

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR COUNTY OF GRAND TRAVERSE

BOARD OF COUNTY ROAD COMMISSIONERS
OF GRAND TRAVERSE COUNTY, a body
corporate,

Plaintiff,

vs

File No. 93-11770-CC

EILEEN HITCHENS LARSEN; OLD KENT
BANK - GRAND TRAVERSE, a Michigan
banking corporation,

HON. PHILIP E. RODGERS, JR.

Defendants.

Richard W. Ford,
Attorney for Petitioner

Mark A. Hullman,
Attorney for Respondent Larsen

DECISION AND ORDER

This case arises out of the Plaintiff's proposed expansion of Hammond Road in Grand Traverse County. It's predecessor case, Grand Traverse File No. 93-11183-CC, was dismissed together with several other related cases due to defects in the appraisals which supported the Plaintiff's "good faith" offers. Prior to dismissing the case, an evidentiary hearing on the Defendants' Motion to Review Necessity had been held. The parties stipulated that the Court could consider the testimony of the witnesses presented at that prior hearing in determining the Defendant's Motion to Review Necessity in this case.

The prior necessity hearing occurred on August 11, 1993. The subsequent hearing in this case took place on January 26, 1994. The parties also submitted certain stipulated facts, additional testimony and oral argument. The parties were also provided with additional time to submit post-hearing briefs. The Court then took the matter under advisement. In consideration of the testimony received at the two prior hearings, as well as the parties' written submissions and oral arguments, the Court will now provide its findings of fact and conclusions of law. MCR 2.517.

Plaintiff is the entity duly organized under Michigan Law to construct and maintain and improve Grand Traverse County highways. Hammond Road lies within Plaintiff's jurisdiction. Plaintiff has

determined that it is necessary to widen, improve and rebuild a portion of Hammond Road, and passed a resolution to that effect. See, Resolution No. 93-14, Plaintiff's Exhibit One. In accordance with the Plaintiff's Resolution of Necessity, Plaintiff determined that it would have to take certain real property for public highway purposes. A portion of that property is the subject of this litigation.

Plaintiff alleges that it made a good faith written offer to purchase the property, was unable to reach an amicable resolution and is now proceeding with condemnation pursuant to Act 87, Public Acts of 1980, as Amended.

The Defendant, Eileen Hitchens Larsen, owns the property subject to the mortgage held by Old Kent Bank - Grand Traverse. The interest which the Plaintiff proposes to take is a 17 foot by 546.4 foot right-of-way easement for highway purposes and a 15 foot by 546.4 foot temporary grading easement to perform road construction, including cutting and filling. The Defendant timely filed a Motion to Review Necessity.

The Defendant does not contest the taking of the grading easement, but rather objects to the width of right-of-way easement which Plaintiff proposes to take for highway purposes. Both parties agree on the applicable law and recognize that absent a showing of fraud, error of law or abuse of discretion, the Plaintiff's determination of necessity is binding on the Court. The burden of proof lies with the Defendant. MCLA 213.56(2). No argument was made regarding fraud or error of law. Rather, the Defendant argues that the Plaintiff's determination of necessity constitutes an abuse of discretion.

Specifically, the Defendant argues that since the southerly boundary of the paved roadway will not move and the improved highway will be 5.1 feet lower than its present surface, an additional 17 feet of right-of-way is not needed for purposes of depositing snow and maintaining the traveled road surface. In fact, the Defendant argues that no improvements are proposed for this 17 feet. The slope is too steep to operate vehicles and all mowing will occur within the existing right-of-way. Defendant also argues that the right-of-way is not needed for the location of utilities, as all utilities are located to the north of the existing roadway, and there are no plans to relocate them. The only foreseeable use of the property, says the Defendant, for highway purposes is the deposit of seasonal snow from road plowing activity. Defendant contests that necessity of a taking for such purposes.

The Plaintiff responded that there are several reasons that support its determination of necessity. Plaintiff's witnesses focused on the desirability of a uniform highway corridor, as well as safety and maintenance concerns. James Johnson, a Road Commission Engineer with a degree in Civil Engineering, worked with the Plaintiff's consultants in preparing the Hammond Road expansion plan. Section drawings of the road in question were received as Defendant's Exhibits F and G. Mr. Johnson testified that Plaintiff needed to preserve space beyond the traveled surface of the road to laterally support it, assure proper drainage and enhance the safe recovery zone for motorists. Mr. Johnson admitted that the road design specifications adopted by the Michigan Department of Transportation do not establish a minimum or recommended distance from the edge of the pavement to the edge of the right-of-way. While Mr. Johnson did argue that the additional right-of-way was, in part, necessary to allow for the safe location of utilities in the future, he focused on the desirability of having continuity of right-of-way for purposes of maintenance activity, including brush cutting, mowing or tree removal. He also emphasized the need for a safe recovery area for motorists.

By the conclusion of Mr. Johnson's testimony, it became evident that the 17 foot easement could not be condemned for utility purposes, as that use would be entirely speculative. See e.g. Defendant's Exhibits A, B and E. This was confirmed with subsequent witnesses.

Joseph Elliott also testified. Mr. Elliott is a graduate Civil Engineer employed by Gordie/Fraser & Associates as a consultant on the Hammond Road project. In fact, he designed the road improvements. Mr. Elliott emphasized the need for the additional right-of-way to maintain the integrity of the fill slope. This, together with the desirability of a uniform highway corridor of consistent width for future maintenance purposes, played a key role in his determination as to the necessity of taking this interest in Defendant's property. Although it was unlikely that mowing activity would occur within the 17 feet, he felt that the easement would be used to maintain clear vision for motorists and as a deposit area for snow thrown from the highway. Mr. Elliott also agreed that any need for Defendant's 17 feet to locate future utilities was speculative.

Mr. Elliott was quite adamant that the road was designed with a uniform corridor. He noted that the offset from the center line of the traveled surface of the road was uniform throughout its

length. The only variations in total width throughout the designed improved area were due to terrain variations such as that caused by the Mitchell Creek tributary, or where the slope of the adjacent property suggested that the use of guardrails were necessary.

Michael Dillenbach also testified. He is the Plaintiff's manager. Mr. Dillenbach indicated that he was familiar with all of Plaintiff's road maintenance, construction and improvement activities. He is Mr. Johnson's supervisor and has been directly and significantly involved in the acquisition of right-of-way for the Hammond Road project. It was also his opinion that the 17 foot easement at issue was necessary to this project to establish minimum highway right-of-way.

Mr. Dillenbach described the process that he went through in balancing the public's need for this additional land with private concerns. He noted that the road was not planned to be an urban highway complete with curb and gutter but, rather, one with flush shoulders in keeping with the area's rural character. Mr. Dillenbach also described the nature of the slopes used by the Plaintiff to lessen the costs and impact on the private land owner and how this 17 foot easement was necessary to avoid a steeper slope and the need for a guardrail. Mr. Dillenbach also discussed the need for a minimum right-of-way associated with snow removal activities .

Due to the nature of the improved Hammond Road as a four lane highway, snow removal will occur at higher speeds. The bulk of the snow will be deposited in a clear zone thirty to forty feet from the edge of the pavement. In Mr. Dillenbach's opinion, 34 feet was a minimum amount of space necessary for snow removal. At the second hearing, the issue of snow removal was further addressed through the testimony of Harold Sheffer, the Grand Traverse County Road Commission superintendent who is directly responsible for all field operations, including snow plowing. Mr. Sheffer was previously employed with the Michigan Department of Transportation for twenty-nine years where his duties also included supervision of snow plowing activities and, indeed, he plowed snow for seven years himself.

It was Mr. Sheffer's opinion that the bulk of snow within the Hammond Road right-of-way will fall within 15 to 20 feet of the shoulder. Factors associated with the distance the plowed snow travels include the consistency of the snow, wind direction and the speed of the snow plow. In ideal conditions, a light snow with a following wind might travel as much as 40 feet. The average snow

deposit from plowing Hammond Road on its south side would fall within 15 to 20 feet. This 15 to 20 feet would lie within Plaintiff's proposed right-of-way line. See, Plaintiff's Exhibit 2 from the January 26, 1994 hearing.

Mr. Sheffer noted that this particular road would be within a rural area and plowed according to rural standards. A rural plow normally drives at a maximum of 25 to 35 miles per hour. The plows have a fixed blade and the arc of the snow off the blade is sufficiently high to prevent the ditch adjacent to the roadway and its related slope from limiting the distance the snow travels.

The Defendant's expert witness, James Murphy, is also a Civil Engineer with prior experience in right-of-way acquisition. Currently, he is a self-employed consultant. Mr. Murphy was retained only a few days before he testified. Mr. Murphy did acknowledge the propriety of the temporary grading easement and the necessity of maintaining that grade within the additional 17 feet. He acknowledged that the design of the Hammond Road improvements were more difficult due to the hilly topography, and that his experience was primarily in southeastern Michigan, which is much flatter. Mr. Murphy had no opinion with respect to the necessary "clear space" for snow removal and storage. He recognized that this issue was beyond his experience and that the amounts of snow in northern Michigan were quite different than he had encountered in his work in southeastern Michigan.

Without question, the petitioner relied upon the recommendation of its manager, his staff and their consulting engineer in determining that the 17 foot right-of-way easement was necessary to this particular project. In this Court's opinion, reliance upon the opinions of these trained and expert individuals was neither misplaced nor an abuse of discretion. The desirability of a uniform highway corridor for maintenance and safety purposes is self evident. The fact that this portion of the highway may be more subject to brush cutting than mowing does not eliminate the underlying necessity for maintenance. Certainly, the need to provide lateral support to the highway was uncontested, as well as the need to have significant clear space for the deposit of snow.

Although it is evident that snow may travel great distances when plowed under ideal conditions, the average distance snow may be expected to travel from plowing the south side of the improved Hammond Road highway is 15 to 20 feet, an area within the proposed right-of-way line.

Acquisition of the 17 feet at issue, then, for the purposes described is rational and consistent with current highway needs. The Defendant's Motion to Review Necessity is denied, and the

Plaintiff is hereby granted possession of the right-of-way and grading permit which are the subject of this dispute. The Court Administrator is hereby directed to set for trial the question of just compensation.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.

Circuit Court Judge

Dated: 5/31/94