STATE OF MICHIGAN

COURT OF APPEALS

BLACKHAWK DEVELOPMENT CORPORATION and DEXTER CROSSING, LLC,

Plaintiffs-Appellants,

v

VILLAGE OF DEXTER and DEXTER DEVELOPMENT,

Defendants-Appellees.

UNPUBLISHED
January 27, 2004

No. 240790
Washtenaw Circuit Court
LC No. 00-000724-CZ

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

SMOLENSKI, J. *(dissenting).*

I respectfully dissent. While I agree with the majority that the language of the express easement is unambiguous, I cannot agree with their conclusion that the changes made to Dan Hoey Road subsequent to its relocation constitute "improvements" as contemplated by the easement.

The "use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). The dispute here focuses on the portion of the easement land between the relocated road and the original road. As the majority noted, the term "improve" is defined as: "To meliorate, make better, to increase the value or good qualities of, mend, repair, as to 'improve' a street by grading, parking, curbing, paving, etc." Black's Law Dictionary (5th ed), p 682. "Improving Dan Hoey Road" cannot be read to mean that the Village had the right to authorize the building of access roads, sidewalks, landscaping, lighting or the running of public utilities across land being unused by the Village for the sole purpose of developing the Dexter Commerce Center, a *private* development.

If the use of the easement is confined to the purposes for which it was granted, there is no question that the construction on plaintiffs' property was improper. I believe that it is disingenuous for defendants to argue that the construction that has occurred is within the scope of the easement because they are necessary for the same reason Dan Hoey Road needed to be realigned, public safety and welfare. But defendants' fail to recognize a key point. None of the measures taken by defendants, even if required by the Village, would have been necessary for *any* reason were it not for the development of the Dexter Commerce Center. Standing alone, the

access roads and utilities were not needed to improve Dan Hoey Road. Moreover, even the Village's actions were to be considered a taking, albeit without the necessary compensation, private property may not be taken for private purposes.[1] *Tolksdorf v Griffith*, 464 Mich 1, 8; 626 NW2d 163 (2001). I believe it is clear that the private purposes predominate over any public benefit, and in fact were the sole driving force behind the purported "improvements."

I would find that defendants' and the trial court's reliance on *Eyde Bros v Dev Co v Eaton Co Drain Comm'r*, 427 Mich 271; 398 NW2d 297 (1986), as support for the proposition that improvement of a public roadway is not limited to surface travel and maintenance, but "may encompass utilities and access roads" is misplaced. In *Eyde* Bros, our Supreme Court held "that a public easement in a highway dedicated by user is not limited to surface travel, but includes those uses, such as the installation of sewers, contemplated to be in the public interest and for the public benefit." *Id.* at 286. The Court did not express any opinion with respect to the scope of an express easement. It also did not address a situation where the proposed improvements ran across or under land that was owned in fee simple by a private party and was not established as, or being used as, a public roadway. The trial court herein nevertheless relied on *Eyde Bros* to approve the construction of an access road and other uses on plaintiffs' land. Because of these significant factual differences, I do not believe that the rulings in *Eyde Bros* have any application to the unique fact pattern presented to this Court.

For the same reasons, I find the majority's citations to *Grosse Pointe Shores v Ayres*, 254 Mich 58; 235 NW 829 (1931) equally inapplicable. The easement in this case was an express easement for specific purposes, not a dedication, and the "improvements" sought by defendants do not merely affect the surface or subsurface of Dan Hoey Road, but also plaintiffs' privately owned property, which was not subject to the easement.

Accordingly, I would hold that the trial court erred in granting summary disposition to defendants and that summary disposition should have been granted in favor of plaintiffs with respect to the scope of the easement, pursuant to MCR 2.116(I)(2). Furthermore, I would hold that plaintiffs should not be precluded from pursuing their claims for injunction and damages for trespass on remand.

/s/ Michael R. Smolenski

[1] Contrary to defendants' position, we do find the facts presented in this case are akin to a taking because the actions approved by the Village were not authorized by the easement.