STATE OF MICHIGAN

COURT OF APPEALS

GATCHBY PROPERTIES, L.P.,

Plaintiff-Appellant,

v

ANTRIM COUNTY ROAD COMMISSION, TOWNSHIP OF HELENA, ASSOCIATION FOR THE PRESERVATION OF PUBLIC ACCESS, and MICHAEL CRAWFORD,

Defendants-Appellees,

and

ISABEL AMERSON,

Defendant.

UNPUBLISHED
October 13, 2000

No. 217417
Antrim Circuit Court
LC No. 97-007232-CH

Before: White, P.J., and Talbot and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right from separate orders denying its motion for summary disposition and granting defendants' motions for summary disposition under MCR 2.116(C)(10). This suit involves the question whether a disputed piece of land is private or public. Plaintiff asserts that the trial court's application of a "presumption of regularity" to defendants' affirmative defense of condemnation was error and that the court improperly denied plaintiff's motion for summary disposition on the ground that defendants had not made prima facie showings as to any of their asserted affirmative defenses. After reviewing de novo the trial court's decision under MCR 2.116(C)(10), *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999), we affirm in part, reverse in part, and remand for further proceedings.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

I

Plaintiff first argues that the court erred in applying a "presumption of regularity" to remove defendants' burden to show that an 1897 condemnation proceeding was valid and shift the burden to plaintiff to show that the condemnation was invalid. We agree.

Our review of the record indicates that the only evidence remaining of whether there was a valid condemnation of the disputed property as a road in 1897 is a two-page handwritten document by then Commissioner John Main. As all parties agree, not all documents required under the statute are attached to the document and they apparently cannot otherwise be found in the township records. Based on the assertions contained in this document, the trial court employed a "presumption of regularity" that the record requirements of the condemnation statute then in effect were met, even though the records could not be found. Then, because plaintiff could not show the condemnation was invalid, the court granted summary disposition to defendants on the basis of the affirmative defense of condemnation.

In the absence of the required documentation, we find the trial court's reliance on a "presumption of regularity" based on this historical document indistinguishable from the historical evidence approach this Court rejected in *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546; 600 NW2d 698 (1999). See also *DeWitt v Roscommon Co Rd Comm*, 45 Mich App 579, 583; 207 NW2d 209 (1973) ("We may in our very limited judicial discretion tolerate inconsequential technical irregularities in record keeping, but not the wholesale absence of required definitive public record entries."). As this Court explained in *Appleton Trust, supra*:

> In essence, defendants are asking this Court to recognize a new basis on which to establish the creation of a public highway. Defendants urge that we need not strictly hold them to the traditional methods of proving title, and that as a matter of public policy we ought to adopt an historical evidence approach to establishing interests in property, especially in cases like this in which other, more definitive evidence is lacking. Defendants argue that public policies regarding recognition of section line roads and access to water also support adoption of an historical evidence approach. However, defendants have otherwise provided us with absolutely no authority from Michigan or any foreign jurisdiction that supports their argument concerning an historical evidence approach. Furthermore, defendants' argument ignores the fundamental notion that a property owner should enjoy exclusive control over his land. By recognizing defendants' proposed new approach to establishing a public road over land that had previously been purchased as, or thought of as, private property, we would undermine the right to hold property to the exclusion of others. Michigan Courts have long recognized that a land owner should have free and exclusive enjoyment of his property. Moreover, our adoption of defendants' approach would result in the taking of private property without just compensation in derogation of the Michigan Constitution. Const. 1963, Art X, § 2. We decline to undermine property rights by adopting defendants'

proposal, and thus we reject historical evidence as an independent means of establishing rights in property. [*Appleton Trust*, *supra* at 555-557 (citations omitted).]

In the absence of a "presumption of regularity," defendants were unable to show a valid condemnation, and plaintiff was entitled to judgment on this affirmative defense.

II

Plaintiff next asserts that the trial court erred when it denied its motion for summary disposition on defendants' affirmative defense of acceptance and dedication. We agree in part.

A dedication is an appropriation of land to a public use by the owner. *Kraus v Gerrish Twp*, 205 Mich App 25, 38; 517 NW2d 756 (1994), aff'd in part sub nom *Kraus v Dep't of Commerce*, 451 Mich 420 (1996). There are a variety of means by which a dedication may be made and a variety of means by which the dedication may be accepted by public authorities. In this case, defendants asserted dedication by recorded plat and common law dedication.

A

A dedication by recorded plat requires (1) a recorded plat designating the areas for public use and evidencing a clear intent to dedicate on the part of the property owner, and (2) an acceptance by the proper public authority. *Id.*; *Appleton Trust*, *supra* at 554. Here, defendants asserted that a dedication by plat occurred as a result of the filings of three different plats that reflected the existence of the road in question and showing it as extending to the shore of Torch Lake. The disputed property is a portion of land that extends thirty-three feet to the north and south of a section line that runs between two of the platted subdivisions, extends west to the lake shore, and east to a road that has recently been graded. Defendants describe the disputed land as an extension of this road, while plaintiff describes the disputed property as the northern extension of its lot, which is in the subdivision directly to the south of the section line. A private road exists as an "L" off the west end of the road, appearing at the east frontage of the lots in the southern subdivision, and traveling in a southerly direction. However, the plats referenced by defendants as formally dedicating the disputed land as a road do not include this disputed land in the descriptions of the property being platted. As such, we find no clear intent to dedicate the land to public use, despite language in the dedication providing that the roads shown are intended for public use. *Kraus*, *supra*. Moreover, we note that the manager of the Antrim County Road Commission admitted that the road itself was not a platted road. Accordingly, defendants have not sufficiently demonstrated the existence of a formal dedication, and, as a consequence, we do not reach the question whether there was an acceptance. Plaintiff was entitled to summary disposition on the affirmative defense of dedication by recorded plat.

B

A valid common law dedication requires: (1) an intent by the owners of the property to offer it to the public for use, (2) acceptance of this offer by the public officials and maintenance of the alley, street, or highway by the public officials, and (3) use by the public generally. *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958); *Appleton Trust*, *supra* at 554. The burden of proving acceptance

of an offer of dedication is on the public authority. *Kraus v Dep't of Commerce*, 451 Mich 420, 425; 547 NW2d 870 (1996). Public acceptance of such a dedication must be timely, and must be disclosed through a manifest act by the public authority. *Id.* at 424. Acceptance may be: (1) formal by resolution, (2) informal through the expenditure of public money for repair, improvement, and control of the roadway, or (3) informal through public use. *Id.; Marx v Dep't of Commerce*, 220 Mich App 66, 74; 558 NW2d 460 (1996). The requirement of public acceptance by a manifest act, whether formally or informally, was necessary to prevent the public from becoming responsible for land that it did not want or need, and to prevent land from becoming waste property, owned or developed by no one. *Kraus, supra,* 451 Mich at 424.

Here, defendants asserted that the request for condemnation in 1897 and the three plats constitute common law dedications because each evidences an intent to offer the property for public use. Defendants further urged that whether there were acts sufficient to demonstrate formal or informal acceptance was a question of fact. Specifically, defendants asserted that a McNitt resolution[1] constituted a formal acceptance, and that various facts purporting to establish official control and maintenance of the road and use by the public were sufficient to create genuine issues of material fact whether informal acceptance occurred. Plaintiff countered that the McNitt resolution was defective and, therefore, defendant's affirmative defense failed as a matter of law for lack of proof of formal acceptance. Plaintiff further contended that the disputes in the factual record did not rise to a level sufficient to make out a prima facie defense of informal acceptance of a dedication.

Our review of the record indicates that defendants set forth facts from which a factfinder could determine that a common law dedication was intended. Our review also demonstrates the existence of genuine issues of material fact regarding the quality and quantity of official acts and public use sufficient to find an informal acceptance. However, we reject defendants' reliance on the 1936 McNitt resolution to establish formal acceptance.[2] In *Kraus, supra,* 451 Mich at 429-430, the Michigan Supreme Court held that "a McNitt resolution can only qualify as formal acceptance where it expressly identified a platted road or the recorded plat in which the road in dispute was dedicated." See also *Christiansen v Gerrish Twp*, 239 Mich App 380; 608 NW2d 83 (2000); *Marx, supra* at 72-73. Here, defendant relies on a 1936 general resolution that provided for taking over the "final 20% of township roads," and an attachment to the resolution appearing to describe the disputed land. The fact remains, however, that the disputed land itself was not part of the description of the recorded plats and, therefore, was not a platted road. See Part IIA, *supra*. Accordingly, the trial court erred to the extent that it denied plaintiff's motion for summary disposition with regard to the affirmative defense of common law dedication and formal acceptance; the court properly denied the motion with respect to the defense of common law dedication and informal acceptance.

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[1] The McNitt Act, 1931 PA 130, repealed by 1951 PA 51, § 21, provided for township roads and roads specified as public in recorded plats to be taken over by the county and incorporated into one county-wide highway system over a period of five years.

[2] We note that defendants are not entitled to the benefit of the current statutory presumption of acceptance under MCL 560.255b; MSA 26.430(255b). See *Vivian v Roscommon County Bd of Road Comm'rs*, 433 Mich 511; 446 NW2d 161 (1989).

III

Lastly, plaintiff argues that the trial court erred in denying its motion for summary disposition as it pertained to defendants' affirmative defense of highway by user. We agree.

The highway by user doctrine is embodied in MCL 221.20; MSA 9.21. To establish highway by user under the statute requires (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use. *Appleton Trust*, *supra* at 554-555. Under *Leelanau County Bd of Rd Comm'rs v Bunek*, 344 Mich 605, 613; 75 NW2d 51 (1956), the use and work by public authorities must also be for a ten-year period and must be exclusive, continuous, uninterrupted, open, and notorious occupation. The burden of showing a highway by user is on the governmental entity claiming the highway by user. *Cimock v Conklin*, 233 Mich App 79; 592 NW2d 401 (1998).

Our review of the record indicates that defendants did not clearly establish a ten-year period of the requisite official conduct or public use that would precede plaintiff's acquisition of the property such that the disputed land became a public road. Sporadic official maintenance of the road that did not include the disputed property, annual treks over the road, or its certification as a public highway are not sufficient official acts to create a highway by user. See *Bunek*, *supra* at 609; *Maghielse v Crawford County Rd Comm*, 47 Mich App 96, 99; 209 NW2d 330 (1973); *Keller v Locke*, 62 Mich App 591, 592; 233 NW2d 666 (1975); *Boone v Antrim County Rd Comm*, 177 Mich App 688, 693-694; 442 NW2d 725 (1989). Cf., *Missaukee Lakes Land Co v Missaukee County Rd Comm*, 333 Mich 372; 53 NW2d 297 (1952). As this Court noted in *Maghielse*, *supra* at 99, "if such a 'boot-strap' method were effective to create a highway, condemnation would be obsolete. Were this Court to adopt the standard proposed by defendant, every former wagon or Indian trial and every lane, path, right-of-way or road created by farmers and other owners could be taken at the mere whim of a county road commission without due process of law. Such a position is neither logically sound nor constitutionally possible." Moreover, our review of the record indicates that the earliest evidence of public use was based on the deposition of a woman who worked for a neighboring landowner and her use of the disputed property was in the same nature as that of others living on the road, rather than as a member of the general public. This is insufficient under *Cimock*, *supra* at 87, 93. Moreover, the record indicates that use of the disputed property was recreational rather than transportational. *Comstock v Wheeler*, 63 Mich App 195, 200-201; 234 NW2d 448 (1975). Defendants failed to establish a prima facie showing on their affirmative defense of highway by user and, therefore, plaintiff was entitled to judgment as a matter of law.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Robert J. Danhof