STATE OF MICHIGAN

COURT OF APPEALS

STANDARD AGGREGATES, INC., MACKENZIE RECYCLING CORP., GRANGER LAND DEVELOPMENT CO., and GRANGER WASTE MANAGEMENT CO.,

Plaintiffs-Appellants,

and

A.L. MESSENGER, M.D.,

Plaintiff,

V

INGHAM COUNTY DRAIN COMMISSION, INGHAM COUNTY DRAIN COMMISSIONER, GROESBECK PARK DRAIN DISTRICT, GROESBECK PARK EXTENSION DRAIN, and GROESBECK PARK EXTENSION DRAIN DISTRICT BOARD OF DETERMINATION,

Defendants-Appellees.

UNPUBLISHED
May 17, 2002

No. 226464
Ingham Circuit Court
LC No. 99-090894-AZ

Before: Saad, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition and denying plaintiffs' motion to file a first amended complaint. We affirm.

I. NATURE OF THE CASE AND PROCEDURAL HISTORY

Under the Michigan Drain Code, in order to establish a drain, there must be an application to designate a drainage district, which consists of all of the properties that would benefit from the drain. MCL 280.51. Ultimately, the drainage district is composed of properties potentially liable for special assessments for the work performed. Once the drainage district has been designated, a petition to establish a drain may be filed by either a municipality or property owner within the district, the road commission or the Michigan Department of Transportation. MCL 280.71. After the petition is filed, a board of determination is appointed, which is charged

with determining whether the drain is necessary and "whether the drain is conducive to public health, convenience or welfare." MCL 280.72.

If the drain is deemed "necessary," by a majority vote, the board of determination must then decide if the whole cost, or only a portion of the project, is necessary for the protection of the public health of a municipality in the drain district. MCL 280.72(3). If the board determines that the entire project is necessary for the public health of a municipality, then the municipality benefited and the Michigan Department of Transportation pays the entire cost of the project. MCL 280.72(3). If only a portion of the project is found to be necessary for the protection of the public health of a municipality, the drain commissioner will apportion a percentage of the project to the municipality, a portion to the Michigan Department of Transportation and the remainder to the property owners in the district on a pro-rata basis in accordance with the benefits derived. MCL 280.72(3).[1]

After a drain is established, "maintenance and improvements" may be performed on the drain in accordance with section 191 of the Drain Code. MCL 280.191. The maintenance and improvements under section 191 require a separate petition, hearing and findings of necessity by a board of determination. MCL 280.191. Specifically, section 191 states that a petition for the maintenance and improvement of an established drain shall proceed under the same procedures provided for the establishment and construction of a new drain. MCL 280.291.

The subject of this dispute, the Groesbeck Park Drain, is located in Ingham County. The Ingham County Drain Commissioner initially laid out the Groesbeck Drain District in 1985. In June 1990, a petition was filed in order to establish the drain, and a board of determination was convened in order to determine the necessity of the drain. In February 1999, land was added to the drain district and the board of determination was reconvened, ultimately determining that the drain was necessary.

In May 1999, the Ingham County Road Commissioner filed a petition with the Ingham County Drain Commission to "clean out, widen, deepen, straighten or extend" the drain, in accordance with section 191 of the Drain Code. Another board of determination was convened to consider this petition. On October 27, 1999, the board passed an order of necessity determining that the petition set forth improvements to the drain "necessary and conducive to the public health, welfare and convenience." However, the board concluded that only a *portion* of the proposed improvements were necessary for public health purposes. As a result of this determination, plaintiffs, who are business property owners within the drain district, may be assessed costs to make up the difference between the cost of the project necessary for public health and the portion of the project deemed necessary for other purposes, such as pubic welfare or convenience. It is this determination, and its consequent potential assessment against plaintiffs' property, that forms the primary basis for plaintiffs' claims on appeal.

I.

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[1] Of course, if the Board determines that the proposed drain is not necessary, no work will be performed under the petition, and then "the board of determination shall file with the commissioner an order dismissing the petition. . . ." MCL 280.72.

II. POTENTIAL FOR BIAS

Plaintiffs say that the trial court erred in granting summary disposition on their claim that the potential for bias of Evan Hope, a decision maker on the board of determination, was constitutionally intolerable. We find no error in this ruling.

The Drain Code provides that before a project may proceed, an administrative tribunal consisting of three disinterested persons, referred to as the "*board of determination*," must be appointed in order to make a determination with regard to the overall necessity of the project. MCL 280.72(1); *McGregor v Coggins Drain Bd*, 179 Mich App 297, 299; 445 NW2d 196 (1989). In *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 379-380; 395 NW2d 195 (1986), the Michigan Supreme Court held that "although actual bias does not have to be shown, a party seeking disqualification of a decision maker must still show a risk or probability of unfairness that is too high to be constitutionally permissible." In *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), the Michigan Supreme Court identified four situations that would call into question the decision maker's potential for bias or partiality:

> (1) the decision maker has a pecuniary interest in the outcome;
>
> (2) the decision maker has been the target of personal abuse or criticism from the party before him;
>
> (3) the decision maker is enmeshed in other matters involving petitioner ...; or
>
> (4) the decision maker might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision maker.

Clearly, a decision maker should not be put in the position of reviewing a decision he may have participated in. *Crampton, supra* at 351. This would pose the intolerable risk that the decision maker may have prejudged the issues, and, therefore, due process would require the appointment of an alternative decision maker. *Id.* Plaintiffs focus on this element of the *Crampton* test, and contend that Hope's prior employment with the drain commission resulted in the "substantial probability that he may have prejudged the issues . . . ." Plaintiffs also maintain that because the drain commission, as well as the drain at issue, had previously been challenged and criticized by plaintiffs in the course of Hope's employment with the drain commission, Hope, in essence, had been the target of criticism, and was therefore biased according to the *Crampton* test.

When a motion for summary disposition is made and supported, an adverse party must, by documentary evidence, set forth specific facts showing that there is a genuine issue of material fact for trial. *Skinnner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). When viewed in the light most favorable to plaintiffs, plaintiffs failed to set forth facts demonstrating actual or probable bias. The record shows that Hope was no longer employed by the drain commission at the time he served as a decision maker on the board of determination. Indeed, he had not been employed by the drain commission for a period of time exceeding one year. Furthermore, Hope's affidavit says that he was not involved in matters relating to the drain at issue during the course of his employment with the drain commission. Moreover, plaintiffs have not shown that Hope was subject to personal criticism by plaintiffs as he is not deemed to

have been personally criticized simply because the drain commission had been criticized. *Livonia v Dep't of Social Services*, 423 Mich 466, 509; 378 NW2d 402 (1985).

We also note that transcripts submitted by defendants from the board of determination's hearing establish that Hope carefully listened to the testimony presented. Ultimately, plaintiffs have failed to set forth specific facts, by affidavit or otherwise, to support their allegations of potential bias on the part of Hope. Therefore, plaintiffs have failed to show the existence of a constitutionally intolerable risk of partiality. As a result, there were no genuine issues of material fact on this count and summary disposition of this claim was properly granted.

II.

III. THE BOARD OF DETERMINATION'S RULING THAT ONLY A PORTION OF THE PROJECT IS NECESSARY FOR PUBLIC HEALTH

The board's ultimate determination that this project was necessary is not in dispute. Plaintiffs conceded the drain's necessity for a number of public health reasons. However, the board of determination ruled only a portion of the project was necessary for public health, which could leave property owners, such as plaintiffs, responsible for a percentage of the costs of the project. It is this specific determination that plaintiffs challenge.

Under the Drain Code, the proceedings in issue are administrative proceedings. *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 597; 633 NW2d 489 (2001). Generally, our courts presume that an administrative body has acted correctly and that its orders are valid. *Hitchingham v Washtenaw Co Drain Comm'r*, 179 Mich App 154, 159; 445 NW2d 487 (1989). The findings of fact and the decisions of an administrative agency, including the board of determination, are reviewed in order to determine whether the decision was supported by "competent, material and substantial evidence on the whole record and whether the decision is authorized by law." *Id.* at 158. "Substantial" evidence is "any evidence which reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla, but may be less than a preponderance of the evidence." *Barak, supra* at 597.

When there is sufficient evidence to support an agency's decision, a court may not substitute its judgment for that of the agency, though the court may have reached a different result. *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994). Similarly, we will not set aside such findings merely on the basis that alternative findings could have also been supported by substantial evidence on the record. *Payne v Muskegon*, 444 Mich 679, 692; 514 NW2d 121 (1994). Ultimately, "[G]reat deference should be given to an agency's choice between reasonable differing views as influenced by administrative expertise." *In re Kurzyniec Estate, supra* at 537.

Here, the board of determination relied on competent, material and substantial evidence in order to justify its decision that only a portion of the project was necessary for public health. For example, evidence supports the need for the drain in order to remedy the flooding problems of various property owners. One property owner testified that she was having trouble with her septic system and that this was due to water levels. Other property owners also testified regarding flooding in their basements. There was also testimony supporting the need to improve

and expand the drain in order to support commercial development within the drain district. Based on the foregoing, we find that the evidence was adequate to support the board of determination's decisions. Because there is competent, material and sufficient evidence to support the board's ruling that only a portion of the project was necessary for public health, we will not substitute our judgment for the board's.

IV. PROPRIETY OF THE PROCEEDINGS

Further, plaintiffs say that the trial court erred in granting summary disposition regarding plaintiffs' claim that the drain commission unconstitutionally, and in violation of the Drain Code, divided the establishment of a single drain into two "phases." We disagree.

The Drain Code provides that a petition may be filed requesting the "maintenance or improvements" to an already established drain. In accordance with MCL 280.191, the "maintenance" or "improvement" of a drain includes situations when a drain needs:

> cleaning out, relocating, widening, deepening, straightening, tiling, extending, or relocating along a highway, or requires structures or mechanical devices that will properly purify or improve the flow of the drain or pumping equipment necessary to assist or relive the flow of the drain, or needs supplementing by the construction of 1 or more relief drains which may consist of new drains or extensions, enlargements, or connections to existing drains . . . .

Pursuant to the Drain Code, once the petition for maintenance or improvements is filed, a board of determination is again convened in order to determine its necessity. Plaintiffs asserted that the petition and project at issue were not for the maintenance or improvement to an established drain at all, but was merely a continuation of the initial establishment of the drain, i.e., that it was actually broken into two "phases" and that the instant project was, in reality, a "phase" of the initial establishment. Plaintiffs argued that this "phasing" was in violation of the Drain Code, and in violation of their right to make an informed decision as to the total assessment against their property. We disagree.

It is presumed that when drain officers conduct proceedings under drain law and designate a project a "drain," unless the opposite is shown, the project is indeed a drain. *Village of Clawson v Von Wagoner*, 268 Mich 148, 152; 255 NW2d 743 (1934). Here, defendants followed proper Drain Code procedure during the initial establishment of the drain. Plaintiffs offered no documentary evidence to the contrary. Furthermore, no challenges to the petition or procedure of the initial establishment of the drain were upheld.[2] Accordingly, defendants clearly established the drain. Therefore, the current project, which purports to "clean out, widen, deepen, straighten or extend" the established drain, obviously contemplates improvements or maintenance to the established drain in accordance with MCL 280.191. Because plaintiffs fail to

[2] Plaintiffs' earlier lawsuits which challenged the original determinations regarding this drain were ultimately dismissed. *In Re Standard Aggregates, Inc.*, Ingham County Circuit Court No. 99-89949-AS; *In Re MacKenzie Recycling Corp.*, Ingham County Circuit Court No. 99-89949-AS; *In re Groesbeck Park Drain*, Ingham County Probate Court No. 99-569-AT; *In re Groesbeck Park Drain*, Ingham County Probate Court No. 99-568-AT.

offer evidence showing that the instant petition or procedures were in contravention of the Drain Code, no genuine issues of material fact were in existence, and summary disposition was proper.

Moreover, any attack on the validity of the initial establishment of the drain is barred by the statute of limitations set forth in MCL 280.161 which establishes the procedure for appealing an alleged error in the establishment of a drain. Section 161 of the Drain Code, MCL 280.161, expressly states that appeal for "any error occurring before or after the final order of determination shall be issued *within 10 days* after a copy of such final order is filed in the office of the drain commissioner." Because the final order of determination was entered in April 1999, and because this lawsuit was not filed until November 1999, plaintiffs' attacks with regard to the original establishment of the drain are time-barred.

V. FIRST AMENDED COMPLAINT

Finally, plaintiffs allege that the trial court erred in denying their motion to file a first amended complaint. Again, we disagree.

Plaintiffs acknowledge that the only new allegation contained in their proposed amended complaint concerns count IV. Accordingly, the proposed amendments to counts I through III do not assert new facts, theories or causes of action. Consequently, plaintiffs' proposed amendments to counts I through III are futile, as they simply restate allegations already made. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Therefore, the trial court did not abuse its discretion in failing to allow plaintiffs to reallege identical counts in the amended complaint.

The proposed amended count IV requests that the trial court mandate a "day of review" of the Drain commissioner's forthcoming final order of determination. Regarding this request, we look to section 191 of the Drain Code, which states, in pertinent part:

> After the board of determination determines the necessity for the work, as provided in section 72, the commissioner shall, as soon as practicable after the final order of determination prescribed in section 151 has been filed by him, proceed as provided in sections 151 to 161. *If the apportionment is the same as the last recorded apportionments, no day of review is necessary*, but in other cases the commissioner shall proceed as provided in sections 151 to 161, including the notice of and the holding of a day of review. [MCL 280.191.] [Emphasis added.]

The statute expressly states that in the instance where an apportionment of the costs would remain the same for the improvement to a drain as for the last recorded apportionment, a day of review is not a requirement. Plaintiffs, nonetheless, argue that this is in violation of their due process right to appeal.

The Michigan Supreme Court addressed this issue in an analogous case. *In Wayne Co Rural Taxpayers Ass'n v Wayne Co Drain Comm'r*, 369 Mich 516; 120 NW2d 217 (1963), the plaintiffs attempted to protest the assessments against their property for the maintenance and repair of an established drain. The Court determined that where the plaintiffs' claims did not

assert that the assessment was apportioned on a basis different from that of the original apportionment, no hearing was required. Specifically, the Court stated:

> "At the time of the original apportionment of benefits to the lands full opportunity for hearing and appeal from such apportionment is provided by the statute. [Citation omitted.] As the added assessments are based on the same percentages as the original apportionment, there is no new determination of benefits to the land, the parties have had full opportunity of hearing on such apportionment. Thus there is no denial of due process of law in not providing for new hearings." [*Id*. at 526, quoting *Oakland Co Drain Comm'r v Royal Oak*, 325 Mich 298, 314; 38 NW2d 413 (1949).]

Clearly then, under § 191 and our Supreme Court's decision in *In Wayne Co Rural Taxpayers Ass'n, supra,* the trial court was without authority to order a "day of review". The proposed amendment would fail to state a claim upon which relief could be granted and is therefore futile. *KinderCare, supra,* at 697. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to amend the complaint with regard to this issue.

Regarding the portion of proposed count IV wherein plaintiffs request the disqualification of the Ingham County Drain Commissioner from making determinations as to the apportionment of taxes, MCL 280.381 provides for the disqualification of the Drain Commissioner:

> [w]henever the commissioner of any county shall receive a petition for the laying out, construction, cleaning out, deepening or widening of any drain . . . wherein such commissioner shall be interested by reason of himself, wife or child, owning lands that would be liable to an assessment for benefits upon the work or proceeding proposed to be done or had, and in cases where such commissioner may be otherwise disqualified to act in the making of apportionment of benefits.

Plaintiffs fail to allege that the drain commissioner, or his family, owns property in the drain district. Regarding the language "*and in cases where such commissioner may be otherwise disqualified to act in making an apportionment of benefits*," we hold because plaintiffs have failed to state a claim of actual or possible bias or impartiality, the proposed amendment would be futile. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion to file a first amended complaint.

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Jessica R. Cooper