STATE OF MICHIGAN

COURT OF APPEALS

FRANK G. SCHULTZ, a/k/a GEORGE F. SCHULTZ,

Petitioner-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent-Appellee.

UNPUBLISHED
May 6, 2008

No. 272995
Ingham Circuit Court
LC No. 02-000218-AA

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

For longer than a decade, petitioner was engaged in proceedings with respondent agency to obtain a permit to build a home on a Lake Charlevoix wetland. Respondent would not grant the permit unless petitioner granted it a conservation easement on all undeveloped areas of the parcel of property where he intended to build the home. The hearing referee rejected his challenge to this condition, and petitioner appealed this decision in the circuit court. The circuit court affirmed the hearing referee's decisions. The circuit court subsequently denied petitioner's motion for a relief from judgment and awarded $800 in costs to respondent. Petitioner appeals these two orders. We affirm.

I. Facts and Proceedings

This case has a lengthy procedural history, and previously came before this Court in *Schultz v Dep't of Environmental Quality*, unpublished opinion per curiam of the Court of Appeals, issued February 20, 2007 (Docket No. 271285) ("*Schultz I*"). This Court summarized the history of petitioner's proceedings with respondent as follows:

> On April 18, 1991, plaintiff applied to the Department of Natural Resources (the predecessor organization to the DEQ) in order to construct a home on a lot that was all-wetland property. He proposed to build a home on pilings with an attached garage and an access drive, but this original proposal was denied. On November 25, 1996, defendant, after a formal hearing, submitted a final determination and order that entitled plaintiff to a modified permit if he granted defendant a conservation easement over the entire undeveloped portion of the parcel. Plaintiff agreed to comply with the terms and conditions of the final order

> by signing a draft permit on February 6, 1997. Plaintiff submitted several proposed conservation easements, which were all rejected by defendant. Defendant contends that the first document submitted by plaintiff did not meet the conservation easement condition and allowed for supplementary structures that were not a part of the final order: a path, a boardwalk, and a deck. Plaintiff failed to provide an appropriate proposal during the next two years—due to similar problems as the first proposal—so defendant closed the application file on September 22, 1999.
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> On August 27, 2001, plaintiff filed a motion to compel compliance with the final determination and order from 1996, which was denied. Plaintiff then appealed that denial to the Ingham Circuit Court. On November 5, 2002, the parties reached an agreement that plaintiff would file a conservation easement within 30 days; and if defendant denied the proposal, it would provide reasons for its decision. If the exchange proved unproductive, then the parties would return to the court for a ruling. Plaintiff submitted several proposals during the next two years and defendant rejected each proposal because they continued to exempt areas other than the location of the house, garage, and driveway from the conservation easement. [*Id.*, slip op at 1-2.]

At this point in the proceedings, petitioner brought an action for inverse condemnation in the Court of Claims, arguing that respondent's imposition of the conservation easement condition was unconstitutional. The Court of Claims granted respondent summary disposition because petitioner's claim is time barred by the relevant statute of limitations, and this Court affirmed. *Id.*, slip op at 6. Petitioner then appealed the hearing referee's decisions to the circuit court, which affirmed the agency action, and denied petitioner's motion for relief from judgment.[1]

II. Analysis

Petitioner argues that the circuit court erred in accepting the hearing referee's determination that petitioner's 2001 motion to compel and 2002 motion to reconsider were untimely.[2] According to petitioner, the referee's decisions were arbitrary and capricious, and based on an incorrect understanding of the facts.[3] We find no clear error in the circuit court's

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[1] Respondent challenges this Court's jurisdiction to address the circuit court orders. We find that we have jurisdiction under MCR 7.203(B)(1) and MCR 7.205(F)(1).

[2] Petitioner reiterates in this appeal the arguments he made concerning his inverse-condemnation claim in *Schultz I.* In *Schultz I*, we affirmed the Court of Claims decision that petitioner's inverse-condemnation claim was time-barred. Having resolved the inverse-condemnation issue in the prior case, we find that petitioner's reassertion of the issue in this case is barred by the doctrine of collateral estoppel. See *Arim v Gen Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994).

[3] We review the circuit court's decision for clear error. *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 543-544; 705 NW2d 365 (2005). To warrant reversal, this Court must have a definite and firm conviction that the circuit court misapplied the

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decision. The court accepted the hearing referee's determination that petitioner had taken no action on his permit application for nearly two years after respondent closed the permit file. The record supports the referee's conclusion. Once respondent closed its file in 1999, petitioner took no further formal action regarding the file until 2001. Although an attorney representing Eyde Brothers Development Company corresponded with respondent regarding the file after the file closure, petitioner has offered no facts and no legal authority to demonstrate that Eyde's attorney was representing petitioner's interests in the file. Accordingly, the circuit court correctly accepted the referee's decision.

Petitioner also argues that the circuit court should have withdrawn the conservation easement requirement and issued a writ of mandamus requiring respondent to issue a permit. We disagree. Respondent was authorized to impose the easement requirement pursuant to MCL 324.30312(2), which provides that respondent may "impose conditions on a permit for a use or development if the conditions are designed to remove an impairment to the wetland benefits, to mitigate the impact of a discharge of fill material, or to otherwise improve the water quality." The circuit court properly gave deference to the referee's final determination that an easement was necessary to mitigate the potential cumulative environmental impacts of petitioner's building project.[4]

The circuit court also correctly found that petitioner had failed to demonstrate the need for the extraordinary remedy of a writ of mandamus. Petitioner bore the burden of demonstrating that (1) he had a clear legal right to the issuance of the permit or the easement, (2) respondent had a duty to issue the permit or the easement, (3) issuance of the permit or easement is ministerial in nature, and (4) petitioner has no other adequate legal or equitable remedy. *White-Bey v Dep't Of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999). Petitioner clearly fails to satisfy these requirements where he has never submitted a plan in accordance with respondent's restrictions. Petitioner was required to grant a conservation easement on the entire undeveloped portion of his parcel. Instead, as the circuit court found, he "repeatedly submitted a proposed conservation easement stating that there was a conservation easement with exceptions that would allow grantor to have a well drilled, plants, and maintain trees, shrubs, or other plantings, build and maintain a bath or boardwalk, and build a deck."

Petitioner also maintains that the circuit court erred by failing to enforce a settlement agreement that, according to petitioner, required respondent to submit the easement dispute to the circuit court for resolution.[5] We find no abuse of discretion. Contrary to petitioner's characterization of the agreement, it did not require respondent to submit to the circuit court's review of the easement requirements; it merely required respondent to review the conservation

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controlling legal principles or misconstrued the agency's factual findings. *Caprathe v Mich Judges Retirement Bd*, 275 Mich App 315, 319; 738 NW2d 272 (2007).

[4] See *St Clair Intermediate School Dist v Intermediate Educ Ass'n/Mich Educ Ass'n*, 458 Mich 540, 553; 581 NW2d 707 (1998).

[5] The court's decision on this issue was part of its denial of the motion for relief from judgment, which we review for abuse of discretion. *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007).

agreement proposed by petitioner. Respondent fulfilled this obligation and specified the reasons for rejecting the proposal. As we noted *supra*, respondent's reasons for rejecting petitioner's proposals were unassailable where none of the proposals complied with the conservation easement requirement. Therefore, respondent complied with the settlement.

Petitioner also raises procedural issues that merit only brief discussion. He contends that the circuit court erred in denying his motion for a new trial. However, as the circuit court correctly held, there had never been a trial in this administrative appeal, and the record was exclusively documentary evidence from the administrative proceedings. Accordingly, a motion for a new trial has no relevance here. He also challenges the trial court's decisions denying his motion for relief from judgment and awarding respondent costs.[6] Petitioner failed to present any grounds for affording relief under MCR 2.612(C)(1)(f), thus, the trial court did not abuse its discretion in denying the motion.[7] Additionally, the court properly awarded costs and damages to respondent pursuant to MCL 600.2445.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio

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[6] We review these issues for abuse of discretion. *Peterson, supra* at 412 (motion for relief from judgment); *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002) (review of costs award).

[7] *Heugel v Heugel*, 237 Mich App 471, 481; 603 NW2d 121, 126 (1999).