STATE OF MICHIGAN

COURT OF APPEALS

NORTHLAND PROPERTIES, INC., Plaintiff-Appellee,	UNPUBLISHED November 16, 2010
v	No. 291276 Cheboygan Circuit Court
DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellant.	LC No. 07-007790-AA

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

SAWYER, J. (*dissenting*).

I respectfully dissent.

The circuit court did not err when it reversed the final determination and order in favor of plaintiff. The circuit court properly found that defendant did not prove that important wetlands would be lost. And, the circuit court properly found that there were no feasible and prudent alternatives to the proposed project in the record.

In reviewing a lower court's review of an agency decision, we need to determine whether the circuit court "applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test" in reviewing the agency's factual findings. *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996); *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 575; 659 NW2d 629 (1996). This standard is the same as the clearly erroneous standard, where a finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Dignan*, 253 Mich App at 575-576.

A review of the circuit court's opinion reveals that, contrary to defendant's argument, the circuit court did not ignore the statutory criteria nor did it indicate that the only relevant factor is the rarity of hardwood conifer swamps in Michigan. Rather, the circuit court's opinion reflects that it was aware of the statutory factors to be considered. The circuit court reached the conclusion that defendant's "primary objection to this proposed project appears to be the resulting loss of 16 acres of forested wetland swamp." After an extensive analysis of this issue, the circuit court's opinion then states that the "central issue to be decided in this appeal is whether the finding that a conifer swamp is a resource providing unique values not found in the majority of wetlands in the area and its destruction would eliminate important wetland diversity is a finding that is arbitrary and capricious or in the alternative not supported by substantial

evidence on the whole record." The circuit court then reaches its ultimate conclusion that the evidence did not support the final determination and order's finding that "the destruction of the 16 acre conifer swamp would eliminate important wetland diversity . . . if the record established that such wetlands were rare."

The circuit court analyzed the same question that the final determination and order analyzed: would the project eliminate important wetland diversity? The circuit court concluded that in this particular case the final determination and order's denial of the permit was premised on a conclusion that the destruction of 16 acres of hardwood conifer swampland would eliminate wetland diversity, and for that conclusion to be correct it would be necessary to conclude that hardwood conifer swamps are rare in Michigan. And if that conclusion was erroneous, then so was the denial of the permit. The circuit court essentially concluded that transforming 16 acres of the conifer swamp into open wetlands when the evidence below established that there are approximately 1.9 million acres of conifer swamp in Michigan (and over 50,000 acres in the local area) could not support the conclusion that important wetland diversity would be eliminated. I am not persuaded that the circuit court grossly misapplied the substantial evidence test. *Boyd*, 220 Mich App at 234.

While it is unclear whether the circuit court actually reversed the final determination and order on the issue of alternatives, it is clear that the circuit court was critical of the final determination where it found that there were feasible and prudent alternatives to the proposed project that were supported by competent, material and substantial evidence on the whole record. The circuit court opined as follows:

> One aspect of the statutory analysis that must be engaged in order to determine whether or not to allow or deny a permit such as the one now at issue is whether there are reasonable and prudent alternatives to the proposed project. The Petitioner contends that the [final determination and order's] conclusion that all six proposed alternatives were feasible and prudent without any discussion was arbitrary and capricious and as a conclusion not supported by substantial evidence on the whole record.

The circuit court's opinion then reviews the final determination and order's conclusory statements that the alternatives are feasible and prudent and it reviews the hearing officer's determination in the proposal for decision that none of the six alternatives are feasible and prudent. The circuit court's opinion then states:

> The [final determination and order] simply rejects the four paged detailed analysis of the six alternatives contained in the [proposal for decision] with the statement "in light of this project purpose, I find that all six alternatives offered by the LWMD [Land and Water Management Division] and discussed in the [proposal for decision] are feasible and prudent." While the experts had disagreements over the feasibility and prudence of the various alternatives, it is impossible to discern from the [final determination and order] what facts and circumstances were relied upon to conclude that all six alternatives offered by the LWMD were feasible and prudent.

It is unclear whether the circuit court concluded (1) that, in light of its conclusion that the final determination and order's determination that important wetland diversity would be lost was not supported by substantial evidence on the whole record, it was unnecessary to resolve the issue of the final determination and order's conclusions regarding the alternatives being prudent and feasible or (2) that it was agreeing with plaintiff that the lack of any meaningful analysis by the final determination and order established that its conclusion was arbitrary and capricious and not supported by substantial evidence on the whole record. In either case, I am not persuaded that the circuit court would have erred in such a conclusion.

I would affirm.

/s/ David H. Sawyer