STATE OF MICHIGAN

COURT OF APPEALS

CROWN ENTERPRISES INC,

Plaintiff-Appellee,

v

CITY OF ROMULUS,

Defendant-Appellant,

and

AMERICAN DIESEL TRUCK REPAIR INC, RUBEN CHACON, and JUAN MOLINA,

Defendants.

UNPUBLISHED
May 20, 2010

No. 286525
Wayne Circuit Court
LC No. 05-519614-CZ

Before: BECKERING, P.J., AND MARKEY AND BORRELLO, JJ.

PER CURIAM.

This case arises from plaintiff's effort to route trucks accessing its truck terminal over Harrison Avenue, a road that is partly public and partly private but to which plaintiff claims an easement. Defendant city of Romulus tried to prevent plaintiff from using Harrison Avenue for truck traffic because Harrison did not meet the city's standards for roads serving truck traffic and because the Harrison access point was not part of plaintiff's approved site plan required by defendant's zoning ordinance. Although ultimately the trial court ordered plaintiff not to use Harrison Avenue until it had obtained an amended site plan, the court also ruled that defendant violated plaintiff's procedural due process rights early in the dispute by erecting, without notice or hearing, a barricade that blocked access over the claimed easement. The trial court also awarded plaintiff attorney fees pursuant to 42 USC 1988. We reverse in part and remand.

I. FACTS AND PROCEEDINGS

Plaintiff owns property in the city of Romulus where it operates a large trucking terminal that it acquired in 1994 after the bankruptcy of the prior owner, Jones Transfer, which also operated a trucking business on the site. Both Jones Transfer and plaintiff for at least 20 years before the instant dispute had always used north-south Harriet Avenue for trucks to enter and leave its trucking facility via Ecorse Road, an east-west main road. To the immediate east of Harriet is another north-south street, Harrison Avenue. There are four homes on the south side

of Ecorse between Harriet and Harrison. A truck repair business, American Diesel Truck Repair, Inc. (American Diesel), is located on the south side of Ecorse east of Harrison. American Diesel also owns property north of plaintiff's property and west of Harrison.

In 1926, part of plaintiff's property was included in a recorded plat: Gordon's Detroit Park Subdivision. This plat depicts two north-south roads: Balmoral Avenue, subsequently renamed Harriet, and to the east, Edison Avenue, subsequently renamed Harrison Avenue. Sometime before 1979 the city of Romulus vacated the portions of Harrison and Harriet actually running through plaintiff's property. In 1979, the city vacated an additional 43 feet of Harrison Avenue immediately to the north of plaintiff's property; the fee of this vacated part of Harrison reverted to American Diesel, MCL 560.227a(2).[1] The remainder of Harrison north to Ecorse Road is an unimproved public street. The 1979 vacated portion of Harrison Avenue to which plaintiff claims an easement is the subject matter of this lawsuit.

In 1995, consistent with defendant's zoning ordinance that provides "no use shall be carried on . . . except as shown on an approved site plan," plaintiff obtained approval of a site plan to expand its operations; the approved site plan specified Harriet Avenue as the single point of access for ingress and egress to the facility. At the time the site plan was approved, plaintiff improved Harriet to upgrade it to a Class "A" road, another requirement of defendant's zoning ordinance for truck traffic. All trucks entering and leaving plaintiff's truck terminal facility continued to use Harriet Avenue exclusively until late 2004 when plaintiff's managers decided to implement a circular traffic flow pattern where trucks would enter its facility from Harrison Avenue and depart by Harriet. This traffic pattern required trucks to drive over both the unimproved public portion of Harrison Avenue and the vacated portion owned by American Diesel. As many as 100 tractor-trailers entered plaintiff's facility 24 hours a day, seven days a week. At least one Harrison Avenue resident complained.

In January 2005, defendant began taking action to prevent plaintiff from using Harrison Avenue for truck traffic. Defendant installed a sign stating that commercial vehicles were prohibited and the police began to ticket defendant's truck drivers using Harrison Avenue. Also, defendant briefly placed barricades to prevent ingress and egress to and from plaintiff's truck terminal from Harrison Avenue. Defendant removed the barricades after reaching an agreement with plaintiff for the purpose of negotiating with plaintiff regarding its obtaining a revised site plan before using Harrison Avenue for access to its truck terminal. This temporary truce ended on June 2, 2005, when the city reinstalled the barricades because it believed that plaintiff had violated the interim agreement not to use Harrison Avenue for truck traffic pending negotiations over a new site plan. Defendant installed the barricades with permission on American Diesel's property opposite defendant's gated access to the vacated portion of Harrison Avenue.

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[1] MCL 560.227a(2) provides: "If the lots abutting the vacated street or alley on both sides belong to the same proprietor, title to the vacated street or alley shall vest in that proprietor. If the lots on opposite sides of the vacated street or alley belong to different proprietors, title up to the center line of the vacated street or alley shall vest in the respective proprietors of the abutting lots on each side."

According to the testimony of one long-time employee of both Jones Transfer and plaintiff, before plaintiff began to use Harrison to access its facility in late 2004, the gate to the vacated portion of Harrison Avenue remained locked and "chained 24 hours a day, seven days a week." Further, plaintiff's employees were not allowed to enter the facility from Harrison Avenue. But, this employee also remembered that many years ago some Jones Transfer drivers would use Harrison Avenue to park their personal vehicles and access their tractor-trailers. American Diesel owner Ruben Chacon testified that around 1979 Jones Transfer used Harrison Avenue for auto traffic "for a little while," then they "closed it down after that."

On July 1, 2005, plaintiff filed this lawsuit that initially contained nine counts: (1) trespass, (2) unlawful interference with a private road easement, (3) unlawful interference with an implied easement, (4) unlawful interference with a prescriptive easement, (5) procedural due process violation, (6) a violation of the "fair and just treatment" clause of Michigan's constitution, (7) substantive due process, (8) equal protection violation, and (9) unlawful private use taking. The trial court permitted plaintiff to amend its complaint on July 31, 2006, to add as count ten a 42 USC 1983 claim.

On July 25, 2005, the trial court heard the parties' arguments on plaintiff's motion for a temporary restraining order to remove the barricades and permit access to Harrison Avenue. The trial granted plaintiff's motion and observed in responding to defense counsel's argument that plaintiff had a different access point it had used for years: "That is no excuse for this City's behavior. This is nothing more than an unconstitutional lack of due process taking of these people's property." The court ordered the barricades removed within 48 hours and instructed the parties to return to their original agreement. The trial court's hand-written order provides:

> IT IS ORDERED Plaintiff's motion for preliminary injunction is granted, and Defendant's motion for preliminary injunction is denied.
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> IT IS FURTHER ORDERED that the city will remove the barricades on Harrison Rd. within 48 hours; the court will hold an evidentiary hearing for both parties' motions on August 16, 2005, at 10:00 a.m.; that [plaintiff] will not use Harrison Avenue as its primary access until further order of the court.

Because defendant removed the case to federal court until December 8, 2005, the evidentiary hearing was not held until February 2006. That hearing did not result in the trial court's deciding either plaintiff's easement or constitutional claims. The parties agreed, however, that American Diesel, Chacon and Juan Molina, the owners of the vacated part of Harrison Avenue, be added as third party defendants. The trial court also issued a preliminary injunctive order on February 16, 2006, which provided in part:

> (1) The City of Romulus shall be hereby enjoined from interfering with the use of Harrison Avenue as a means of ingress or egress to the truck terminal located at 28475 Ecorse Road by Plaintiff, its employees, customers or other trucks that may access this facility. The Court finds that placement of barricades by the City of Romulus to prevent access from Harrison Avenue was without legal justification.

> (2) The Defendant shall, as a means of enforcing its zoning code, submit to the Plaintiff, notice of what it believes is necessary for Plaintiff to comply with the site plan requirements of the zoning ordinance.
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> (3) Upon the providing of the notice to Plaintiff by defendant of such notice, Plaintiff shall within 14 days submit a site plan to the City of Romulus for 28475 Ecorse Road, and file the same with this court. The documents submitted on behalf of Plaintiff shall comply, to the extent required by this order, with Sections 4.03, 4.35, 17.03 and 18.03 of the City of Romulus Zoning Ordinance and any other applicable state and local regulations. The City's review of the site plan shall be limited to the issue of access to Harrison Avenue and vehicular circulation on the site and related issues.

The February 16, 2006, order also set deadlines for defendant's review of a new site plan. But the order stated it should not be construed as restricting defendant from enforcing its zoning ordinance, "provided that the City complies with procedural requirements" of the ordinance. Finally, the order noted that it did not dispose of the claims and defenses raised by the parties.

Plaintiff submitted its proposed new site plan to defendant in April 2006. The city approved the site plan in July 2006 subject to two conditions: (1) that Harrison Avenue be upgraded to a Class "A" road, and (2) that plaintiff submit documents verifying that it held an easement across the vacated portion of Harrison Avenue owned by American Diesel.

On April 28, 2006, defendant's initial motion for summary disposition was heard and denied without the trial court's stating a reason. Defendant argued that plaintiff's procedural due process claim failed because plaintiff had no constitutionally protected liberty or property interest to support such a claim. Specifically, defendant argued that plaintiff's legal theories regarding its claim to an easement in the vacated portion of Harrison Avenue failed. Defendant also argued that plaintiff had never previously used Harrison Avenue as an entrance to its property for trucks and that the approved 1995 site plan did not permit access to plaintiff's facility from Harrison Avenue. Defendant specifically asserted in an April 26, 2006 reply brief that even if an easement arose in plaintiff's favor, it had been abandoned by nonuse. Plaintiff admits defendant raised the issue of abandonment, but argues that defendant gave the issue only cursory treatment in a reply brief, and at the hearing, defense counsel never used the words "abandon" or "abandonment." The trial court did not explicitly address the issue of abandonment in any of its opinions or orders.

Next, on August 18, 2006, the trial court held a hearing on plaintiff's motion for partial summary disposition with respect to its claim to an easement in the vacated portion of Harrison Avenue. The third-party defendants were served with notice of the hearing. Plaintiff's property is located at the southern end of Harrison Avenue where the public portion of the road dead-ends. Plaintiff argued that this fact made it an "abutting" landowner for the purposes of MCL 560.227a. Plaintiff further argued that its property, as part of Gordon's Detroit Park Subdivision, held an easement in the platted streets. Thus, plaintiff argued, the fact that its property shared a "common line" with the vacated portion of Harrison Avenue was sufficient to establish its right to use both the vacated and non-vacated portions of Harrison for ingress and egress, regardless of which property owners took fee title to the vacated roadway. Defense counsel generally agreed with the legal point that a private easement may arise when a street depicted in a plat is

subsequently vacated, but argued that plaintiff had not met its burden of proof by producing a deed showing its reliance on the plat. Third party defendants American Diesel, Chacon and Molina did not appear at the hearing. The trial court granted plaintiff's motion. The trial court's October 4, 2006, order provides in part:

> 5. Pursuant to Resolution 79-104, the City of Romulus vacate[d] Harrison Avenue between Lots 170 and 173 of the Gordon's Detroit Park Subdivision. The portion of Harrison Avenue was 43 feet wide. Title to the vacated portion of Harrison Avenue was vested in Defendants Rebuen [sic] Chacon and Juan Molina as abutting property owners, pursuant to MCL 560.227(a)(2).
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> 7. Plaintiff Crown Enterprises, Inc.'s property was indicated on Gordon's Detroit Park Subdivision Plat which was recorded with the Wayne County Register of Deeds (Liber 61 of Plats, Page 5, Wayne County Records, and this plat showed Plaintiff Crown Enterprises, Inc.'s property shares a boundary line with Harrison Avenue. Harrison Avenue provided an ingress and egress access to Plaintiff Crown Enterprise, Inc.'s property.
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> IT IS ORDERED Plaintiff Crown Enterprises, Inc. . . . as owners of property: Commonly known as: 28475 Ecorse, Romulus, MI 48174 [legal description and tax identification number omitted] . . . has an easement over the property vacated by the City of Romulus in 1979. Said easement shall run with the land and is described as an easement over the following vacated property being: [legal description omitted]
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> IT IS FURTHER ORDERED Plaintiff Crown Enterprise, Inc.'s easement arises from law both pursuant to the rights of an abutting land owner when Harrison Road was vacated by the City of Romulus, and also as an owner of a portion of property that had been platted and recorded under Gordon's Detroit Park Subdivision Plat which and [sic] recorded with the Wayne County Register of Deeds . . . .

Although plaintiff obtained an order that it held an easement, it failed to upgrade Harrison Avenue to a Class "A" road as required to satisfy the city's zoning ordinance. Because plaintiff had not made the necessary improvements to Harrison Avenue, defendant moved to enjoin plaintiff's use of Harrison until the conditions of the new site plan were satisfied. The trial court granted the motion and entered its order on May 18, 2007, providing that plaintiff "shall not use the Harrison road gate as a means of ingress or egress for semi trucks with attached trailers" unless "[t]he road has been improved to meet the structural requirements of a Class A road as defined by local ordinances, or . . . [t]he road has been improved in a manner which meet[s] the structural equivalent of a Class A road, as agreed to by" the parties, or "[f]urther order of this Court." At the hearing on defendant's motion, the trial court observed that it had ordered the city to remove the barricades because the city's behavior at the beginning of the case was "disturbing" and that it had never intended to permit plaintiff to use Harrison Avenue without complying with the city's ordinance.

The trial court heard the parties' motions for summary disposition on November 2, 2007, and issued its order on November 20, 2007, granting defendant summary disposition on all plaintiff's claims except for the procedural due process violation and liability under 42 USC 1983. On these two claims, the trial court granted plaintiff summary disposition. But the trial court found that plaintiff had "not established any damages as a result of Defendant's conduct." At the hearing on the motions, the trial court reasoned regarding the due process violation that the city's actions resulted from the failure to follow their own established procedures, which "requires notice of a violation from the chief of the building inspector." But, the court expressed doubts whether plaintiff had achieved prevailing party status under 42 USC 1988. The court noted:

> [I]n some circumstances even if a plaintiff who prevails in their 1983 claim may not be entitled may not be entitled to attorney fees under 1988. . . . I'm going to make a finding there was violation of the plaintiff's procedural due process, but in view of the fact they have failed to put forth any damages, compensable damages, it would be an award of nominal damages. But even despite that, I have a question as to whether I approve award of attorney fees under 1988. It's almost more a technical victory than a substantive victory, because [the] fact of the matter is even though the City barricaded the road in violation of their own procedures[,] I also issued an order preventing Plaintiff from using the road because it wasn't fit to be driven on by trucks.

The trial court permitted supplemental briefing regarding attorney fees under 42 USC 1988, and heard additional oral argument on the issue on December 14, 2007. The trial court reasoned at this hearing as follows:

> I think that there's three factors that that the Court should consider in determining whether to award . . . attorney fees when plaintiff has received only nominal damages under a 1983 claim. The first is the difference between the judgment recovered and the recovery sought. And that was considered the most important.
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> The next one is the significance of the legal issue on which the plaintiff prevailed and the public purpose served by the litigation. . . . The significance of the legal issue I think has been significantly diminished in view of the fact that although the plaintiffs got their injunction, I also had to issue an injunction against the plaintiff to prevent them from using the road.
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> Lastly, the difference between the judgment recovered and the recovery sought, the initial complaint also requested money damages. And it was determined [plaintiff] could not demonstrate any money damages and really what they sought was use of this road, which they did not achieve. So at most I would consider attorney fees for obtaining an injunction, not the entire case.
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> I would consider . . . also the reasonableness of the attorney fee . . . in light of the results achieved. I believe this was a technical—[plaintiff] prevailed technically not substantively.

Despite this reasoning, the trial court issued its opinion and order on May 30, 2008, granting plaintiff an award of attorney fees in the amount of $186,679.58 for legal work on the case through the issuance of the injunctive order on February 17, 2006. In its opinion, the court first determined that plaintiff was a "prevailing party" under 42 USC 1988. The court opined:

> Plaintiff prevailed on its procedural due process claim when the court ruled that Defendant's placement of barricades on Harrison Avenue in 2005 constituted a procedural due process violation, providing a basis for a cause of action pursuant to 42 U.S.C. § 1983 and an award of attorney fees pursuant to § 1988. *Pouillon v Little*, 326 F3d 713, 716 (6th Cir 2003).
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> * * *
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> In the case at bar, the Court's order enjoining Defendant from interfering with Plaintiff's use of Harrison Avenue as ingress to and egress from its truck terminal resolved the dispute initiated by Defendant's barricade of Harrison Avenue and affected Defendant's behavior toward Plaintiff.

The trial court distinguished *Cramblit v Fikse*, 33 F3d 633 (CA 6, 1994), and *Pouillon*, *supra*, cases in which the Sixth Circuit Court of Appeals held that a reasonable fee under § 1988 was no fee at all because the civil rights plaintiffs primarily sought money damages but obtained only nominal awards of $1 and $2, respectively.

> In contrast to *Pouillon* and *Cramblit*, Plaintiff Crown Enterprises's complaint sought relief in the form of injunctive relief and declaratory judgment, as well as monetary damages, and Plaintiff acted quickly (filing its motion two weeks after filing the complaint) and successfully to secure injunctive relief, its immediate and primary concern being the removal of barricades blocking an access route to its facility.
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> * * *
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> Plaintiff Crown Enterprises, Inc filed this action as a result of Defendant City of Romulus's barricading an access route to its facility without notice. Plaintiff's immediate and primary goal in filing this case was injunctive relief, which it succeeded in obtaining. In light of the continuing legal relationship between the parties, Plaintiff is entitled to attorney's fees commensurate with its success.

The trial court went on to determine a reasonable attorney fee to award under § 1988. It discussed *Hensley v Eckerhart*, 461 US 424; 103 S Ct 1933; 76 L Ed 2d 40 (1983) and noted that case held that "[w]here the plaintiff's successful and unsuccessful claims are based on 'a common core of facts' and 'related legal theories,' the lawsuit cannot be viewed as a series of discrete claims, and the court should focus on the 'significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" Quoting *Hensley*, 461 US at 435. The trial court noted plaintiff's counsel supported his fee request, opining:

> Plaintiff alleged related claims seeking relief for the same course of conduct, Defendant's barricading of Harrison Avenue to prevent Plaintiff's use of the road to access its truck terminal. Plaintiff obtained relief, prevailing on the federal constitutional claim of a procedural due process violation when the Court granted its motion for preliminary injunctive relief and found that Defendant's placement of barricades to block access was without legal justification. . . . It is Plaintiff's success on the due process claim that entitles it to attorney's fees pursuant to § 1983 and § 1988.
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> Plaintiff's choice to pursue its easement rights under state law after establishing the due process violation and remedying the course of conduct that gave rise to this litigation, though successful, removes the easement claim from the purview of § 1988 attorney fee eligibility. Alternatively, Plaintiff cannot be considered a prevailing party entitling it to attorney's fees beyond February 17, 2006.
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> Therefore, Plaintiff's total requested fee of $242,700.41 is reduced by $54,333.33, the latter figure reflecting all fees, in every category, incurred after February 17, 2006. Plaintiff's request for attorney's fees is granted in the amount $186,679.58.

Defendant filed a motion for reconsideration on June 13, 2008, which the trial court denied on June 19, 2008, and now brings this appeal by right.

II. STANDARD OF REVIEW

This court reviews de novo a trial court's decision on a motion for summary disposition. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005). Likewise, whether plaintiff held an easement over the vacated portion of Harrison Avenue—the only possible subject of the alleged due process violation—presents a question of law the Court reviews de novo. *Minerva Partners, LTD v First Passage*, LLC, 274 Mich App 207, 218; 731 NW2d 472 (2007).

When contemplating an award of attorney fees under 42 USC 1988(b),[2] a court must employ a two-step analysis. The court must first determine whether a plaintiff seeking attorney fees is the "prevailing party." *Texas State Teachers Ass'n v Garland Independent School Dist*, 489 US 782, 789; 109 S Ct 1486; 103 L Ed 2d 866 (1989) ("no fee award is permissible until the plaintiff has crossed the 'statutory threshold' of prevailing party status"). Whether a plaintiff is a "prevailing party" is a question of law appellate courts review de novo. *Outdoor Systems, Inc v City of Clawson*, 273 Mich App 204, 209; 729 NW2d 893 (2006); *Radvansky v City of Olmsted Falls*, 496 F3d 609, 619 (CA 6, 2007).

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[2] 42 USC 1988(b) provides in pertinent part: "In any action or proceeding to enforce [various federal statutes, including 42 USC 1983] . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ."

Second, an appellate court must review for an abuse of discretion the reasonableness of an attorney fee awarded to a "prevailing party." *Cramblit*, 33 F3d at 634. "Abuse of discretion exists only when a district court relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard." *DiLaura v Ann Arbor Twp*, 471 F3d 666, 671 (CA 6, 2006) (citations and quotation marks omitted).[3] The degree of success a plaintiff achieves is the most important factor in determining a reasonable attorney fees under 42 USC 1988. *Farrar v Hobby*, 506 US 103, 114; 113 S Ct 566; 121 L Ed 2d 494 (1992). When a plaintiff wins only nominal damages, a reasonable attorney may be no fee at all. *Id*. at 115; *Cramblit*, 33 F3d at 635-636.

III. ANALYSIS

We conclude that the trial court erred in finding defendant violated plaintiff's procedural due process rights because, assuming plaintiff held an easement in the vacated portion Harrison Avenue by virtue of its ownership of platted property, plaintiff had long ago abandoned the easement by not using it and by submitting its 1995 site plan providing for ingress and egress to its property only by Harriet Avenue. In addition, even if an easement arose from the plat in defendant's favor, it did not include the right to use Harrison Avenue for the commercial trucking that plaintiff sought to impose on it. While plaintiff argues that the barricades also precluded plaintiff from using the vacated portion of Harrison for non-truck traffic, both the facts and plaintiff's complaint belie plaintiff's claim it sought to use Harrison Avenue for that limited purpose. Plaintiff in late 2004 began using Harrison Avenue for commercial trucking entering its truck terminal—as many as 100 tractor-trailers a day, 7 days a week—not as a point of emergency ingress or egress, and not to permit employee access in private vehicles. Plaintiff never held a vested right to use Harrison Avenue for such large-scale commercial truck traffic, even if it did hold an easement in Harrison Avenue by virtue of the laying out of streets in the residential plat of Gordon's Detroit Park Subdivision. Because plaintiff did not have a protected property interest to use Harrison Avenue for truck traffic, defendant could not have violated plaintiff's procedural due process rights in precluding such traffic. Consequently, plaintiff's 42 USC 1983 claim fails, and it cannot be a "prevailing party" entitled to attorney fees under 42 USC 1988.

Both the United States Constitution and the Michigan Constitution prohibit the government from depriving a person of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, sec 17; *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 28-29; 703 NW2d 822 (2005). Plaintiff's claim to an award of attorney fees under 42 USC 1988 is premised on a finding that defendant is liable under 42 USC 1983, which in turn is premised on plaintiff's claim of denial of procedural due process required by the Fourteenth Amendment. 42 USC 1983 provides a remedy for violations of federal law, but "is not itself a source of substantive rights; it merely provides a remedy for violations of rights guaranteed by the federal

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[3] Federal law governs plaintiff's federal constitutional right to due process and its 42 USC 1983 claim. *Markis v City of Grosse Point Park*, 180 Mich App 545, 553; 448 NW2d 352 (1988). An abuse of discretion occurs under Michigan law when the trial court's decision is outside the range of principled outcomes. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

constitution and federal statutes." *Meagher v Wayne State University*, 222 Mich App 700, 720; 565 NW2d 401 (1997). Here, plaintiff claims defendant violated its constitutional right to procedural due process. See *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998). The Due Process Clause generally requires the government before depriving a person of life, or a protected liberty or property interest, to provide notice and an opportunity for a meaningful hearing before an impartial fact finder and a written statement of findings. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195, 209, 213-214; 761 NW2d 293 (2008).

The threshold inquiry regarding plaintiff's procedural due process claim is whether plaintiff at the time of the alleged deprivation possessed a liberty or property interest protected by the Constitution. *Mettler Walloon*, 281 Mich App at 209; see also *Warren v City of Athens, Ohio*, 411 F3d 697, 708 (CA 6, 2005), and *Wojcik v City of Romulus*, 257 F3d 600, 609 (CA 6, 2001). "Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process." *Warren*, 411 F3d at 708. But, protected property rights arise not from the Constitution but from state law. *Id*.; *Wojcik*, 257 F3d at 609. "Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Meagher*, 222 Mich App at 720, quoting *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). "A property right cannot be vested unless it is something more than an abstract need, desire, or unilateral expectation." *Id*. "Unilateral expectations of a property interest are insufficient to trigger due process concerns." *Wojcik*, 257 F3d at 609. Here, the parties agree that plaintiff's procedural due process claim must rest on its having a protected property interest in the portion of Harrison Avenue that was vacated in 1979, i.e., an easement over the property of American Diesel. We note that defendant correctly argues that the city's failure to follow the enforcement procedures of its own ordinance cannot by itself form the basis of plaintiff's constitutional claim of a procedural due process violation. See *By Lo Oil*, 267 Mich App at 28.

An easement is a limited property interest; it is the right to use particular land but not the right to occupy or possess the land. *Carmody-Lahti Real Estate*, 472 Mich at 378. "Accordingly, an easement, whether appurtenant or in gross, is generally confined to a specific purpose." *Id*. at 378-379. An easement may arise under Michigan law in many ways, such as by specific grant or reservation, or by operation of law. See *Chapdelaine v Sochocki*, 247 Mich App 167, 172; 635 NW2d 339 (2001); *Minerva Partners*, 274 Mich App at 220 n 8. Plaintiff asserted it acquired an easement in the vacated portion of Harrison first by virtue of defendant's act of vacating the portion of Harrison at issue in 1979 because it was a "dead-end abutter," and, second, because it was the successor in interest to owners that acquired lots in Gordon's Detroit Park Subdivision in which the street that became Harrison Avenue was platted as a street providing ingress and egress to the platted lots. The trial court eventually agreed with plaintiff, ruling that plaintiff held an easement in the vacated portion of Harrison under both theories.

Defendant persuasively argues that the caselaw on which plaintiff relies for its "dead-end abutter" theory does not support its claim to an easement. Plaintiff merely cites the common-law rule that ownership of an abandoned road or street reverts to the abutting property owner. *Dalton Twp v Muskegon Co Rd Comm'rs*, 223 Mich App 53; 57; 564 NW2d 692 (1997). But

that case says nothing about a dead-end abutter acquiring an easement when a public road is vacated. Also, *Giegling v Helmbold*, 357 Mich 462; 98 NW2d 536 (1959), which plaintiff cites, does not address whether an easement may arise in favor of a dead-end abutter when a public street is vacated. Rather, *Giegling* holds that a party is not bound by a quiet title action to which it was not a party. *Giegling*, 357 Mich at 465. Likewise, 73 ALR 2d 652, "Power To Directly Regulate or Prohibit Abutter's Access To Street or Highway," addresses access to public streets, not to whether an easement arises when a public street is vacated.

On the other hand, plaintiff's claim to an easement arising from its succession to property that was part of Gordon's Detroit Park Subdivision has merit. "The purchaser of property recorded in a plat receives both the interest described in the deed and the rights indicated in the plat." *Minerva Partners*, 274 Mich App at 219, citing *Kirchen v Remenga*, 291 Mich 94, 102-108; 288 NW 344 (1939). "A grantee of property in a platted subdivision acquires a private right entitling him 'to the use of the streets and ways laid down on the plat, regardless of whether there was a sufficient dedication and acceptance to create public rights.'" *Nelson v Roscommon Co Rd Comm*, 117 Mich App 125, 132; 323 NW2d 621 (1982), quoting *Rindone v Corey Community Church*, 335 Mich 311, 317; 55 NW2d 844 (1952). This private right in the platted streets that arises in the plat lots is in the nature of an "incorporeal hereditament," i.e., it attaches to and runs with the land. See *Kirchen*, 291 Mich at 108-109. Vacating the public's rights to dedicated public streets in the plat does not dissolve the private rights of the owners of the platted property. *Nelson*, 117 Mich App at 133. "[I]f the platted streets in a subdivision are abandoned for public use, the lot owners still retain a separate, private right to use the streets in that subdivision." *Minerva Partners*, 274 Mich App at 219. Thus, as an owner of property in Gordon's plat, defendant acquired an easement in Harrison Avenue, including the portion the city vacated in 1979, which survived defendant's vacating that portion of it at issue in this case in 1979. *Id*.

The next question is the nature of the easement that arose to use the streets depicted in Gordon's Detroit Park Subdivision. Absent evidence to the contrary, we conclude the 1926 plat created a subdivision of lots for residential development. Accordingly, it follows that the platted streets, including the predecessor of Harrison Avenue, were intended to serve residential traffic—not the heavy commercial truck traffic that plaintiff proposed and initiated in late 2004. An easement is generally limited to the use for which it was created. *Carmody-Lahti Real Estate*, 472 Mich at 378-379. A related principle is that the "owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Schadewald v Brule*, 225 Mich App 26, 36; 570 NW2d 788 (1997), citing *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). Clearly, if the streets in the plat were intended to serve residential traffic, the use plaintiff desired to make of Harrison Avenue was "a new and additional burden." *Id*. So, we conclude that before this litigation was begun, never possessed a private easement in Harrison Avenue for commercial truck traffic by virtue of its ownership of platted property.

Moreover, even if plaintiff acquired an easement in the vacated portion of Harrison Avenue by either of the means the trial court accepted, defendant asserts that plaintiff abandoned the easement by long nonuse and by expressing affirmatively the intent to abandon it when plaintiff submitted and obtained approval for its 1995 site plan. The parties dispute whether the issue of abandonment has been preserved for appellate review. Plaintiff correctly argues that generally "an issue is not properly preserved if it is not raised before, addressed, or decided by

the circuit court or administrative tribunal." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). But the fact that a trial court does not address an issue will not necessarily result in its forfeiture. See *Miller-Davis Co v Ahrens Const, Inc*, 285 Mich App 289, 298-299, 777 NW2d 437 (2009). Here, plaintiff concedes that defendant did raise the issue of abandonment, albeit in a cursory fashion. In addition, plaintiff suggests that the trial court actually addressed the issue by correctly finding through its silence on the issue that plaintiff did not abandon its easement. We conclude that defendant preserved this issue by raising it below and arguing facts to the trial court that could support a finding that plaintiff abandoned any easement it acquired in Harrison Avenue. Moreover, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Here, because the essential facts necessary to find abandonment are undisputed, it becomes a question of law for the Court to decide. See *Carmody-Lahti Real Estate*, 472 Mich at 362, 385-388.

An easement may be lost through abandonment. *Minerva Partners*, 274 Mich App at 214. But "mere nonuser of a way, arising either by prescription or grant, for a period short of the statute of limitations, will not extinguish the easement, unless accompanied by an intention on the part of the dominant owner to abandon it." *McMorran Milling Co v Pere Marquette R Co*, 210 Mich 381, 394; 178 NW 274 (1920). Thus, to establish abandonment, "both an intent to relinquish the property and external acts putting that intention into effect must be shown. Nonuse, by itself, is insufficient to show abandonment. Rather, nonuse must be accompanied by some act showing a clear intent to abandon." *Ludington & Northern R v The Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991) (citations omitted). Here, plaintiff abandoned any easement in the vacated portion of Harrison Avenue though its long history of non-use coupled with the submission of its 1995 site plan under defendant's zoning ordinance which did not propose using Harrison Avenue for truck traffic and specifically depicted using only Harriet Avenue for ingress and egress.

The undisputed evidence shows that neither plaintiff nor its predecessor in interest, Jones Transfer, used Harrison Avenue for truck traffic. At best, many years ago, Jones Transfer employees occasionally used Harrison to access the truck terminal. Such limited use many years ago by Jones Transfer employees did not constitute Jones Transfer's use of Harrison Avenue in its trucking business. Moreover, this limited employee use preceded plaintiff's acquisition of the property and its clearly expressed intent to abandon any easement it may have had in Harrison Avenue by not including it as an access point in plaintiff's 1995 site plan.

Goodman v Brenner, 219 Mich 55; 188 NW 377 (1922) is somewhat analogous. Goodman sought to prevent Brenner from trespassing over his property. Both Goodman and Brenner had acquired their property from the same common grantor. Brenner's 40 acres were land-locked, and the Court held that at the time of the conveyance to Brenner, those circumstances created an implied easement over a 2-acre strip of land over which Brenner was accused of trespassing some thirty years later. But for those thirty years after Brenner acquired his 40 acres, he did not use the 2-acre strip to which he held an easement, except for two times with plaintiff Goodman's permission. *Id.* at 58. Rather, Brenner during that time accessed his property over the farm of Charles Miller. Brenner also filed a circuit court action against Miller

claiming an easement by necessity and filed an affidavit in support averring that crossing Miller's property was the only way he could access his 40-acre back parcel. *Id*. at 58, 61. The Court quoted the rule in *McMorran Milling Co*, 210 Mich at 394, i.e., that mere nonuse of an easement will not constitute abandonment "unless accompanied by an intention on the part of the dominant owner to abandon it." The Court held that Brenner's "sworn statements [in the affidavit] voluntarily made indicate rather clearly that [Brenner] had abandoned every other way, except that which he was claiming over Miller's land." *Goodman*, 219 Mich at 61. Noting other acts of Brenner, the Court held that "the acts and the conduct . . . clearly indicated his intention to give up and abandon his easement, and this, together with the fact that he had not used it for 30 years, was sufficient to extinguish it." *Id*.

For the reasons discussed above, we conclude that the trial court must be reversed because it erred in finding a procedural due process violation. Even though the trial court correctly ruled that plaintiff held an easement in Harrison Avenue on the basis of its ownership of property in Gordon's Detroit Park Subdivision, this easement did not clearly include use of it for commercial trucking. Moreover, plaintiff abandoned the easement by its long nonuse and affirmative act of obtaining its 1995 site plan which evidenced an intent to abandon Harrison Avenue as a means of ingress and egress. Because plaintiff did not hold an easement to allow for truck traffic in the vacated part of Harrison at the time defendant erected the barricade, plaintiff did not have a vested property interest that could be the subject of a procedural due process violation. Consequently, because defendant was not liable under 42 USC 1983, the trial court erred in awarding plaintiff attorney fees under 42 USC 1988.

Our holding is limited to finding that the trial court erred in its determination that defendant violated plaintiff's procedural due process rights and erred by ruling plaintiff was entitled to attorney fees under 42 USC 1988. It does not affect the trial court's ruling of October 4, 2006, granting plaintiff an easement in that part of Harrison Avenue vacated in 1979. The fee owners of the property, the third-party defendants, had notice of plaintiff's motion for partial summary disposition to establish the easement and failed to appear; they have not appealed. Consequently, this Court's holding that at the time the barricades were erected plaintiff held no easement that could be the subject of a procedural due process violation does not affect the trial court's subsequent order granting defendant an easement.

We reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant may tax costs as the prevailing party under MCR 7.219.

/s/ Jane E. Markey
/s/ Stephen L. Borrello