COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2009AP326
2009AP327

Cir. Ct. Nos. 2007CV3479
2007CV3481

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

NO. 2009AP326
CRAIG S. HUSAR AND DANIELLE M. HUSAR,

PLAINTIFFS-APPELLANTS,

V.

CITY OF BROOKFIELD,

DEFENDANT-RESPONDENT.

NO. 2009AP327
ROBERT P. MARSH AND KAREN L. MARSH,

PLAINTIFFS-APPELLANTS,

V.

CITY OF BROOKFIELD,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Reversed and cause remanded with directions.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. In this consolidated appeal, Craig S. and Danielle M. Husar and Robert P. and Karen L. Marsh (collectively "the appellants") appeal from a trial court judgment in favor of the City of Brookfield. The City condemned portions of the appellants' properties, taking a permanent limited easement across the Marshes' land, for purposes of creating ingress and egress to their residences, which would otherwise be landlocked due to the City's expansion of Calhoun Road. While the appellants do not challenge the necessity of the taking, the appellants brought this WIS. STAT. § 32.05 (2007-08)[1] action against the City contesting the City's right to condemn the proposed portions of their properties. The appellants argued that the City's actions rendered their properties uneconomic remnants, thereby resulting in a total taking. The trial court disagreed and granted judgment in favor of the City. We conclude that the trial court's grant of judgment in favor of the City was based on an erroneous finding of fact which was premised in large part on the parties' treatment of the easement at issue as private in nature. Because the easement is public and because the nature of the easement is central to the issues in dispute, we reverse the judgment and remand for further proceedings.

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

BACKGROUND

¶2 The underlying facts are undisputed. The appellants own separate residential properties located along the west side of Calhoun Road in the city of Brookfield. In 2007, the City undertook the "Calhoun Road Public Improvement Project" to widen Calhoun Road to four lanes between Bluemound Road and Greenfield Avenue. As part of the project, the City, pursuing its rights as a condemnor under WIS. STAT. ch. 32, terminated the appellants' access to Calhoun Road and took a permanent limited easement interest in the Marshes' property in order to grant the Husars access through the Marshes' property to an adjacent street. Specifically, the Husars' and Marshes' properties are bordered by Calhoun Road to the east and a neighboring lot to the west. The property to the west abuts Adelmann Avenue. Prior to the Calhoun Road Project, the Husars' and the Marshes' respective driveways accessed Calhoun Road. As a result of the project, that access was terminated and new driveways were created by running the Husars' driveway to the Marshes' property, where it would join the Marshes' new driveway and then proceed west through a neighboring lot to Adelmann Avenue. As described by the City's engineer: "Both properties will access off of Adelmann Avenue via the new driveway that the City will construct through the neighbors' property that abuts them to the rear. And then through their property to provide access to both parcels."

¶3 On October 23, 2007, the City extended jurisdictional offers to both the Husars and the Marshes. The "legal description" attached to the Marshes' offer describes the "permanent limited easement" to be taken by the City

> [f]or the right to construct and maintain a driveway, including for such purpose the right to operate the necessary equipment thereon and the right of ingress and egress as long as required for such public purpose,

> including the right to preserve, protect, remove or plant thereon any vegetation that the highway authorities may deem necessary or desirable, but without prejudice to the owner's right to make or construct improvements on said lands or to flatten the slopes, providing said activities will not impair or otherwise adversely affect the highway facilities within the right of way, in and to the following tract of land in Waukesha County ….

The jurisdictional offers advised the Husars and the Marshes that each had twenty days in which to accept the offer or, if refused, forty days in which to "commence a court action to contest the right of condemnation as provided in [WIS. STAT. §] 32.05(5) …."

¶4 On November 28, 2007, the appellants filed separate actions against the City, which were later consolidated. The appellants challenged the adequacy of the jurisdictional offer, alleging as to each of their properties that "the taking results in a loss of access to the property, effectively landlocking it, and an attempted solution to the problem constituting an easement over an abutting neighbor's property, to a different road located to the West of the property" violates the City's ordinances, creates an uneconomic remnant, and constitutes a "total taking." The City denied that its actions had resulted in a total taking or uneconomic remnants and requested that the complaint be dismissed on the merits. The trial court denied the City's request based on its determination that the complaint "stated appropriate causes of action" under WIS. STAT. § 32.05(5).

¶5 The matter proceeded to a court trial on July 1, 2008. The court heard testimony from the city engineer, two appraisers, and the appellants, Craig Husar and Robert Marsh. Following additional briefing and oral arguments, the trial court issued its oral ruling on October 8, 2008, and later entered judgment in favor of the City. The Husars and Marshes appeal.

DISCUSSION

¶6 A property owner is authorized to contest a condemnor's right to condemn under WIS. STAT. § 32.06, and this authorization includes the right to contest the proposed taking because it results in an uneconomic remnant. ***Waller v. American Transmission Co.***, 2009 WI App 172, ¶17, 322 Wis. 2d 255, 776 N.W.2d 612. An uneconomic remnant is defined by § 32.06(3m):

> In this section, "uneconomic remnant" means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability. If acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

This case requires us to interpret and apply condemnation statutes to undisputed or found facts, thus presenting questions of law for our de novo review. *See* ***Warehouse II, LLC v. DOT***, 2006 WI 62, ¶4, 291 Wis. 2d 80, 715 N.W.2d 213. While we are not bound by the trial court's conclusion of law, we will not set aside its findings of fact unless clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also* ***Chmill v. Friendly Ford-Mercury***, 144 Wis. 2d 796, 803, 424 N.W.2d 747 (Ct. App. 1988).

¶7 Here, the appellants do not challenge the necessity of the taking. Rather, they argue that the City should have condemned the entirety of their properties. Their arguments as to this assertion are three fold. First, the appellants contend that the City's taking of a permanent limited easement across the Marshes' property for the Husars' use is an illegal and improper taking for private use, and without the easement they are landlocked. Next, they argue that the condition of their properties after the taking will violate the City's ordinances

requiring lots to abut public streets and meet certain size requirements. Third, the appellants contend that, even if the easement is valid, the properties' economic viability is substantially impaired so as to create uneconomic remnants.

¶8 The disposition of this appeal focuses on the appellants' first argument, which is premised on the easement being private, not public. However, the legal description of the permanent limited easement across the Marshes' property provides the City with "the right of ingress and egress as long as required for such public purpose."[2] The City confirmed at oral argument that the permanent limited easement held by the City is a public one for public use, providing access to anyone who chooses to use it.[3] Indeed, the easement makes no

---

[2] Before the trial court and in briefing, the parties' arguments focused on the "public purpose" of the Calhoun construction project as a whole—whether a city may use eminent domain to take private property for a private easement when city construction projects obstruct access to private property. The plaintiffs rely upon ***Osborn v. Hart***, 24 Wis. 89, 91 (1869), in which the court held that a statute permitting the taking of a private road for the use of the "applicant, his heirs or assigns" was unconstitutional because no power existed for taking private land for the construction of a road benefiting a private party, without the consent of the owner, whether or not compensation is paid.

The plaintiffs' summary judgment briefing referred to the taking of "private property for private use," and the creation of a "private street" or "shared private driveway." The City's rebuttal provided no clarification by also referring to the permanent limited easement as a "shared driveway" and "new access driveway." In so arguing, the parties failed to recognize that the easement across the Marshes' property, by its own terms, granted access to the public at large.

[3] When asked: "So are you saying that the phrase in the easement that the City has retained the right [of] ingress and egress [as long as required for such] public purpose allows anybody and everybody to go on this property," the City responded, "Theoretically, yes." Excerpted from the recording of oral argument, Feb. 25, 2010, http://wicourts.gov/opinions/aoralarguments.htm (last visited May 24, 2010). The City then referenced the court's decision in ***State ex rel. Happel v. Schmidt***, 252 Wis. 82, 86, 30 N.W.2d 220 (1947), in which the court explained:

> It is the right of travel by all the world, and not the exercise of the right, which constitutes a way a public highway, and the actual amount of travel is not material. If it is open to all who desire to use it, [it] is a public highway although it may

(continued)

mention of the Husars as the beneficiaries of the easement across the Marshes' property, nor does it limit the use of the "highway facilities within the right of way" to the property owners. The City, citing to ***State ex rel. Happel v. Schmidt***, 252 Wis. 82, 30 N.W.2d 220 (1947), indicated at oral argument that the omission of language which restricts the use of the easement to certain individuals serves to circumvent the unconstitutional taking issues associated with taking private land for private use.

¶9 Our review of the record reveals that the trial court's consideration of the easement on the Marshes' property was based on its understanding that the easement was a "private easement." Its written judgment states in part: "[T]he use of a private easement for the new access to Plaintiffs' properties is proper and constitutes a valid public use and purpose," and that "the new access to Plaintiffs' properties is reasonable." Therefore, the trial court's decision reflects a misunderstanding of this underlying fact—one that was perpetuated by the litigants, whose arguments throughout the lower court proceedings focused on the private nature of the easement, presumably because the Husars and Marshes would be the ones using the easement.

¶10 Indeed, the crux of the City's argument is that "[b]efore and after the partial taking, Appellants[']] use and utility of their properties remain the same—residential" and that the properties' "character remain[s] in substantially the same condition, with the same function and utility." The City contends that this is

---

> accommodate only a limited portion of the public or even a single family or although it accommodates some individuals more than others.

(Citation omitted.)

merely a change in access—the moving of a driveway from one area to another. The City's expert appraiser's opinion that "[e]verything remained the same with the exception of the access," did not address the public's right to use the appellants' driveways.

¶11 The private nature of the easement was arguably integral to the trial court's determinations. As to the uneconomic remnant claim, the court found that the properties are still "usable as residential property lots. They're not unusual or irregular to such an extent that they're not unusable as residential property lots. The size is sufficient. The location is sufficient." There is no indication in the record that the court's findings take into account the public nature of the easement.

¶12 Courts have recognized that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." ***Dolan v. City of Tigard***, 512 U.S. 374, 384 (1994) (citation omitted). Under the terms of the permanent limited easement, the Marshes no longer have this "essential stick" in their bundle of rights to their residential property; their driveway is now open to the public. The trial court's findings as to whether the properties' condition is of "substantially impaired economic viability" did not take this into account.

CONCLUSION

¶13 A property owner who is left with a substantially diminished parcel of unencumbered property has a right to contest a condemnation that does not acknowledge an uneconomic remnant. ***Waller***, 322 Wis. 2d 255, ¶17. The Husars and Marshes have done so here. Because the trial court's finding as to the nature of the easement is clearly erroneous, and because it could potentially affect the

trial court's findings as to the other arguments raised by the appellants, we must reverse the trial court's order and remand for further findings.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.