STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

MICHIGAN DEPARTMENT OF TRANSPORTATION,
Plaintiff,

vs

File No. 91-2833-CC
HON. PHILIP E. RODGERS, JR.

DOMINICK A. DeVARTI and ALICE DeVARTI, husband and wife,
Defendants

Thomas J. O'Toole (P18558)
Attorney for Plaintiff

John D. Noonan (P42888)
Attorney for Defendants

DECISION AND ORDER

The evidentiary hearing on Defendants' Motion to Review Necessity was concluded on July 17, 1991. Thereafter, the parties submitted proposed findings of fact and conclusions of law. The Court took the matter under advisement and the parties waived the statutory time provision for publication of a decision. MCLA 213.56(4). The Court will now issue its findings of fact and conclusions of law. MCR 2.517. For reasons that will be more fully discussed ahead, the Defendants' Motion is denied.

The issues before the Court relate to a state trunk line highway improvement in the village of Glen Arbor on a section of M-22 located between Oak Street and M-109. Plaintiff describes the project as an effort to improve drainage and traffic control of M-22 by widening the highway to 44 feet, resurfacing it with bituminous pavement and installing curb and gutter and storm sewer along the length of the improvement.

As currently proposed, storm water would run-off from the highway and be conducted through water-tight sewer pipe southerly off M-22 along the westerly side of Pine Street to a point nearly opposite the northerly line of the Defendants' lands described in the Declaration of Taking and then to a lift station or pump-house. From this lift station, storm water would be placed into a retention basin which would occupy substantially all of the subject property. Within the retention basin, the storm water would either

evaporate or filter through the soils at the bottom of the basin into the existing high water table.

The Defendants own the lands where Plaintiff proposes to construct its retention basin. Defendants object to the necessity of the taking for two principal reasons: (1) MDOT failed to petition for a drain through the Leelanau County Drain Commissioner; and (2) the project poses an environmental hazard and MDOT has failed to show an absence of feasible or prudent alternatives.

The Court will first address Defendants' argument that Plaintiff is without legislative authority to condemn real property for the purpose of draining state trunk line highways. Simply stated, Defendant posits that when Plaintiff finds it necessary to condemn land in order to drain highways on lands outside of the highway right-of-way that it must apply to the County Drain Commissioner pursuant to the highway law codified at MCLA 235.8 and the Drain Code, MCL 280.1 to MCL 280.630. The Plaintiff responded to this argument with a thoughtful and persuasive analysis of the relevant statutes. The Court must conclude that the legislature included drainage within the concept of maintenance and, thus, granted Plaintiff the power to condemn real property for the purpose of draining state trunk line highways. The use of the permissive term "may" rather than the mandatory term "shall" evidences the legislative intent that Plaintiff not be required to petition the County Drain Commissioner for drainage related to a state trunk line highway.

Whether or not the proceedings associated with the drain code are accurately described by Plaintiff as "cumbersome and awkward" and "inconsistent" with the Plaintiff's duty to maintain state trunk line highways in a condition reasonably safe and fit for travel, the Court finds Plaintiff's analysis of the relevant statutory provisions to be sound, logical and supported by the plain meaning of the language used.

With respect to the environmental issues, Plaintiff introduced an Environmental Study For Project Classification for this project which included the construction of a retention basin. (Plaintiff's exhibit F) This study classified the project as a "categorical exclusion" having no adverse environmental consequences.

The Defendants note that no hydrogeological study to determine the impact of the project on ground water was ever made. Plaintiff responds by citing applicable rules of the Water Resources

Commission which specifically exempt retention basins containing storm water run-off from permit monitoring or hydrogeological reporting requirements. R323.2209 of the Water Resources Commission's general rules provide, in pertinent part, as follows:
"(1) The following activities do not require a permit from the commission or a hydrogeological report or ground water monitoring, except as may be required by the commission on a case by case basis, where such activities are or may become injurious to the protected uses of a useable aquifer:

(h) retention of storm water run-off in surface impoundments or surface waterways . . ."

In reviewing the testimony and documents submitted to the Court, the Court must conclude that no evidence was admitted which demonstrated that Plaintiff's proposed project "may become injurious to protected uses of a useable aquifer."' To the contrary, Plaintiff's hydrogeological expert, Robert Gorman, testified that Plaintiff's project, as designed in Plaintiff's exhibits G and H, would not be likely to pollute, impair or destroy the ground water at or near the retention basin nor would it

Footnote 1: In the absence of the proposed road improvements, existing urface water run-off drains into the same aquifer. The fact that the storm water is now proposed to be collected in a retention/filtration basin in the same aquifer was not shown to have any enhanced and deleterious impact on the aquifer or nearby wells or septic fields.

pollute Defendants' water well which is located some 150 feet north and west of the proposed retention basin.

Plaintiff also introduced evidence of the available alternatives which it had considered. Gary Karttunen, an MDOT design engineer, testified that these alternatives included the direct discharge of highway storm water run-off into the Crystal River, direct discharge of the highway storm water run-off at the end of Pine Street into existing wet lands and healthy trees and the construction of a retention basin at other locations adjacent to M-22, all of which were shown to have a higher water table than the Defendants' property.

The Leelanau County Drain Commissioner, Peter DeCamp, testified for Plaintiffs. Mr. DeCamp is a Yale educated civil engineer with 29 years of experience with MDOT. In his current capacity, Mr. DeCamp described his efforts to eliminate retention basins. He finds them “dirty . . . dangerous . . . . (and) not maintainable." However, when asked if the retention basin was a necessary element of this project, Mr. DeCamp stated that he could not answer the question. Mr. DeCamp was not asked for an opinion that would establish the prima facie showing required by the Michigan Environmental Protection Act of 1970, ("MEPA"), MCLA 691.1201, et seq; MSA 14.528, et seq.

A consideration of the evidence, as a whole, leads the Court to the conclusion that Defendants did not carry their burden of establishing a prima facie case that the proposed retention basin and expected highway storm water run-off would be likely to pollute, impair or destroy the ground water at or near the retention basin. Plaintiff, then, has reasonably complied with the duties imposed upon it by MEPA. Further, the subject property, as described in the Declaration of Taking, is reasonably suitable and necessary for the construction and completion of Plaintiff's project.

In reaching these conclusions, the Court is cognizant of the fact that the burden of proving an abuse of discretion rests with the Defendants. Kent Co Road Commission v Hunting, 170 Mich App 222; 428 NW2d 353 (1988); Citv of Lansing v Jury Rowe Realty Co, 59 Mich App 319; 229 NW2d 432 (1975); City of Muskegon v Irwin, 31 Mich App 263; 187 NW2d 481 (1971). An abuse of discretion in a civil matter is defined as follows:

"The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." Spalding v Spalding, 355 Mich 382, 384-385; Marrs v Board of Medicine, 422 Mich 688, 694.

The Court is also aware of the limited scope of review in a determination of necessity. The Court is not empowered to second guess the necessity of the project. Rather, its review is limited to a finding as to whether or not Plaintiff abused its discretion

in determining that the land described in the Declaration of Taking was reasonably suitable and necessary for Plaintiff's project and whether Plaintiff needed Defendants' land, as opposed to other property, in order to construct and implement its project. Nelson Drainage Dist v Filippis' 174 Mich App 400, 403; 436 NW2d 682 (1989); State Hiahway Comm v Vanderkloot' 392 Mich 159, 176-177; 220 NW2d 416 (1974).

The Plaintiff has cited ample authority which supports its argument that MDOT has broad discretion in determining what land is suitable for the implementation of a project. Whether or not an alternative design may have been superior or whether other property may have been taken for purposes of the project is irrelevant to the Court's review unless the Court can find an abuse of discretion has been committed by Plaintiff. Without such a finding, the Court may not substitute its judgment for that of Plaintiff. State Highway Comm v Taylor, 41 Mich App 601; 199 NW2d 838 (1972); Livingston Road Comm v Herbst, 38 Mich App 150, 153-154; 195 NW2d 894 (1972); Nichols on Eminent Domain, 3rd Ed Sec 4.11(4).

Here, Defendants allege an abuse of discretion premised upon Plaintiff's failure to reasonably comply with the duties imposed upon it by MEPA. Again, the burden of persuasion lies with the Defendants. ". . . the substantive environmental duties placed on the Commission [MDOT] by EPA are relevant to MCLA 213.368; MSA 8.261(8), judicial review in that failure by the Commission [MDOT] to reasonably comply with those duties may be the basis for a finding of fraud or abuse of discretion." Vanderkloot, supra, at 190. "The Commission's [MDOT] filing of a Declaration of Necessity will continue to be considered prima facie evidence of necessity with the property owner, having the subsequent burden of proving fraud or abuse of discretion." Id. at 189. The evidence offered by Defendants does not persuade the Court that Plaintiff's determination to take the subject property will be likely to "pollute, impair or destroy the air, water or other natural resources or the public trust therein . . ." MCLA 691.1203; MSA 14.528(203). Plaintiff has offered additional evidence to rebut Defendants' environmental assertions and has demonstrated that no feasible or prudent alternative to drain the highway storm water run-off from a widened and improved M-22 exists.

Defendants having failed to sustain their burden of proof on the proposition that Plaintiff abused its discretion in determining to take Defendants' land as described in the Declaration of Taking, it is this Court's opinion that the Motion to Review Necessity must be denied. MCLA 213.56.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 3/24/92