.229," citing *Martin v Beldean*, 469 Mich 541, 542-543; 677 NW2d 312 (2004), and *Little v Hirschman*, 469 Mich 553, 561-562; 677 NW2d 319 (2004), in support. We find these cases inapplicable. The issue in this case is not whether a lot owner is denied use of an easement granted to him via a private dedication in the plat, but whether the plat of Port Sheldon Beach, which dedicates the streets and alleys of the plat to the "sole and only use of the lot owners," prohibits the PSBA, as owners and proprietors of the land underlying these streets and alleys, from extending these easement rights over the streets and alleys to individuals who are not lot owners in the plat of Port Sheldon Beach. In *Little, supra* at 561-562, the Court noted:

> in both the era of statutory silence on private dedications (1835-1924) and the era of implicit statutory recognition of private dedications (1925-1966), a dedication of land for private use in a recorded plat gave owners of the lots an irrevocable right to use such privately dedicated land. We agree with such holdings.

The only right the *Little* Court guaranteed to lot owners in a plat subject to a private dedication is the right of lot owners to actually *use* the land dedicated on the plat for their use. We see nothing in the Supreme Court's ruling in *Little, supra*, that would prohibit the PSBA from granting an easement appurtenant to property not within the plat of Port Sheldon Beach.

Finally, defendant argues that it should receive title to Lots 1-3 in exchange for paying plaintiffs just compensation for the loss of all economically beneficial use of this land. While this argument has appeal, we must reject it.

Plaintiffs suffered a compensable regulatory taking when the MDEQ, by applying the provisions of the Natural Resources and Environmental Protection Act (NREPA) and denying

the special exception permit application, deprived them of all economically beneficial use of Lots 1-3. "[W]hen the state affects [sic effects] a taking merely by depriving an owner of all beneficial use of property, the state does not *acquire* the property 'taken.'" *Miller Bros v Dept of Nat'l Resources*, 203 Mich App 674, 690; 513 NW2d 217 (1994) (emphasis in original). Instead, "[t]he Uniform Condemnation Procedures Act (UCPA), [MCL 213.51 *et seq.*,] defines the exclusive means by which government is empowered to judicially condemn and acquire property." *Id.* at 687, citing MCL 213.75. If the MDEQ wants to acquire title to Lots 1-3, it must follow the procedures set forth in the UCPA; it cannot acquire title merely by paying plaintiffs just compensation for the regulatory taking. We note that in *Miller Bros*, *supra* at 686-688, the Court determined that the trial court erred in awarding the fair market value of the property because the property was not acquired by the DNR through the UCPA, and therefore the taking was essentially temporary in nature. The MDEQ has not made a similar argument here.

We also note that in the Wetlands Protection Act, MCL 324.30301 *et seq*., the Legislature has directed the courts to do exactly what the MDEQ asserts should be done here. MCL 324.30323 provides:

> (2) For the purposes of determining if there has been a taking of property without just compensation under state law, an owner of property who has sought and been denied a permit from the state or from a local unit of government that adopts an ordinance pursuant to section 30307(4), who has been made subject to modifications or conditions in the permit under this part, or who has been made subject to the action or inaction of the department pursuant to this part or the action or inaction of a local unit of government that adopts an ordinance pursuant to section 30307(4) may file an action in a court of competent jurisdiction.
>
> (3) If the court determines that an action of the department or a local unit of government pursuant to this part or an ordinance authorized pursuant to section 30307(4) constitutes a taking of the property of a person, then the court shall order the department or the local unit of government, at the department's or the local unit of government's option, as applicable, to do 1 or more of the following:
>
> (a) Compensate the property owner for the full amount of the lost value.
>
> (b) *Purchase the property in the public interest as determined before its value was affected by this part or the local ordinance authorized under section 30307(4) or the action or inaction of the department pursuant to this part or the local unit of government pursuant to its ordinance*.
>
> (c) Modify its action or inaction with respect to the property so as to minimize the detrimental affect [sic effect] to the property's value. [Emphasis added.]

While the same policy underlying this provision of the WPA would seem applicable here, the Legislature made no such provision in the SDPMA, and we therefore find no error in the trial court's failure to award title to the MDEQ.

On cross-appeal, plaintiffs argue the circuit court should have applied the doctrine of collateral estoppel to prohibit the MDEQ from arguing that the denominator parcel should not be limited to Lots 1-3, because the court had previously decided in the case of *Heaphy v Port Sheldon Twp* that Lots 1-3 constituted the proper denominator parcel to consider when determining if a compensable taking of plaintiffs' property occurred. In light of our disposition of the issues raised in the MDEQ's appeal, we find it unnecessary to address plaintiffs' cross-appeal.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Patrick M. Meter