COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2116 **Cir. Ct. No. 2014CV103**

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

DELORES FISCHER,

PLAINTIFF-APPELLANT,

V.

CITY OF PRAIRIE DU CHIEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Crawford County: CRAIG R. DAY, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. The case involves an eminent domain-related benefit for persons displaced from their residences by public projects in Wisconsin. Displaced persons must be "fairly compensated" by the condemnor, not only for the value of the property acquired by the condemnor, but for other

specified losses. *See generally* WIS. STAT. § 32.19 (2013-14).[1] The "other loss" at issue here is a "replacement housing payment." A condemnor is obligated to make a replacement housing payment to a displaced person when "the acquisition payment" made by the condemnor for the property is not enough to allow the displaced person to cover "the reasonable cost of a comparable replacement dwelling available on the private market." Section 32.19(4)(a)1.

¶2 The City of Prairie du Chien displaced Delores Fischer from her house and lot in connection with a public project. Fischer purchased a replacement property. There is no dispute that the following two determinations made by the City were reasonable: (1) Fischer was entitled to receive $108,000 from the City as the fair market value for her house and lot, and (2) the cost of a comparable replacement dwelling available on the private market was $95,000. However, despite the fact that the $108,000 payment to Fischer exceeded the $95,000 cost for replacement housing, Fischer filed a claim with the City for an additional $35,600 as a "replacement housing payment" under a theory that we describe below.

¶3 The City denied Fischer's claim. Pursuant to WIS. STAT. § 32.20, Fischer filed this action seeking an order requiring the City to pay Fischer $35,600. The circuit court dismissed the action, and Fischer appeals.

¶4 We reject the only argument that Fischer advances on appeal because we conclude, as did the circuit court, that her argument rests on a false

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

premise. The false premise is that the $108,000 market valuation of the property was based on a higher and better use than residential use, namely, on commercial use of the property. In fact, the market valuation was entirely based on residential use, and was not based in whole or in part on some higher and better commercial use. Accordingly, we affirm the circuit court.

BACKGROUND

¶5 The following facts are undisputed. Beginning in 1988, Fischer continuously owned a single-family house and lot ("the acquired property") in Prairie du Chien. In October 2012, the City paid Fischer $108,000 ("the acquisition payment") to obtain the acquired property. A valid public purpose justified this use of eminent domain authority.

¶6 Fischer filed a claim with the City identifying herself as a "displaced person" entitled to $35,600 as a replacement housing payment. *See* WIS. STAT. § 32.19(2)(e)1., (4)(a).[2] A displaced person is entitled to a replacement housing

[2] More precisely, Fischer qualified as an "owner displaced person," but we will use the simple phrase "displaced person." *See* WIS. STAT. § 32.19(2)(g). Section 32.19(2)(e)1. and (4)(a) provide in pertinent part:

> (2) DEFINITIONS. In this section and ss. 32.25 to 32.27:
>
> ….
>
> (e)1. "Displaced person" means, except as provided under subd. 2., any person who moves from real property …:
>
> a. As a direct result of a written notice of intent to acquire or the acquisition of the real property, in whole or in part or subsequent to the issuance of a jurisdictional offer under this subchapter, for public purposes; …
>
> ….

(continued)

payment that equals the amount, if any, by which "the reasonable cost of a comparable replacement dwelling available on the private market" ("the comparable replacement amount") falls short of the acquisition payment received by the displaced person. Section 32.19(4)(a)1.

¶7 The City accepted as accurate the fair market valuation of $108,000, as determined by a real estate appraiser retained by Fischer, and paid Fischer that amount. It is undisputed that the comparable replacement amount is $95,000.

¶8 From the time Fischer made her claim to now, Fischer has taken a position that we now briefly describe, and which we address more fully in discussion below. Fischer does not object to the comparable replacement amount side of the equation ($95,000). Instead, she contends that there needs to be a "carve out" from the acquisition payment side of the equation ($108,000), in order to determine whether she is due a replacement housing payment. This is so, Fischer argues, because a carve out to the acquisition payment is required in light of her asserted fact that the value of *the residential portion* of the acquired property was only $59,400. Thus, $95,000 less $59,400 equals the $35,600 that Fischer claims she is due as a replacement housing payment. Fischer's view is

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> (4) REPLACEMENT HOUSING. (a) *Owner-occupants*. In addition to amounts otherwise authorized by this subchapter, the condemnor shall make a payment, not to exceed $25,000, to any displaced person who is displaced from a dwelling actually owned and occupied … by the displaced person for not less than 180 days prior to the initiation of negotiations for the acquisition of the property…. Such payment includes only the following:
>
> 1. The amount, if any, which when added to the acquisition payment, equals the reasonable cost of a comparable replacement dwelling available on the private market, as determined by the condemnor.

that what matters is that she received only $59,400 for the "residential aspect" of the acquired property, even if the total value of the acquired property rose to $108,000 due in part to the fact that, as the appraiser hired by Fischer opined, if the acquired property had been vacant and unimproved, it had a higher and better use as commercial property.

¶9 The circuit court rejected Fischer's argument on the ground that the "complicated mathematics" involved in Fischer's proposed "residential aspect" carve out do not apply here, given that the acquisition payment for the acquired property was based on a residential use fair market valuation. On this ground, the court granted the City's motion to dismiss.[3] Fischer appeals.

DISCUSSION

¶10 Given the issue we resolve on appeal, we need not recite any aspect of the familiar summary judgment methodology used by the circuit court and this court. *See generally* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). Nor are there any disputes that we review questions of

[3] While the court formally granted the City's motion to dismiss, the court acknowledged effectively granting a motion for summary judgment by the City, because the parties' arguments relied on allegations of fact based on submitted affidavits. Without dispute by the parties, we treat this as an appeal of summary judgment against Fischer.

Separately, we need not address a disagreement between the parties as to whether the limitation on the amount of replacement housing payments contained in WIS. STAT. § 32.19(4)(a) ("not to exceed $25,000") applies to Fischer's claim for $35,600, in light of the exception contained in § 32.19(4)(c), because we conclude for the reasons explained in the text of this opinion that Fischer is not entitled to a replacement housing payment in any amount.

We also conclude that neither side develops a persuasive argument that this case is controlled by, or even that we should be guided by, any statement in ***Pinczkowski v. Milwaukee County***, 2005 WI 161, 286 Wis. 2d 339, 706 N.W.2d 642.

statutory interpretation de novo, seeking "to determine what a statute means in order to give the statute its full, proper, and intended effect," that the interpretation of administrative code provisions is also subject to de novo review, or that "the determination as to whether [a code] provision … is consistent with the applicable statute … [is] subject to principles of statutory construction." *See* ***Orion Flight Servs., Inc. v. Basler Flight Serv.***, 2006 WI 51, ¶¶16-18, 290 Wis. 2d 421, 714 N.W.2d 130 (footnote and citations omitted).

¶11 We begin by summarizing our conclusion. We assume, without deciding, that Fischer is correct that WIS. STAT. § 32.19(4)(a)1. requires a carve out from the acquisition payment to reflect the value of only the residential aspect of the acquired property when the market value of the property used in calculating the acquisition price is based on a higher and better use than residential. However, we conclude that the only argument that Fischer makes on appeal, based on this carve out concept, has no merit because the market value of the acquired property used in calculating the acquisition price was *not* based on a higher and better use than a residential use.

¶12 Turning to the language of the statute, as quoted in footnote 2 *supra*, WIS. STAT. § 32.19(4)(a)1. requires a condemnor to pay an owner-occupant a replacement housing payment equal "only" to the "amount, if any, which when added to the acquisition payment, equals the reasonable cost of a comparable replacement dwelling available on the private market, as determined by the condemnor." As noted above, there is no dispute that, here, the comparable replacement amount is $95,000, that the City paid Fischer $108,000 as the acquisition payment for her house and lot, or that this was based on the fair market value of the acquired property as determined by Fischer's appraiser.

¶13 We turn now to the particular administrative code provision on which Fischer's argument depends. The "Relocation Assistance" chapter of the administrative code, Chapter Adm. 92, interprets WIS. STAT. § 32.19(4)(a)1. to require a variety of carve outs and modifications for replacement housing payments. *See* WIS. ADMIN. CODE. § Adm 92.68(7) (through July 2016).[4] As Fischer correctly points out, the general intent of these carve out code provisions is evident: in certain circumstances, condemnors must base replacement housing payment calculations on "apples to apples" comparisons between the residential components of acquired properties and the residential components of comparable replacement properties. The particular carve out code provision that Fischer argues applies here states:

> *Dwelling on land with higher and better use.* The maximum [housing] replacement payment shall be the selling price of a comparable dwelling on a lot typical in the area, less the price of the acquired dwelling and the price of that portion which represents a lot typical for residential use in the area, when the market value is based on a higher and better use then [sic] residential.

WIS. ADMIN. CODE. § Adm 92.68(7)(c).

¶14 With the terms of WIS. ADMIN. CODE. § Adm 92.68(7)(c) in mind, we now elaborate on our prior summary of Fischer's argument. Fischer argues that, under § Adm 92.68(7)(c), because "the market value" of the acquired property "is based on a higher and better use" than "residential," it is necessary to add the following two numbers to arrive at a $59,400 "residential aspect" of Fischer's property acquired by the City, based on information provided by

[4] All references to the Wisconsin Administrative Code are to the July 2016 version unless otherwise noted.

Fischer's appraiser and public records: (1) $42,600 (the exclusive value of the dwelling on the acquired property, as opposed to the land); and (2) $16,800 ($2.00 as the per square foot value of vacant land used for residential purposes in Fischer's area at the time of the acquisition x the size of acquired property lot, 8,400 square feet).

¶15 We are unclear about various aspects of the argument that Fischer makes, and also about how, in detail, WIS. ADMIN. CODE. § Adm 92.68(7)(c) should be applied in various scenarios, consistent with the plain language of WIS. STAT. § 32.19(4)(a)1. Nonetheless, we need not resolve any such questions. This is because, assuming without deciding that, pursuant to § Adm 92.68(7)(c), a residential-portion carve out may be applied to an acquisition payment when "the market value" of the acquired property is "based on a higher and better use" than "residential," in this case "the market value" of the acquired property was *not* "based on a higher and better use" than "residential." It is uncontested that the City paid Fischer $108,000 based on an appraisal that included the following statement: "*As improved*, the highest and best use of [the] subject property *is that of its current use*, *residential use*." (emphasis added; formatting of text regularized). Indeed, Fischer acknowledges in her briefing that the appraiser she hired, who established the $108,000 value, concluded that the highest and best use of the property, as it was then currently improved, was residential.

¶16 Fischer's argument rests on a statement of the appraiser that immediately follows the above statement: "If [the property were] vacant, the highest and best use of [the] subject property would be that of commercial purposes." (formatting of text regularized). However, this observation of the appraiser does not help Fischer, because it merely says that *if the situation were different*, that is, if the property were vacant, then the highest and best use of the

property would be commercial. But the property is not vacant. To repeat, Fischer's own appraiser states that, *as improved*, the property's highest and best use is residential.

¶17 Fischer acknowledges in her principal brief on appeal that the circuit court reached the same conclusion that we now reach, but fails to explain in that brief why this conclusion is incorrect. In her reply brief, for the first time, Fischer makes the specific argument that the $108,000 fair market valuation, while based on residential highest and best use, included a $33,600 "value increment due to the commercial element" of the acquired property. Whatever Fischer precisely intends to argue along these lines, we conclude that there is a fatal disconnect between this argument and the text of WIS. ADMIN. CODE. § Adm 92.68(7)(c), upon which she entirely relies, putting aside the lack of a sufficient connection to the text of WIS. STAT. § 32.19(4)(a)1.

CONCLUSION

¶18 For these reasons, we affirm the order granting dismissal of this action.

By the Court.—Order affirmed.

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