COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2922 **Cir. Ct. No. 2009CV774**

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

WASHINGTON COUNTY,

PLAINTIFF-APPELLANT,

V.

WASHINGTON COUNTY CONDEMNATION COMMISSION AND ROGER R. DAHM,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Washington County appeals from an order denying its request for a writ of prohibition barring the Washington County Condemnation Commission (the Commission) from hearing Roger R. Dahm's appeal of an award

of damages. The County contends that Dahm did not serve it with notice of the application for assignment to the Commission in accordance with WIS. STAT. § 32.05(9)(a) (2009-10).[1] We conclude that Dahm's interpretation of the statute's notice requirements were reasonable under the facts of this case. We affirm.

¶2 The facts are not disputed. The County, through its highway department, condemned a portion of Dahm's property for a highway-widening project and recorded an award of damages on January 18, 2007. Dahm wanted to appeal the award. On January 16, 2009, Dahm filed with the clerk of courts office a document entitled "Application to the Judge for Circuit Court Washington County, Wisconsin for an Assignment to a Commission of County Condemnation Commissioners for Determination of the Amount of Compensation Due an Owner under a Taking dated January 18, 2007."

¶3 The clerk receiving the filings was unacquainted with condemnation procedures and referred the matter to the employee familiar with them. Later that day, the second individual advised Dahm that she had reviewed county procedures and that the clerk of courts office would file his application, provide a standard order for execution by the intake judge and, after entering a case number, serve notice upon the interested parties.

¶4 On January 20, Judge Patrick Faragher signed the order assigning the petition and directing the Commission chairperson to fix the time and place of the hearing. On January 23, the clerk of court sent a letter by certified mail to Dahm, his attorney, Daniel Dineen, and to the highway department, in care of the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

county clerk, advising them that a hearing, pursuant to WIS. STAT. § 32.08, was scheduled for February 13. The letter indicated its subject was "In the matter of the Appeal of Roger R. Dahm of a Compensation Award of certain lands in Washington County, Wisconsin" and bore the assigned case number. The county clerk, on behalf of the highway department, returned the certified mail receipt. Dineen wrote the clerk of court, copying the highway department, to request an adjournment due to his unavailability. The County acknowledges that it received Dineen's letter. On February 27, Deputy County Attorney Christine Ohlis filed a notice of appearance, subject to jurisdictional challenges.

¶5 Meanwhile, on February 6, Ohlis contacted Dineen to discuss the hearing and its anticipated length in regard to the number of Dahm's witnesses. Dineen advised Ohlis he had requested an adjournment of the February 13 hearing. Ohlis and Dineen engaged in subsequent discussions to coordinate a new hearing date and other related matters. Dineen averred in his affidavit in support of Dahm's circuit court brief that at no point did Ohlis communicate an objection to any of the procedures related to the application or assignment.[2]

¶6 On June 8, 2009, the County filed a summons and complaint requesting an order prohibiting the Commission from hearing Dahm's appeal. The County alleged that Dahm did not serve notice of the application by certified mail or personal service within ninety days of filing his application, contrary to WIS.

[2] The circuit court expressed concern that the County's attorney engaged in discussions with Dahm's attorney while "laying in the weeds" for the time for service to pass. We, too, are dismayed at the lack of professional courtesy.

STAT. §§ 32.05(9)(a) and 801.02(1).[3] Dahm's failure to do so, the County alleged, deprived the court of authority to assign his appeal and the Commission of the jurisdiction to hear it. The parties filed briefs.

¶7 The circuit court issued a decision, but set the matter for a hearing on the issue of what constitutes statutory "notice of the application." Based on the parties' briefs and oral arguments, the court found that WIS. STAT. § 32.05(9)(a) is ambiguous because it neither defines "notice of the application" nor specifies who must give the notice; that WIS. STAT. § 801.02(1) prescribes a ninety-day time limit for giving notice; and that there is no authority for the County's proposition that giving "notice of the application" requires supplying a copy of the application. The court concluded that the clerk of court's January 23, 2009 "gratuitous" letter sent by certified mail constituted proper notice. It thus denied the County's request for a writ of prohibition, dismissed the complaint on the merits and allowed a new order of assignment to the Commission. The County appeals.

¶8 "A writ of prohibition is an extraordinary remedy traditionally employed to restrain an inferior tribunal from exceeding its jurisdiction." ***City of Madison v. DWD***, 2003 WI 76, ¶9, 262 Wis. 2d 652, 664 N.W.2d 584. A circuit court's decision whether to issue a writ of prohibition ordinarily is reviewed for an erroneous exercise of discretion. *See* ***id.***, ¶10. Here, however, issuance of the writ hinged on whether service was proper under WIS. STAT. § 32.05(9)(a). Statutory construction is a question of law that we review de novo, aided by the analysis of

[3] WISCONSIN STAT. § 32.05(9)(a) does not designate the time limit for serving notice on other parties. WISCONSIN STAT. § 801.02(1) therefore controls here and requires service to be made within ninety days of filing. *See* ***City of La Crosse v. Shiftar Bros.***, 162 Wis. 2d 556, 560, 469 N.W.2d 915 (Ct. App. 1991); *see also* § 801.02(1).

the circuit court. *See* ***Community Dev. Auth. v. Racine Cnty. Condemnation Comm'n***, 2006 WI App 51, ¶10, 289 Wis. 2d 613, 712 N.W.2d 380.

¶9 We set out the relevant portion of WIS. STAT. § 32.05(9)(a):

> Any party having an interest in the property condemned may, within 2 years after the date of taking, appeal from the award … by applying to the judge of the circuit court for the county wherein the property is located for assignment to a commission of county condemnation commissioners as provided in s. 32.08 …. This application shall contain a description of the property condemned and the names and last-known addresses of all parties in interest but shall not disclose the amount of the jurisdictional offer nor the amount of the basic award. Violation of this prohibition shall nullify the application. *Notice of the application shall be given to the clerk of the court and to all other persons other than the applicant who were parties to the award. The notice may be given by certified mail or personal service*…. (Emphasis added.)

¶10 The County does not contend that Dahm's application for an appeal was deficient or untimely or that it, the County, was unaware of the hearing. Dahm is foreclosed from an appeal, the County contends, because he failed to serve the County by certified mail or personal service with proper notice of the application. The County submits that proper notice contemplates service by the applicant and inclusion of a copy of the application. We disagree.

¶11 The exercise of the power of eminent domain is an '"extraordinary power' and requires that a rule of strict construction be employed to benefit the owner whose property is taken against his or her will." ***Redevelopment Auth. v. Bee Frank, Inc.***, 120 Wis. 2d 402, 409, 355 N.W.2d 240 (1984). Because strict compliance with procedural statutes is necessary, they must clearly set forth the procedural requirements. *See* ***Trojan v. Board of Regents***, 104 Wis. 2d 277, 284, 311 N.W.2d 586 (1981). Where an ambiguity exists because a procedural statute

does not provide specific direction for compliance, we liberally construe it in favor of the person appealing the condemnor's award of damages. *See* ***DOT v. Peterson***, 226 Wis. 2d 623, 633, 594 N.W.2d 765 (1999).

¶12 WISCONSIN STAT. § 32.05(9)(a) requires that "[n]otice … shall be given to the clerk of the court and to all other persons other than the applicant who were parties to the award … by certified mail or personal service." Here, the clerk of court gave notice by certified mail to the other parties. The County asserts that notice must be given *to*, not *by*, the clerk of court and that it "then follows" that it is the applicant who must give the notice. The County offers no authority or compelling argument for that rationale. Granted, the statute does not obligate the clerk of court to give notice, which is why the circuit court called the January 23 letter "gratuitous." But nor does it forbid the clerk of court from doing so. More to the point, the statute does not impose a personal duty of notice on the applicant.

¶13 The County asserts that service also was deficient because serving only the notice of the application forces the party served to track down a copy of the application itself. It contends that "the way to serve Notice of the Application is by serving the Application itself…. The notice should incorporate everything that is required in the application." The County's proposal, perhaps pragmatic, again is not a clear statutory mandate. Here, the notice gave the case number and apprised the County that the hearing was "In the matter of the Appeal of Roger R. Dahm of a Compensation Award of certain lands in Washington County, Wisconsin." The County thus received both notice of the subject of the application and, with the case number, a means to "track [it] down."

¶14 The legislature did not specify in WIS. STAT. § 32.05(9)(a) who is to give the notice or what the notice is to contain. If, as the County urges, we are to

read the statute as mandating the applicant to give a notice which includes a copy of the application, the legislature should reveal its intent by making these requirements explicit. *See* ***Trojan***, 104 Wis. 2d at 284.

¶15 Furthermore, depriving Dahm of a review of his award when he was in compliance with the literal language of the service requirement strikes us as an unnecessarily harsh result. *See* ***id.*** A series of events out of Dahm's control did not go according to Hoyle. The clerk of courts office advised him that it would serve the necessary notices. The intake judge signed the order before proofs of service were filed. *See* WIS. STAT. § 32.05(9)(a). The County attorney played along as though the County considered that service was properly accomplished.

¶16 Finally, we agree with the circuit court that Judge Faragher's order, executed before proofs of service were filed, was a nullity. That defect since has been cured. We conclude, therefore, that the fresh assignment Judge Gonring signed is permissible. *See* ***Community Dev. Auth.***, 289 Wis. 2d 613, ¶27. The County has not demonstrated that, if service was improper, it caused the County "extraordinary hardship" that cannot be remedied by an appeal, so as to entitle it to the writ it seeks. *See* ***State ex rel. Kiekhaefer v. Anderson***, 4 Wis. 2d 485, 490-91, 90 N.W.2d 790 (1958).

By the Court.—Order affirmed.

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