COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-2600

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

LORI KAISER, MICHAEL KAISER, GARY R. STEELE, MARY STEELE, JOHN STRONG, MARY STRONG, JOHN TOMKIEWICZ AND KRISTINE TOMKIEWICZ,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

VILLAGE OF HARTLAND,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

VILLAGE OF HARTLAND,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

WESLEY BUCKALLEW, CYNDA BUCKALLEW, MICHAEL KAISER, LORI KAISER, JAMES LEISTIKOW, JACQUELINE LEISTIKOW, GARY STEELE, MARY STEELE, JOHN STRONG, MARY STRONG, JOHN TOMKIEWICZ AND KRISTINE TOMKIEWICZ,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

EDWARD CONNELLY, SUSAN CONNELLY, ROBERT J. KOENEN, PATRICIA R. KOENEN, THOMAS H. TEETER AND MARLENE M. TEETER,

DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. The Village of Hartland appeals from a judgment declaring the location of an easement along the Bark River within the village. The declared easement runs over property owned by Lori and Michael Kaiser, Gary and Mary Steele, John and Mary Strong, John and Kristine Tomkiewicz, James and Jacqueline Leistikow, and Wesley and Cynda Buckallew.[1] These owners cross-appeal from the declaration that skateboarders, rollerbladers or bicyclists may use the pedestrian path to be created along the easement. Regarding the Village's claim that the 100-year floodline was intended to delineate the easement and that the easement agreement permits the pedestrian path to be improved with asphalt or boardwalks, we reverse the judgment's contrary declarations. We affirm the judgment with respect to the declaration

[1] The easement also runs over property owned by Edward and Susan Connelly, Robert and Patricia Koenen, and Thomas and Marlene Teeter. They are also respondents in this appeal.

challenged in the cross-appeal. We remand the case for entry of a judgment consistent with our opinion.

Waukesha county, in accordance with its parkway development plan, required a preservation easement over the floodplain adjacent to the Bark River when the plat for the property owners' subdivision was developed. For the lots adjacent to the river, the county and developers entered into a special easement agreement which granted a preservation easement over "[a]ll lands lying between the Wetland Boundary and the Bark River as indicated on the plat." The agreement included a grant to the county

> for the purpose of providing public access for ingress and egress for pedestrian traffic only, the right … to construct and maintain a pedestrian path over, along and across, the area lying within the Wetland Boundary to the Bark River as shown on the subdivision plat, except that vehicles shall be permitted on said parcel for the maintenance of said easement area.

The plat did not include any demarcation of the wetland boundary. It showed the 100-year floodline and included this notation: "A special easement agreement is on file for lots abutting the Bark River below the 100 year floodline."

The easement was transferred to the Village by the county by an agreement dated May 21, 1997. To link two parks, the Village proposed a six-foot wide asphalt path, including a 300-foot long wooden plank section, within the easement. The Village's plan showed the 100-year floodline as the easement's landward boundary. The property owners sought declaratory judgment that the landward boundary of the easement is the actual wetland boundary as determined by the Department of Natural Resources (DNR) and the Army Corps of Engineers

in the spring of 1996.[2] The difference between the parties' boundary line determines whether the easement is 150-feet wide or five-feet wide in some places. The property owners also sought a declaration that the asphalt and wooden plank construction of the pathway and nonpedestrian uses would violate the terms of the easement.

Upon finding that the easement agreement was unambiguous, the circuit court held that the actual wetland boundary in the survey compiled by the DNR and Army Corps of Engineers was the boundary of the easement. It also declared that an asphalt path and boardwalk was not permitted under the easement agreement. Permitted uses for the path were declared to include "persons on foot, joggers, bicyclists, wheelchairs, rollerblades, and any other mode of transportation that does not involve a motorized vehicle except as required by a disabled person for movement."

The circuit court granted summary judgment. None of the parties to the appeal argues that there are disputed facts which would preclude summary judgment. *Cf.* ***Clay v. Horton Mfg. Co.***, 172 Wis.2d 349, 353-54, 493 N.W.2d 379, 381 (Ct. App. 1992) (if there are disputed issues of material fact, a grant of summary judgment is inappropriate). Thus, the case involves contract interpretation, which is a question of law. *See* ***Atkinson v. Mentzel***, 211 Wis.2d 628, 638, 566 N.W.2d 158, 162 (Ct. App. 1997).

Whether a written contract is ambiguous is a question of law which we review independently of the circuit court. *See* ***id.*** We conclude that the special

[2] The Village commenced a declaratory judgment action against the affected property owners. The two cases were consolidated.

easement agreement is ambiguous. Although the agreement defines the easement by the wetland boundary, it also refers to and incorporates the subdivision plat. The plat does not include a definitive wetland boundary line. Rather, the plat itself defines the easement by reference to the 100-year floodline and shows the floodline. The two documents together create an ambiguity.

When construing an ambiguity, the intentions of the parties are paramount. *See* ***Rikkers v. Ryan***, 76 Wis.2d 185, 188, 251 N.W.2d 25, 27 (1977). To determine the parties' intent, the court may look beyond the face of the contract and consider extrinsic evidence. *See* ***Capital Invs., Inc. v. Whitehall Packing Co.***, 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979). Additionally, the court may rely on canons of construction which are designed to ascertain the intentions of the parties entering into a contract. *See* ***id.*** One principle of contract construction particularly applicable to the instant case is that "[a]mbiguities in an agreement must be construed in a manner consonant with its dominant purpose and conducive to the accomplishment of that purpose." ***Id.*** at 191 , 280 N.W.2d at 260.

Here, the easement was required by the county to further the goals of its parkway plan. That plan recommended the acquisition and preservation of floodplains, major streams and environmental corridors for public recreational purposes.[3] The plan defined floodplains as lands within the 100-year floodline. It was the county's design to acquire easements defined by the 100-year floodline.

[3] We acknowledge that the 1973 Waukesha County Park and Parkway Plan is not part of the record and that the Village argues its importance for the first time on appeal. However, the written plan is legislation subject to judicial notice. *See* § 902.03(1), STATS. We will not disregard this important piece of information simply because the Village failed to bring it to the forefront in the circuit court. *See* ***Waukesha County v. Pewaukee Marina, Inc.***, 187 Wis.2d 18, (continued)

Further evidence of the use of the 100-year floodline as marking the easement comes from the condition the Waukesha County Park and Planning Commission imposed for approval of the subdivision plat that "[p]edestrian and preservation easement for all lands lying below the 100 year floodplain must be recorded at the time of recording of the Final Plat. A notation shall be placed on the Plat that the easement exists." The notation on the plat defining the easement by the 100-year floodline is consistent with this condition and the parkway plan.

The interpretation consistent with the purpose of the easement is that the 100-year floodline constitutes the landward boundary of the easement.[4] We reverse the circuit court's determination to the contrary.

The circuit court declared that an asphalt and boardwalk path could not be constructed because it would not preserve the natural state of the property and it would destroy vegetation. Although the easement agreement describes its purpose to preserve the area in its "natural state" and to preserve "existing vegetation native to the area," the agreement is silent as to the type of material that can be used to construct the pedestrian path. The paragraph granting the construction right vested the county with discretion to determine the appropriate means of providing public access to the area as balanced against its own goal of preservation. No method of path construction will preserve the existing vegetation right where the path is placed. While the property owners find the asphalt path

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22, 522 N.W.2d 536, 538 (Ct. App. 1994) (waiver is a rule of judicial administration and may be overlooked).

[4] We also note that this interpretation is consistent with the grant to construct a pedestrian path. If the path were to be confined to the area below the actual wetland boundary, it is possible that at certain times of the year the path would be unsafe for pedestrian use due to water. "Wetland" means land "where water is at, near, or above the land surface." Section 23.32(1), STATS.

intrusive, it is not completely inimical to preservation goals. Without stated restrictions, the owner of the easement cannot be prohibited from using that method which it deems appropriate and which does not destroy the area. We reverse the circuit court's judgment that an asphalt and boardwalk path cannot be utilized.

By their cross-appeal the property owners challenge the circuit court's ruling that the path could be used by skateboarders, rollerbladers, bicyclists, or other persons using motorized or nonmotorized vehicles, except for such vehicles required by disabled persons. They urge that a common and singular meaning be applied to the agreement's grant of access for "pedestrian" traffic. They want to limit use to foot and wheelchair traffic only. *See* § 340.01(43), STATS. ("'Pedestrian' means any person afoot or any person in a wheelchair").

We agree with the circuit court's conclusion that the property owners' reading of the grant of pedestrian use is unreasonable and far too narrow. The phrase "pedestrian traffic" must be read to serve the purpose of providing public recreation. The agreement includes the limitation that no motor vehicles may be permitted, except those necessary for maintenance of the path. Thus, the easement distinguishes between two types of maneuvering along the path: those related to foot power and those motor propelled. It is a discernible difference. Any motor propelled vehicle is prohibited, with the exception of a motorized transport system for a disabled person.[5] The path may be put to use by any

[5] The property owners do not dispute that the path may be used by motorized or nonmotorized vehicles required by disabled persons for movement. Thus, despite the parties' mention of the Americans With Disabilities Act (ADA), we need not decide what application the ADA has.

method of travel that is related to foot power. We affirm the judgment on this point of construction.

On remand, the circuit court shall enter a judgment consistent with this opinion. The Village is entitled to its costs for the appeal from all the respondents and for the cross-appeal from the cross-appellants.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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