

STATE OF MICHIGAN
COURT OF APPEALS

HASTINGS PUBLIC LIBRARY and CITY OF
HASTINGS,

UNPUBLISHED
March 2, 2004

Plaintiffs-Appellees,

v

DEPARTMENT OF TRANSPORTATION
DIRECTOR and DEPARTMENT OF NATURAL
RESOURCES DIRECTOR,

No. 243950
Barry Circuit Court
LC No. 01-001037-CZ

Defendants-Appellees,

and

SUPERETTE LODI, INC.

Defendant-Appellant.

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant Superette Lodi, Inc. appeals from a September 5, 2002 order of the Barry Circuit Court granting plaintiffs' petition to vacate a portion of Mill Street in the city of Hastings, pursuant to MCL 247.41 *et seq.* We affirm.

I. Facts And Procedural History

On December 28, 2001, plaintiffs filed a petition with the Barry Circuit Court seeking to vacate portions of Mill Street and Jefferson Street in the city of Hastings in order to construct a new public library. Because Mill and Jefferson Streets are close to the Thornapple River, plaintiffs were required by MCL 247.41 to obtain the authorization of the circuit court before the streets could be vacated. Therefore, after plaintiffs joined all necessary defendants and gave notice by publication pursuant to MCL 247.43. The circuit court, as required by MCL 247.44(1),

held hearings to determine that there is no reasonable objection to the petition for vacation and that the vacation is necessary for the best interest and welfare of the public.

At the commencement of the first hearing the court and defendants, attempted to clarify the court's role with respect to making the determination of whether there were any reasonable objections under MCL 247.44. After considerable discussion, the court determined that the purpose of MCL 247.41 *et seq.* is to protect citizens who may be affected by a loss of access to the river and ruled that the only objections it would hear were those regarding the effects that closing the streets would have on the public's access to, or use of, the river. Thereafter, the court allowed citizens of Hastings to present testimony as to why they believed the closing of the streets would adversely affect them.

Doug Ward, a lifelong resident of Hastings who owns a store on Church Street, was initially the only citizen to come forward. According to Ward, many of the people who came into his store to sign a petition¹ said that they spear fish in the river and were not sure how closing Mill Street to construct the library would affect that activity. The bulk of Ward's testimony, however, focused on his belief that closing Mill Street would create traffic problems by forcing too many people onto Apple, Main, and Court Streets. Moreover, Ward stated that closing Mill Street would affect his business, would increase traffic on Apple Street, and would force the closing of a 160-year old waterworks building.

After Ward testified, the court asked the audience if any other citizens would like to be heard. After receiving no response from the gallery, the court allowed plaintiffs to present their case.

Plaintiffs called a total of seven witnesses over the three days of hearing. Jeff Mansfield, Hastings city manager, testified about the city's ownership of the land proposed to be used for the library, and that there was no public access to the river between Mill and Jefferson streets.² According to Mansfield, the library site plan includes a provision for a previously planned river walk, and that, according to a traffic engineering firm, the new library would not affect the nearby fire department. Mansfield also testified that the old waterworks building was vacant and had no historical designation.

Also testifying for plaintiffs was David Clark, a senior architect, who had developed over the past three-and-a-half years a schematic design and site evaluation for the proposed library. Clark opined that the site chosen was the most feasible based on a number of factors, including zoning, utilities, visibility, and natural beauty, and that many other sites were rejected because of prohibitive development costs, insufficient size, or lack of availability. The proposed library would not inhibit, but would enhance, river access, because of additional "greenspace," a two-

¹ Ward had a petition available in his store for people to sign who were opposed to plaintiff's project.

² However, Mansfield did testify that nothing in the area prevented public access to the river, other than natural stream bank impediments.

story glass wall overlooking the river in the library, extension of a sidewalk, allowance of the planned riverwalk, and clearance of the thick brush along the river.³

At the second day of hearings, plaintiffs called three business owners in the affected area, each of whom testified that they believed of a new library in the area would have a positive impact on their businesses because it would increase traffic flow into the area, which, in turn, would improve their businesses.

Plaintiffs then called Barbara Schondelmayer, administrator of Hastings Public Library since 1984. Schondelmayer's testimony somewhat mirrored that of Clark, in that she testified about the library board's procurement of consultants to develop site plans and to conduct traffic impact studies. She also detailed the reasons other sites were rejected.

After Clark, plaintiffs called Shirley Wollner, who is employed by a civil engineering firm. Wollner testified that the east to west traffic currently traveling on Mill between Michigan and Jefferson would have to be diverted to Apple Street, but that the Apple/Jefferson intersection had plenty of reserve capacity to handle much more volume than would result from the shifting traffic from Mill Street.⁴ Wollner testified that the largest impact of closing Mill Street would be on citizens who come across the Thornapple River, but those citizens' travel path would only change by an additional one or two blocks.

The last witness called by plaintiffs was Roger Caris, chief of the Hastings fire department, who testified that building the library would not affect fire truck ingress or egress, or hinder fire truck access to the fire station. Caris further testified that installing the coordinated signals would actually make the fire department's ingress and egress much easier because it would clear traffic.

Plaintiffs then rested. Defendants first called Mike Michalski, president of a multi-service economic development firm. Michalski testified that he had met with three business owners in the area of the proposed library and stated that closing Mill Street could cost local businesses several million dollars and affect at least nineteen direct jobs. According to

³ After Ward was briefly called as a witness by defendants, and an adjournment was granted by the court, the trial court again stated that the statute required it to make its determination of a reasonable objection based on whether use of or access to the river would be restricted, but allowed the defense to present legislative history or case law indicating that it was allowed to consider other factors. Defendants apparently did so, because the court issued a written opinion on March 29, 2002, in which it stated that its February 27, 2002, ruling that a reasonable objection must relate to whether the public's use of the river as a waterway would be restricted, was in error based on this Court's holding in *Abbey Homes of Michigan, Inc v Wilcox*, 89 Mich App 574, 583; 280 NW2d 868 (1979), that the term reasonable objection is a term of art that "requires circuit judges to consider all of the circumstances of the case"

⁴ Wollner also testified that the intersection of Michigan and Apple Streets would warrant the installation of a traffic signal before the traffic was diverted from Mill Street.

Michalski, closing the streets could impact the businesses because downtown businesses need direct visibility and immediate accessibility or else customers will take their business elsewhere.

After calling Michalski, defendants had no other witnesses, and the court allowed additional citizen testimony. Thereafter, Jim Brown, who owns a commercial rental office on Mill Street close to Ward's, stated that he failed to see how closing off one block on the east end of Mill Street would affect his or Ward's business. Following Brown's testimony, no other citizens came forward to present testimony.

At the last hearing, defendants called Diane Cizauskas, owner of defendant Superette Lodi, Inc., a grocery store located at the corner of Mill Street and Michigan Avenue.⁵ Cizauskas is opposed to the closing of Mill Street. According to Cizauskas, she previously owned a second grocery store in Middletown that was forced to close because of prolonged road construction. Cizauskas stated that business never returned to normal after construction was completed, and that she is concerned this will occur at the Superette if Mill Street is closed. Although Cizauskas testified that she does not know how the street's closing is going to affect the Superette, she stated that she is reasonably concerned that sales will decline in sales because the store is located on Michigan Avenue across from the Mill Street/Michigan Avenue intersection, and people who stop at the corner of Mill Street and Michigan Avenue look straight at the Superette. Therefore, Cizauskas believes closing Mill Street would affect how many people would be able to see and access the Superette.⁶

Thereafter, both plaintiffs and defendants rested, and the court again opened the floor for public comment. Four citizens testified. Two opined that the closing of streets would be disruptive to the city, while two others testified that the site was a good one for the library.

II. The Trial Court's Ruling

After closing arguments, the trial court, after noting that this case presents a unique issue that "kind of skates the line between political decisions and legal decisions," held that there had been no evidence presented showing that the streets' closings would in any way adversely affect the public's use of the river. Indeed, the court noted that all of the evidence presented was to the

⁵ Defendants also recalled Ward to testify. According to Ward, his review of Hastings' police reports indicated that there had been five accidents at the Mill Street/Michigan Avenue intersection over the past ten years, two of which were caused by cars sliding through the intersection during icy conditions, whereas there had been thirty-one accidents at the Apple Street/Michigan Avenue intersection.

⁶ On cross-examination, Cizauskas clarified that the Superette is located on Michigan Avenue about one-quarter of a block from the corner of Mill Street, and on the opposite side of Michigan Avenue from Mill Street. When asked if the fact that her business is located on Michigan Avenue would prevent any adverse impact on her store since the construction would take place on Mill Street and not prevent access, Cizauskas stated that she doesn't know that Mill Street's closing would not affect her business, and that is what concerns her.

contrary, and tended to show that access to the river, and the public's best interests in the river, would be enhanced if the streets were closed.

The court then ruled that it must next determine whether the street closings were necessary for the best interests and welfare of the public. The court stated that it did not believe that this issue had been in dispute, as there had been no dispute that there is a need for the library and that the library would have a positive impact on the community. The court also concluded that the potential disruption to some businesses did not translate into a reasonable objection to the project.

Accordingly, on September 5, 2002, the trial court issued a written order allowing for the vacation of the designated portion of Mill Street and requiring plaintiffs to amend their complaint or file a new action under MCL 560.221 *et seq.*, with respect to the designated portion of Jefferson Street.

III. Analysis

This case requires consideration of the term "reasonable objection" as stated in MCL 247.44, and statutory interpretation presents a question of law that is reviewed de novo. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Moreover, this Court reviews a circuit court's findings of fact under MCL 247.44 for clear error. *Abbey Homes, supra*, at 580. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Gumma v D & T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999).⁷

Because the portion of Mill Street proposed to be vacated is adjacent to the Thornapple River, the present case is subject to MCL 247.41 *et seq.* MCL 247.41 states:

A public highway or a portion of a public highway that borders upon, crosses, is adjacent to, or ends at a lake, or the general course of a stream, shall not be abandoned, discontinued, vacated, or have its course altered resulting in a loss of public access by the order or action of an official or officials of a city or village in this state, until an order authorizing the abandonment, discontinuation, alteration, or vacation is made by the circuit court for the county in which the highway is situated in the manner provided in this act.

Under MCL 247.42, before a city may vacate streets that are within 5 rods [82½ feet] of the shore of a lake or stream, MCL 247.46(a), it must present an application to the circuit court that

⁷ We reject plaintiffs' assertion that this Court lacks jurisdiction because defendant failed to comply with the notice requirements of MCL 247.45. Plaintiffs have developed no argument as to why this notice provision trumps the time period under the court rule for filing a claim of appeal, nor have plaintiffs explained why failure to comply with part of the statute, but not all, requires a finding of lack of jurisdiction. We will not search for authority or arguments to support a party's position. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

is signed by at least 21 landowners and substantiated by the oath of five or more of the signatories, which states the circumstances of the case, describes the street proposed to be vacated, and sets forth the reasons for the proposed vacation. Moreover, under MCL 247.43, the plaintiffs must comply with extensive service and notice requirements and, once the application is filed, the circuit court is required to schedule a hearing on the application. In the present case, Superette does not dispute that the city complied with these requirements.

The manner in which a circuit court is to review an application filed under MCL 247.42 is set forth in MCL 247.44(1), which states:

Upon the day of hearing the application or any adjournment of the hearing, testimony may be taken from any person or persons interested in the application, and if it satisfactorily appears to the court that there is no reasonable objection *to the application*, and that it is necessary for the best interest and welfare of the public that the highway be abandoned, discontinued, vacated, or altered as to its course, as prayed for in the application, or if it appears to the court that the highway or any part of the highway should remain as then established, an order shall be entered in the record of the court in accordance with the determination.
[Emphasis added.]

This Court has determined that a circuit court's role under MCL 247.44(1) is not to review the actions of local city officials in determining whether to vacate the street, but rather to "make an independent determination of the matter based on the guidelines of MCL 247.44." *Abbey Homes, supra* at 580. Thus, the circuit court proceedings are an original action, and the circuit court's review is to be conducted de novo. *Id.*

In its appeal to this Court, Superette challenges the trial court's determination that there was no reasonable objection to the application for the streets' vacation. Specifically, it appears that Superette is asserting, as it did below, that a reasonable objection under MCL 247.44(1) need not be based on whether the public's access to the river would be impeded, but that the court should have considered other factors, such as safety factors of the proposed alternative, the scenic value of the road, the testimony as to whether the rerouting would potentially impact local businesses, and the fact that the waterworks building would have to be torn down in order to construct the new library.

In support of its assertion, Superette relies primarily on this Court's decision in *Abbey Homes, supra*. In *Abbey Homes*, plaintiffs sought to move an intersection 410 feet away from the border of Orchard Lake in Oakland County in order to subdivide some property on Orchard Lake Road. *Id.* at 576, 578. In its ruling, the circuit court stated that defendants had presented objections relating to the loss of a historic route and public scenic view of the lake, but stated that the issue presented to it was whether the proposed alternative route was in the best interests and welfare of the public. Thereafter, the circuit court stated extensive findings that the existing road was inadequate, that the proposed road would be a safer and more adequate route, that the proposed alternative road would not require a public expense, and that only a minimal amount of the existing road would be moved away from the lake. Thus, the trial court reasoned that the objections to the proposed alteration, although real, were not reasonable because the acquired aesthetic beauty of the proposed road would balance the loss of scenic beauty caused by vacating

the existing portion of the road next to the lake. *Id.* at 578-580. On appeal, this Court set forth the following definition of the term “reasonable objection,” as contained in MCL 247.44:

The term “reasonable objection”, as used in the act, is a term of art. It requires circuit judges to consider all the circumstances of the case to determine if there is a reasonable objection. The phrase “all the circumstances of the case” includes, but is not limited to, a comparison of the scenic, historic and public access values of the existing road and the proposed alternative; consideration of the safety features of the existing road and the proposed alternative; recognition of any relevant cost factors; and an evaluation of the best interest and welfare of the public. [*Id.* at 583.]

In setting forth this definition of “reasonable objection,” this Court was addressing the defendants’ assertion that a circuit court must first determine that there has been no reasonable objection posed before even considering the best interest and welfare of the public, and that a reasonable objection could be founded solely on the defendants’ assertion that the proposed alteration would result in a loss of the scenic beauty presented by the existing road’s proximity to the lake. *Abbey Homes, supra* at 582. This Court rejected the defendants’ argument, reasoning that it would render the statute useless because every road in close proximity to a lake presumably “has some scenic, historic or public access value.” Therefore, this Court held that if the act were construed as the defendants asserted, the alteration of any road near a lake would be virtually impossible, even if it were in the best interests and welfare of the public, because a single isolated objection based on the assertion of scenic, historic, or public access values could prevent any proposed alteration; a result which this Court stated it did not believe to be the intention of the Legislature. *Id.* at 582-583.

Thus, this Court’s definition of the term “reasonable objection” in *Abbey Homes, supra*, when viewed in context, stands for the proposition that not every mere assertion that some scenic, historic, or public access values may be affected equates to a reasonable objection. Moreover, this Court’s holding in *Abbey Homes* does not stand for the proposition that a “reasonable objection” may be founded solely on factors unrelated to scenic, historic, or public access values of the existing road’s proximity to the body of water. Indeed, this Court held that a determination of whether a reasonable objection has been presented requires consideration of all the circumstances of the case, which “includes, but is not limited to, a comparison of the scenic, historic, and public access values of the existing road and the proposed alternative” *Id.* at 583 (emphasis added).

Further support for the conclusion that a “reasonable objection” under MCL 247.44(1) must be, at least in some way, related to the scenic, historic, and public access values of the existing road’s proximity to the Thornapple River comes from the purposes of the statute. *Ross v Dep’t of Treasury*, 255 Mich App 51, 55; 662 NW2d 36 (2003). MCL 247.41 and MCL 247.42 only require a petition signed by landowners and an order of the circuit court authorizing the abandonment, vacation, discontinuation of use, or alteration of the course of highways within 5 rods of a lake or stream when such would result in a loss of public access to the lake or stream. Therefore, it is clear that in enacting MCL 247.44(1), the Legislature intended that a circuit court’s determination of whether a “reasonable objection” has been posited must, at a minimum, involve the public’s access to the lake or stream.

In the present case, the only witness who offered testimony regarding a potential loss of access to the river was Ward, who briefly stated that he and others who had fished in the river were concerned about whether it would impact the fishing. However, Ward was admittedly not sure that closing the streets to construct the library would affect this activity. There was also testimony that there is no designated public access to the river along the portions of the streets proposed to be closed, and that the library plans indicated that the river walk would be incorporated into the library's construction. Moreover, Clark testified that the proposed library site plan would not inhibit access to the river, but would most likely enhance it because of increased parking, additional sidewalks, and the construction of the river walk. Clark further testified that the river bank is currently very steep and covered with brush and trees, making it inaccessible, and that the river bank would be cleaned up during the library's construction.

Moreover, the only mention of any historic value that the current streets' proximity to the river might hold also came from Ward, who testified that closing Mill Street and constructing the library would require the destruction of the 140-year-old waterworks building located near the river. However, other than the building's age, defendants offered no testimony tending to show that the building had any historical significance. Moreover, Mansfield testified that the building is currently vacant and is not really conducive to conversion for reuse because of its size and age. Mansfield further stated that the building currently has no historical designation, and that he is not aware of its having any historical significance.

Therefore, taking into consideration the testimony presented regarding the scenic, historic, and public access values regarding the streets' proximity to the river, the trial court's ruling that defendant had not presented a reasonable objection was not clearly erroneous.

Finally, even though no reasonable objection was presented, the circuit court was still required to determine whether altering the course of the streets "is necessary for the best interest and welfare of the public before approving the change." *Abbey Homes, supra* at 583; MCL 247.44(1).

Superette initially argues that, with regard to traffic flow, the circuit court failed to consider the safety features of the existing road and the proposed alternative. Defendant's argument on this issue, however, fails to take into consideration the testimony of Wollner, who testified that the Apple Street/Michigan Avenue intersection was currently in need of a traffic signal, had plenty of reserve capacity to handle the traffic that would be diverted to it, and that there would only be additional congestion to the intersection if no improvements were made. However, Wollner testified that she would be recommending that the intersection be improved by the addition of a traffic signal which, in addition to controlling congestion, would contain a traffic signal preempt to clear the intersection during fire department responses and increase safety in the community.

The bulk of Superette's argument, however, focuses on its assertion that the circuit court failed to give adequate weight to the testimony of local business owners who fear a resulting adverse economic impact and, especially, failed to consider the testimony of defendant's expert, Michalski, and Dianne Cizauskas, who testified that she had been forced to close her grocery store in Middletown because of a similar road closing. Again, the trial court's findings were not clearly erroneous. Initially, we note that Michalski met with only three business owners, was only basing his opinion on the potential economic impact to those businesses on information

provided to him concerning gross revenues, and that he had not conducted any specific analysis on the actual adverse impact of the street closings. Moreover, with respect to Cizauskas, she testified that her store is not located on the portion of Mill Street that is proposed to be closed, but is actually located on the opposite side of Michigan Avenue from where the construction would take place. Thus, Cizauskas was unable to say with any reasonable certainty that her store would be adversely affected.

We also reject defendant's assertion that subjective fears are sufficient to comprise a reasonable objection. First, Superette's reliance on *Westveer v Ainsworth*, 279 Mich 580, 585; 273 NW 275 (1937), is misplaced. *Westveer* involved former 1929 CL 1929. In *Abbey Homes*, *supra*, at 584, n 3, this Court expressly avoided drawing an analogy between such statutes and MCL 247.44 because they differ significantly in both language and intent.

Second, defendant's argument is analogous to the one posed in *Abbey Homes*, *supra* at 582-583, which when "taken to its logical conclusion, reduces the statute to a useless enactment." Quite simply, if defendant's assertion were adopted, a few isolated objections based on unsubstantiated subjective beliefs that the alteration may have adverse effects, would prevent a circuit court from finding that the proposed alteration is in the best interests and welfare of the public. As in *Abbey Homes*, we do not believe the Legislature intended such a result. *Id.* at 583.

Therefore, we conclude that the circuit court's determination that closing the streets to build the proposed library is in the best interests and welfare of the public was not clearly erroneous.

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey