STATE OF MICHIGAN

COURT OF APPEALS

SOUTHERN CLINTON COUNTY MUNICIPAL UTILITY AUTHORITY, Plaintiff/Counter-Defendant/Appellee,	UNPUBLISHED December 11, 2003
v	No. 242393 Clinton Circuit Court
PATRICIA L. McAVOY and RICHARD McAVOY, Defendants/Counter-Plaintiffs/Appellants.	LC No. 01-009304-CZ

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

PER CURIAM.

Defendants appeal from an order of the circuit court granting summary to disposition to plaintiff and denying summary disposition to defendants on plaintiff's complaint to enforce easement rights and defendants' counterclaim alleging a taking of private property for public use and seeking compensation. We affirm in part, reverse in part, and remand for further proceedings.

In 1998, defendants purchased property in Dewitt Township in Clinton County. The lot was subject to a utility easement. Also, at the time of the purchase, there was a sewer lift station which was serviced by plaintiff. There was a two-track gravel driveway servicing the lift station. Defendants began construction of a home in the fall of 1999 and by the summer of 2000, had installed an underground sprinkling system and had landscaped their front yard. In the process, defendants replaced the driveway servicing the lift station with topsoil, which was seeded for grass.

A representative of plaintiff, Brian Ross, contacted defendants, specifically Patricia McAvoy, regarding the access drive to the lift station. According to defendants, Ross stated that he wished to pave the access drive with asphalt and extend it some distance across defendants' front lawn. Mrs. McAvoy inquired whether plaintiff had an easement and indicated that any change or expansion of the lift station and the access to it would have to be the result of an agreement between the parties. According to defendants, plaintiff thereafter paved the access drive, increasing it to a length of seventy-four feet, with defendants being notified of the action after the fact.

The driveway was installed within the road right-of-way and a permit had been requested from the Clinton County Road Commission, with the permit being approved two days after the fact. Defendants further allege that no authorization was obtained from plaintiff's governing board or the local township. Defendants also claim that the next year, in summer of 2001, plaintiff further deposited crushed concrete on the property and spread it across defendants' lawn.

Defendants engaged in various activities to limit plaintiff's access to the service drive, including stringing red plastic tape across the drive, secured by their mailbox and a guard rail. Mrs. McAvoy also sent a letter to Mr. Ross, requesting the removal of the driveway and indicating that if the request was not honored, defendants would have the driveway removed. This action prompted the filing of this lawsuit and plaintiff's request for a restraining order.

In the hearing on the restraining order, the trial court concluded that the driveway was "reasonably necessary" and granted the restraining order. Thereafter, the trial court ruled in plaintiff's favor on the parties' cross motions for summary disposition.

Defendants first argue that the trial court erred in granting plaintiff summary disposition when plaintiff had no authority to use the right-of-way from the governing body having jurisdiction. Specifically, defendants argue that plaintiff was obligated to obtain permission from both the township and the county road commission before paving the driveway and that plaintiff only received permission from the county road commission after the fact and not at all from the township. Plaintiff counters that it was unnecessary to obtain permission from the township because of its general agreement with the township which authorizes plaintiff to maintain the sewer system and that it had obtained administrative approval from the county road commission and, therefore, did not have to wait for formal approval by the road commission board.

Turning first to the issue of approval by the road commission, MCL 247.184 provides in pertinent part as follows:

> In case it is proposed to construct a telegraph, telephone, power line or cable television line, pipe lines, wires, cables, poles, conduits, sewers, or like structures upon, over or under a county road or bridge, the consent of the board of county road commissioners shall be obtained before the work of such construction shall be commenced; . . .

The fact that plaintiff received permission from an employee of the road commission before commencing the work is irrelevant. The statute clearly and unambiguously provides that the consent must come from the board of county road commissioners. Permission from an employee is inadequate to satisfy the statute. But we are persuaded by plaintiff's argument that the permission granted by the board after the fact cures the error. It would be a ludicrous waste of resources to require plaintiff to send a work crew out to tear up the existing driveway because it was installed before proper permission was granted only to have that same work crew then immediately lay a new driveway, which would be appropriate because it comes after the board gave its consent.

This is not to say that plaintiff acted properly in installing the paved driveway before the board of road commissioners gave its formal consent. Plaintiff did not act properly. And if the

board had declined to follow the recommendation of its employee, with plaintiff then not receiving the board's consent, plaintiff would have had no choice but to remove the driveway. In short, plaintiff acted at its own peril by installing the driveway before receiving the board's official consent, but was rescued from danger when the board granted that consent.

With respect to the issue of the necessity of obtaining permission from the township, this issue is not so easily resolved because it does not appear that the township has ever granted consent, even after the fact. Defendants rely upon both constitutional and statutory provisions. Const 1963, Art VII, § 29, provides in pertinent part as follows:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; . . . the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

MCL 247.183(1) likewise provides:

> Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, subject to subsection (2), longitudinally within limited access highway rights-of-way, and across or under any of the waters of this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.

In *Union Twp v Mt Pleasant*, 381 Mich 82; 158 NW2d 905 (1968), the Supreme Court addressed the question whether permission had to be obtained from a township before laying a water line within the right-of-way of a county road. The Supreme Court held that, although jurisdiction over township roads had been transferred to the county under the McNitt Act in 1931, the constitutional provision grants townships control over the use of rights-of-way by utilities within the township regardless of what governmental entity has jurisdiction over the road itself. *Union Twp, supra* at 89-90.

Plaintiff argues that *Union Twp* is inapplicable to this case because that case involved a water line run underground, while the instant case involves paving on top of the ground. We see no basis under either the constitution or the statute to make a distinction based upon whether the object in question lies above or below ground level. Indeed, MCL 247.183(1) specifically refers to anything which is "upon, over, across, or under" the road.

Plaintiff also argues that its general authority granted by the township to operate the sewer system relieves them from the necessity of obtaining permission to construct sewer system components within the road right-of-way. We disagree. Assuming that the township could explicitly grant blanket permission on an on-going basis to plaintiff to build within the right-of-way, we see no such permission granted in the provisions cited by plaintiff. That is, we simply do not believe a general grant of authority to "do all things necessary" to operate the sewer system includes a delegation of constitutional responsibility to approve utility work within a right-of-way. The consent must come from the governing body and, therefore, at a minimum, the agreement or implementing ordinance would have to include an explicit grant of such permission; the authority to delegate such permission cannot be delegated because neither the statute nor the constitution provides for such delegation.

Plaintiff also argues that defendants raise the issue of the township's approval for the first time on appeal. Defendants, however, did in fact raise the issue, albeit briefly, during the hearing on the summary disposition motions and more fully in their motion for reconsideration. Accordingly, the issue is properly before us.

In sum, we agree with defendants that the necessary and proper permission of the township was not obtained and, therefore, installation of the paved driveway was improper. Furthermore, it does not appear from the record that this error has been cured. Accordingly, on remand, defendants may bring a motion for injunctive relief directing plaintiff to remove the driveway. If plaintiff is unable to produce at that hearing evidence that the township, at any time prior to the hearing, has, even belatedly, consented to the construction of the driveway, the trial court shall issue an order granting such relief. But if plaintiff is able to demonstrate that the township has granted consent, then the trial court shall deny such relief. As with the consent of the road commission, and for the same reason, it is sufficient if the township's consent was given after the fact.

Defendants have two remaining arguments, which we consider together. Defendants first argue that the trial court erred in finding that there was a public necessity, a necessary prerequisite to take private property for a public use. Second, defendants argue that the trial court erred in granting summary disposition to plaintiff on defendants' claim for compensation for the taking of their property. We disagree on both counts because defendants' arguments incorrectly presume that there was an additional taking of their property for public use.

As the Supreme Court observed in *Eyde Bros Dev Co v Eaton Co Drain Comm'r*, 427 Mich 271, 295; 398 NW2d 297 (1986), "when a new use of an existing public easement in a highway dedicated by user adds to the public benefit and does not constitute an additional servitude on the abutting fee owner, the fee owner is not entitled to compensation through condemnation proceedings." Thus, there is a need for condemnation proceedings, and thus a showing of necessity and compensation, only if the paving of what was previously a gravel driveway constitutes an additional servitude on the property. With respect to the question whether there is an additional servitude upon the property, the trial court concluded that there was no showing that there was and defendants do not seriously challenge that conclusion. Indeed, defendants' discussion of the additional servitude issue is limited to a conclusory statement that the paved driveway represents an additional burden on defendants' property. Defendants offer no argument, much less any authority, for that conclusion. Accordingly, like the trial court, we are not persuaded that the paving of a gravel driveway constitutes an

additional servitude.[1] Therefore, defendants have not raised a viable issue regarding whether there was an additional taking occasioned by the paving of the driveway, and the trial court properly granted summary disposition.

Affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello

[1] We should note that the trial court did initially conclude, at the August 10, 2001, hearing on the temporary restraining order, that defendants correctly argued that there was an additional servitude. But at the April 12, 2002, hearing on the summary disposition motions, the trial court concluded that there was no additional servitude. We conclude that the trial court was correct the second time.