

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2017AP601

Cir. Ct. No. 2016CV959

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ANGELA L. CAMPBELL,

PETITIONER-APPELLANT,

V.

VILLAGE OF DEFOREST,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JUAN B. COLAS, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

¶1 FITZPATRICK, J. Angela Campbell's property is burdened by an easement granted to the Village of DeForest for the purpose of constructing a

public pedestrian and bicycle path.¹ When the Village constructed an elevated boardwalk to make use of the easement, Campbell brought this action claiming that she was entitled to just compensation because the Village had taken her property for public use. Campbell appeals an order of the circuit court dismissing her inverse condemnation claim against the Village. Campbell argues that the circuit court erred because the Village has taken her property without just compensation by effectively excluding her from her property without the legal right to do so. We reject Campbell's argument and affirm.

BACKGROUND

¶2 In 1999, Campbell purchased property in the Village of DeForest. Campbell's property is part of the Sunnybrook subdivision and abuts the western edge of the Yahara River. The Sunnybrook subdivision was formed in 1993 by a recorded plat which included a public pedestrian and bicycle easement along the bank of the river running through what came to be Campbell's property. Upon purchasing the property, Campbell knew that it was subject to this easement.

¶3 In 2015, the Village constructed a boardwalk on the easement with the walking and bicycling surface one to four feet off the ground.² The boardwalk is approximately ten feet wide with railings that are fifty-four inches tall on either side and is entirely within the bounds of the thirty-foot easement. The boardwalk

¹ We will refer to the respondent as "the Village" except where the context or the facts require a different approach.

² The height of the boardwalk off the ground varies due to the slope of Campbell's property. The boardwalk is raised approximately one foot off the ground on the side that is closest to her house, but is raised approximately four feet off the ground on the side closest to the river.

is part of the Upper Yahara River Trail, a complex over three miles long which goes through the Village.

¶4 Following construction of the boardwalk, Campbell filed a petition for an inverse condemnation proceeding pursuant to WIS. STAT. § 32.10 (2015-16)³ seeking compensation from the Village based on its construction of the boardwalk. After a bench trial, the circuit court found that the boardwalk created a barrier across Campbell's property that effectively excluded her from using the thirty-foot strip of her property subject to the easement. However, the circuit court also determined that the terms of the easement were very broad, and the Village's design and construction of the boardwalk were reasonably necessary to fulfill the purpose of the easement. Consequently, the circuit court concluded that the Village was acting within its rights pursuant to the terms of the easement in constructing the boardwalk and no taking occurred. Campbell now appeals the circuit court's decision.

¶5 We will mention other undisputed material facts as relevant to a particular argument in the Discussion that follows.

DISCUSSION

¶6 Campbell argues that the Village's construction of the boardwalk on her property burdened by the easement constitutes a taking without just compensation. "Whether government conduct constitutes a taking of private property without just compensation is a question of law" that is reviewed de novo.

³ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist., 2010 WI 58, ¶20, 326 Wis. 2d 82, 785 N.W.2d 409. We are required to construe the meaning and scope of this easement. The meaning and scope of an easement “is reviewed as a matter of law without deference to the trial court’s determination.” *Hunter v. Keys*, 229 Wis. 2d 710, 715, 600 N.W.2d 269 (Ct. App. 1999). However, we defer to the circuit court’s findings of fact unless those are clearly erroneous. WIS. STAT. § 805.17(2).

¶7 A taking occurs where one’s property is taken for public use without just compensation. WIS. CONST., art. I, § 13. When a landowner believes his or her property has been taken without just compensation, they may bring an inverse condemnation claim pursuant to WIS. STAT. § 32.10. *E-L Enters., Inc.*, 326 Wis. 2d 82, ¶36. Section 32.10 sets forth a two-part process for claims of inverse condemnation. First, the court must determine “whether the defendant is occupying property of the plaintiff without having the right to do so.” Sec. 32.10. If that proves to be true, the court then determines compensation. *Id.*

¶8 It is undisputed that the Village is occupying Campbell’s property with its construction of the boardwalk. The primary question is whether the Village had the legal right to construct the boardwalk in the chosen manner given the scope of the easement that was granted to the Village in 1993. Therefore, we must first construe the scope of the easement and, after that, we determine whether the Village exceeded its rights under the easement by constructing the boardwalk as it did.

A. *The scope and the purpose of the Village’s easement are unambiguous.*

¶9 To determine if the Village has taken Campbell’s property without just compensation, we first construe the scope and purpose of the easement. We

conclude that the easement here is unambiguous and without express limitations on the construction or maintenance of the easement.

¶10 “An easement is an interest in land which is in the possession of another.” *Atkinson v. Mentzel*, 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997). An easement creates two distinct property interests: the dominant estate and the servient estate. *Id.* Here, the Village owns the dominant estate and Campbell owns the servient estate. The dominant estate enjoys the privileges granted by the easement while the servient estate permits the exercise of those privileges. *Id.* The dominant estate’s use of the easement must be in accordance with the terms and purposes of the grant. *Garza v. American Transmission Co.*, 2017 WI 35, ¶23, 374 Wis. 2d 555, 893 N.W.2d 1. “Any use not in accordance with the specific right to use granted in the easement is outside the easement’s scope and thus prohibited.” *Id.*

¶11 To determine whether a use is within the scope of an easement, we must look to the instrument which created the easement. *Atkinson*, 211 Wis. 2d at 637. When construing a written instrument concerning an easement, we consider the language granting the easement to determine the parties’ intent and, if that is unambiguous, we apply that language. *Mnuk v. Harmony Homes, Inc.*, 2010 WI App 102, ¶24, 329 Wis. 2d 182, 790 N.W.2d 514. If there is any ambiguity, we consider extrinsic evidence, but the purpose remains that of determining the parties’ intent at the time of the grant. *Id.*

¶12 The full grant of the easement along Campbell’s property is delineated on the face of the Sunnybrook Plat. The Plat indicates, in words and as drawn on the Plat, a “30’ Wide Public Pedestrian and Bicycle Easement.” The description of the easement the parties agreed to is certainly brief but there is no

ambiguity. We conclude the easement's purpose is established unambiguously as a pedestrian and bicycle path along Campbell's property. Because of those terms, and because the easement is over a strip of grass on a relatively steep slope abutting a river, we conclude that the only reasonable construction of the easement is that some changes to the thirty-foot strip which is burdened by the easement were necessary to construct a smooth, level path, sufficiently above the river, so that members of the public can walk or ride a bicycle in all seasons.⁴ We conclude, further, that the terms of the easement contain no language limiting the method or manner in which the path may be constructed or maintained by the Village. More particularly, the easement's terms do not limit the type of materials which may be used to construct the path and those same terms do not limit the burden on Campbell's servient estate to less than all of the thirty-foot strip.

¶13 We consider, next, whether the Village exceeded its rights just described under the easement by constructing the boardwalk in the manner it chose.

B. The Village did not exceed the scope of the easement in constructing the boardwalk.

¶14 Campbell's argument is that, because the Village's construction of the boardwalk effectively excludes her from the thirty-foot strip burdened by the easement, the Village has exceeded the scope of the easement. We reject this contention. Findings of the circuit court are central to the analysis and will now be considered.

⁴ To confirm that a path would be constructed, the Addendum to the Offer to Purchase signed by Campbell and the seller states that Campbell was aware that there was an easement along the Yahara River for "a public pedestrian walking and bicycle path" which will be constructed and maintained by the Village of DeForest in the future.

¶15 The circuit court made the following findings:

- Campbell is effectively excluded from use and enjoyment of her land burdened by the easement because of the construction of the boardwalk.
- The boardwalk “has the effect of creating a barrier which is while not impossible to cross, so difficult to cross that it effectively precludes any practical use and enjoyment of that property.”
- “[A]ny rights [Campbell] had by virtue of being an owner are lost” as to that strip of land through the boardwalk’s construction.
- The Village’s preferred form of construction would have been an asphalt-paved trail, but a number of factors—most predominantly unsuitable terrain—prevented that possibility.⁵
- The elevated boardwalk allowed the Village to overcome various issues with construction on Campbell’s property.
- Once the Village determined that the boardwalk itself had to be raised off the ground, railings were then necessarily constructed as safety precautions.

Neither party has challenged these circuit court findings. Moreover, Campbell never presented any alternative construction methods which would have been viable on her land and would have allowed her to maintain access to the easement

⁵ Specifically, the slope of Campbell’s property, the wetlands on Campbell’s property, access issues, Americans with Disabilities Act regulations, and the width of the easement made it impossible to pave an asphalt path. Consequently, the Village abandoned its original plan to construct an asphalt-paved path and decided to build the boardwalk.

property. It follows that the circuit court correctly concluded that the boardwalk, as constructed, was reasonably necessary to fulfill the purpose of the easement.

¶16 Because the boardwalk was reasonably necessary for the Village to fulfill the purpose of the easement, we next consider the rights of both Campbell and the Village relating to the easement. *See Atkins*, 211 Wis. 2d at 646 (“the easement must be interpreted so as to accomplish its purpose bearing in mind the reasonable convenience of both parties”). Generally, courts look to the grant of the easement to determine the rights of landowners. *Hunter v. McDonald*, 78 Wis. 2d 338, 342-43, 254 N.W.2d 282 (1977). The owner of a property subject to an easement has the power to make use of her land. *Id.* at 343. However, that power is limited to the extent that the “owner may not unreasonably interfere with the use by the easement holder.” *Id.* Moreover, in Wisconsin every easement carries with it the right to do what is reasonably necessary for the full use and enjoyment of the easement in light of the purpose for which it was granted. *E.g., Atkins*, 211 Wis. 2d at 640; *Garza*, 374 Wis. 2d 555, ¶29. But, the right of the dominant estate holder is also not unlimited. The dominant owner has the right to use the land of another “for a special purpose not inconsistent with the general property [rights] in the owner.” *Hunter*, 78 Wis. 2d at 344.

¶17 So, pursuant to Wisconsin law, Campbell has the right to use her property only in a manner that does not unreasonably interfere with the Village’s use of the easement. Similarly, although the Village may do what is reasonably necessary for the use and enjoyment of the easement, its use of the easement must be consistent with Campbell’s use of the property. These concepts create a tension in Wisconsin law that is at the core of this case. But Wisconsin law makes clear that this tension, under the facts of this case, is resolved in favor of the easement. Here, the purpose of the easement was undoubtedly the creation of a pedestrian

and bicycle pathway over Campbell's land, but the only way to construct the pathway was by means of a boardwalk that effectively excludes Campbell from parts of her property. In this scenario, we hold that the Village's right to construct the boardwalk must take precedent.

¶18 Campbell's right to freely use her property must succumb to the Village's use and enjoyment of the easement through the construction of the boardwalk. Any alternative holding would make the easement null or extinguish the easement entirely. Except in limited circumstances not present here, a servient estate may not terminate an express easement. *AKG Real Est., LLC v. Kosterman*, 2006 WI 106, ¶¶25, 28, 296 Wis. 2d 1, 717 N.W.2d 835 (reinforcing the principle that an express easement does not terminate even when the necessity or purpose of the easement ceases). In addition, a court shall not extinguish an express easement unless the burden imposed on the servient estate violates the terms of the easement such that continued use of the easement is precluded as a matter of law. *Grygiel v. Monches Fish & Game Club, Inc.*, 2010 WI 93, ¶¶23-25, 328 Wis. 2d 436, 787 N.W.2d 6.

¶19 The construction of the boardwalk does not violate the terms of the easement. As discussed, the terms agreed to by the parties are broad, and the Village's construction of the boardwalk does not exceed that grant. As a result, the easement should not be, effectively, extinguished or terminated. Because the only way to make use of the easement is the boardwalk, as constructed, and this Court will not extinguish or terminate the easement, the Village's right to construct the boardwalk to fully enjoy the easement supersedes Campbell's right to freely use the property burdened by the easement.

¶20 Our application of easement law is consistent with the principle that “[w]hile the owner of property subject to an easement may make all proper use of his land ... nevertheless such owner may not unreasonably interfere with the use by the easement holder.” *Hunter*, 78 Wis. 2d at 343. This statement “of the servient owner’s rights and duties virtually always phrases [this] duty in terms of protecting the easement holder’s right to use the easement for the purpose for which it is created.” *Id.* at 344. Accordingly, our supreme court has determined that, at least in instances such as this, the servient estate’s rights must succumb to the rights of the easement holder to use the easement for its purpose.

¶21 Although it does not affect our analysis, we note that Campbell knew this property was burdened by the easement when she purchased it. This is not a situation where the Village imposed the easement on the property after Campbell purchased it. The plat that contains the terms of the easement clearly stated that the property was subject to a pedestrian and bicycle easement, and Campbell was notified about the bicycle path in an addendum she signed when

purchasing the property. Had Campbell not wanted an easement on her property, she could have purchased a parcel that was unburdened by the easement.⁶

CONCLUSION

¶22 The construction of the boardwalk complies with the terms of the easement and, as a result, Campbell’s inverse condemnation claim under WIS. STAT. § 32.10 fails.⁷ For these reasons, we affirm the circuit court’s order dismissing Campbell’s inverse condemnation claim.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁶ Campbell also argues that the Village’s easement is “exclusive” and, as a result, void under Wisconsin law. Although this contention was argued in Campbell’s brief-in-chief, it was not raised in Campbell’s reply brief even though the Village rebutted this argument in its brief. We therefore take this as an abandonment of this argument by Campbell. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed conceded). Moreover, this easement cannot be construed as “exclusive.” There are three potential meanings of “exclusive easement” in this context. *Garrett v. O’Dowd*, 2009 WI App 146, ¶9 n.5, 321 Wis.2d 535, 775 N.W.2d 549 (citing *Latham v. Garner*, 105 Idaho 854, 673 P.2d 1048 (1983)). Two of the meanings require that the easement excludes all members of the public from the easement. Here, the parties agree the easement invites members of the public onto the property rather than excluding them. The other meaning of “exclusive easement” requires the terms of the easement to be interpreted as preventing the fee owner from subjecting the easement land to additional burdens. *Id.*; *Lintner v. Office Supply Co.*, 196 Wis. 36, 49, 219 N.W. 420 (1928). The Village does not ask us to construe the easement in that manner. The grant of the easement contains no hint of exclusivity, and the Village does not assert that this easement is exclusive. For those reasons, the easement over Campbell’s property is not “exclusive.”

⁷ Campbell failed to prove that the Village occupied her property without the legal right to do so. Because she did not satisfy the first step of the inverse condemnation analysis under WIS. STAT. § 32.10, we need not consider the second part of the analysis concerning compensation.

