

STATE OF MICHIGAN
COURT OF APPEALS

SUZANNE HALL, BERT HALL, FRANK
MAFRICE, JANICE MAFRICE, MICHAEL
SEIDMAN, M.D., and LYNN SEIDMAN,

UNPUBLISHED
December 23, 2008

Plaintiffs-Appellees,

v

CHARTER TOWNSHIP OF WEST
BLOOMFIELD,

No. 279793
Oakland Circuit Court
LC No. 2006-079606-AS

Defendant-Appellant.

Before: Servitto, P.J., Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order reversing defendant's administrative decision to deny plaintiffs' permit application. We reverse.

I. Basic Facts and Procedural Background

Plaintiffs own adjacent lakefront property on Walnut Lake. According to the Michigan Department of Environmental Quality (MDEQ):

Walnut Lake contains native lake whitefish. The presence of this species is fairly rare and it is not known to be present in any other southern Michigan inland lake. A major concern with respect to the dredging project is the need by lake whitefish not only for large, shallow areas to spawn in, but the fact that their main food source is chronomid larvae [known as midges] that are produced primarily in the shallow areas of the lake. Walnut Lake is rather unusual in that there are limited amounts of large shallow areas present in the lake. While most lakes have from 40-75% of their area comprised of shallow areas less than 5 feet deep, there is only about 20% of Walnut Lake in this depth range.

Shallow water habitat is also the primary area for production of aquatic insects and is utilized by a number of different wildlife species for feeding and nesting. Northern pike and yellow perch that inhabit the lake also require vegetated shallow areas for spawning and feeding. The section of Walnut Lake in front of plaintiffs' properties is shallow, approximately two feet deep, and plaintiffs allegedly have difficulty maneuvering and docking their boats.

In 2001 plaintiffs initiated plans to dredge the area in front of their properties. In order to create a deeper channel, plaintiffs applied for dredging permits from both the MDEQ and defendant in August of 2003. Plaintiffs' application before defendant was denied without prejudice after plaintiffs requested their application to be tabled several times. Plaintiffs appealed this decision in July 2004, but withdrew their application pending the outcome of the MDEQ's decision regarding plaintiffs' application for a state permit.

The MDEQ initially denied plaintiffs' application in November 2004 concluding dredging would have significant adverse impact on the wildlife habitat of Walnut Lake and would set a harmful precedent that would allow subsequent dredging in other shallow areas. The MDEQ also noted that their inspection revealed that plaintiffs could successfully dock and moor their boats, as well as reach deep water, under the present conditions, and that other feasible alternatives were available. Plaintiffs then revised their dredging plans, such that the area of impact was smaller. Under the revised plan, plaintiffs would dredge 383 cubic yards of sediment within a .16-acre area. The MDEQ approved the revised plan in February 2006. After obtaining this permit, plaintiffs reinstituted their request for a permit from defendant.

On September 13, 2006, the defendant's Wetland Review Board (WRB) considered plaintiffs' renewed request for a dredging permit. At the meeting, defendant's environmental consultant, Dr. Steven Niswander, who had previously provided the WRB with a letter summarizing his findings and conclusions, commented that the dredging could result in increased predation of whitefish and could adversely impact the whitefish's food source. Dr. Niswander indicated that the area is critical to the lake because it is one of only two areas suitable for whitefish to spawn in, as well as perch and northern pike, and is also critical to all these fishes' food sources. Viewing the lake as a whole, the proposed dredging to this area could have, in Dr. Niswander's view, a significant impact on the lake's overall aquatic habitat and would not improve the lake in any manner whatsoever. Dr. Niswander also noted that plaintiffs can get in and out of the docking area under current conditions and that the community dock near plaintiffs' properties serves as an alternative for temporary use.

Counsel for plaintiffs countered Dr. Niswander's comments, stating that there had been no evidence of whitefish in Walnut Lake in a very long time and that the population, if any, would not be adversely impacted. Plaintiffs' counsel also indicated that extending the plaintiffs' docks was not a feasible alternative and that the nearby marina is private and not for public use. These assertions were not supported by any evidence. While plaintiffs did present to the WRB a report from their own environmental consultant, plaintiffs did not present this report until the meeting with the WRB was well underway. Thus, the WRB did not have a chance to review it before making their decision at the meeting. Plaintiffs' consultant did not appear before the WRB. Various residents also commented at the meeting and expressed that plaintiffs' permit application should be denied in order to protect the lake and prevent improper precedent. Several residents also indicated that they had seen whitefish in the lake.

At the close of the meeting, the WRB denied plaintiffs' permit request based on the following:

- 1) Dr. Niswander has stated the reasons regarding the negative impact of the fisheries and vegetation [sic] have been insufficiently rebutted by the Petitioner;
- 2) Dr. Niswander has indicated the proposed project will have a *significant*

adverse impact to the aquatic environment of the lake; and 3) there are feasible and prudent alternatives; 4) the West Bloomfield Wetland Review Board can be more protective than the MDEQ and the efforts made by the MDEQ is not known to this Board; 5) the feasible alternatives available to the Petitioner include utilizing an existing marine facilities [sic] on the lake such as one facility located adjacent to the west of the subject property; continued ingress/egress through the area as presently exists, and extending the existing seasonal docks to deeper water; 6) this denial will not deny the Petitioner user of the lake; and 7) as indicated by Dr. Niswander, if the Petitioner proceeds with this proposal to dredge the lake, there would be a high probability of detriment to the lake in terms of species quality and quantity. [Emphasis in original.]

Plaintiffs appealed this decision to the West Bloomfield Township Board, which affirmed the WRB's decision finding that the WRB did not abuse its discretion and reasonable alternatives are available to plaintiffs. Plaintiffs appealed this decision to the trial court arguing that defendant's decision was contrary to the laws and Constitution of this state, arbitrary and capricious, and not supported by substantial evidence. The trial court reversed defendant's decision. This appeal followed.

II. Standard of Review

"On direct review of an administrative decision, a trial court must determine whether the [decision] was authorized by law and whether [it] was supported by competent, material and substantial evidence on the whole record." *Mantei v Michigan Pub School Employees Retirement Sys*, 256 Mich App 64, 71; 663 NW2d 486 (2003); Const 1963, art 6, § 28 "Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence." *Mantei, supra* at 71. The trial court "may not substitute its judgment for that of an administrative agency if substantial evidence supports the agency's decision." *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478-479; 674 NW2d 728 (2003). Further, "[the trial court] should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views." *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). Our review of the trial court's decision is "limited to a determination whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Mantei, supra* at 71 (internal quotations and citation omitted). This review is synonymous with the clear error standard of review. *Id.* at 71-72. "We will overturn the [trial] court's decision only if we are left with the definite and firm conviction that a mistake has been committed." *Glennon, supra* at 478; *Mantei, supra* at 72.

III. Analysis

Defendant argues that the trial court erred in reversing defendant's denial of plaintiffs' dredging permit because the court failed to properly apply the substantial evidence standard, substituted its judgment for the Township's, and failed to give due deference to the Township's discretionary decisions. We agree.

West Bloomfield Township Code of Ordinances, art V, § 12-91(b)(3) and (4) authorizes defendant to require plaintiffs to obtain a dredging permit. Subsection (c) provides criteria for determining whether a permit should be granted:

(c) Criteria for use permit. In reviewing any application for a use permit under subsection (b) above, criteria such as the following shall be considered.

- (1) The water quality, including filtering action;
- (2) The fish and other wildlife, including their habitats;
- (3) The probable impact if the use is permitted upon adjoining wetland or drainage areas and the cumulative effect of similar proposals on the watershed and water table;
- (4) The economic value, both public and private, of the proposed change to the general area;
- (5) The land use for which the property is zoned or planned;
- (6) The recreational impact;
- (7) The feasibility of alternatives;
- (8) The size of the wetland where the use is proposed; and
- (9) The remaining storage capacity is adequate to control a 100-year flood.

In reversing the denial of plaintiffs' request for the dredging permit, the trial court implicitly acknowledged that defendant's decision was authorized under this ordinance. However, it ignored the findings announced at the September 13th meeting that formed the basis of defendant's decision and instead relied upon the MDEQ permit as evidence that dredging pursuant to the permit's specifications would sufficiently maintain the lake's habitat. The trial court stated:

Nowhere in this record is there evidence that the remaining forty-two acres [of the lake not including the subject three acres] or seven-acres [of the lake containing vegetation not including the three subject acres] will not suffice, though there is evidence via the MDEQ permit that the forty-two acres or seven acres will suffice. Dr. Niswander's letter provides conclusions that it will not suffice, however, it is [absent] of premises supporting the conclusions.

The trial court then concluded that defendant's decision, although supported by competent and material evidence, was not supported by substantial evidence.

We find that this reasoning contains several instances of clear error. First, under the substantial evidence standard, the trial court is to review the entire record upon which the

decision was made, *Mantei*, *supra* at 71, and the court failed to do so. Had the court applied the proper scope of review, it would have been clear that there was evidence adequate to support the decision to deny the permit. *Id.* At the September 13th meeting, Dr. Niswander indicated that any disruption to the subject area could have a significant adverse impact on the lake's overall aquatic habitat, including decreasing the fish population, and that it would not improve the lake in any manner whatsoever. In denying the request, the WRB also considered the existence of reasonable alternatives for plaintiffs, including extension of plaintiffs' docks, use of an adjacent marina, and continued ingress and egress under the status quo. Substantial evidence must be more than a scintilla but need not be more than a preponderance of evidence. *Id.* Thus, contrary to the trial court's ultimate conclusion and plaintiffs' argument on appeal, our review of the record shows that substantial evidence supported defendant's decision to deny the permit.

Second, the trial court's apparently exclusive reliance on the permit issued by the MDEQ as evidence that the dredging under the permit would sufficiently maintain Walnut Lake's aquatic habitat is misplaced. If substantial evidence supports defendant's decision, a trial court may not substitute its judgment for defendant's judgment. *Glennon*, *supra* at 478-479. Further, the trial court's role in reviewing an administrative decision is limited to ensuring that the decision is supported by record evidence. *Mantei*, *supra* at 71. The court is not to reach its own factual conclusions or subject the record evidence to de novo consideration. *In re Complaint of Rovas*, 482 Mich 90, 101; 754 NW2d 259 (2008). Here, defendant did not rely upon the MDEQ's permit in making its decision under the ordinance, but the trial court did. By improperly reaching its own factual conclusions based on the permit, the trial court, in essence, conducted a de novo review. *Id.*

Plaintiffs, however, argue that the evidence upon which defendant relied was "factually and scientifically unsound." We cannot agree. Plaintiffs contend that defendant relied on unsound findings because Dr. Niswander never confirmed that whitefish existed in the lake. Plaintiffs, however, ignore other record evidence indicating the contrary: several Walnut Lake residents indicated that they had seen evidence of whitefish in the lake. Dr. Niswander also indicated that he relied on a state study completed around 1900, including follow-up studies conducted by the Department of Natural Resources documenting the existence of whitefish in the lake, as well as the MDEQ's initial permit denial letter, which also indicated the fish's existence in the lake. Thus, it was not improper for defendant to rely upon this evidence. In addition, plaintiffs point to a report from defendant's previous environmental consultant that indicated that limited dredging was reasonable, but not necessary. Although this evidence tends to support plaintiffs' position, even assuming that this report reasonably supports granting the permit, "[g]reat deference should be given to an agency's choice between . . . reasonabl[ly] differing views" *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994). For these reasons, plaintiffs' arguments fail.

Our review of the record shows that the trial court misapplied the substantial evidence test to defendant's factual findings, that the defendant's decision to deny plaintiffs' application under the ordinance was supported by competent, material and substantial evidence, and, further that the trial court improperly substituted its own judgment for that of the defendant. Accordingly, we reverse the trial court's decision and reinstate defendant's decision denying plaintiffs' application for a dredging permit.

Reversed.

/s/ Deborah A. Servitto

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly