COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2013

Diane M. Fremgen
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. 2012AP541 **Cir. Ct. No. 2009CV2728**

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

GAYLE GABORSKY, RAFFI SHIRIKIAN, LYNNE OLSEN, NEIL MOOERS, EILEEN MOOERS, AL WAGNER AND SUSAN WAGNER,

PLAINTIFFS-APPELLANTS,

V.

MARGARET E. ZERWEKH,

DEFENDANT,

CITY OF DELAFIELD,

DEFENDANT-RESPONDENT,

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

INTERESTED PARTY.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Gayle Gaborsky and other property owners (collectively, the owners) appeal an order denying their motion for reconsideration of the grant of summary judgment dismissing their inverse condemnation claim against the City of Delafield (the City). The consequential damage the owners alleged does not constitute a taking. We therefore affirm.

¶2 The Nemahbin Roller Mill Dam is situated on property owned by Margaret Zerwekh. The dam created Mill Pond, once about twelve acres and five feet deep. The owners' properties are located on the pond's banks. After the Wisconsin Department of Natural Resources (DNR) granted Zerwekh's request for a permit to abandon the dam and issued a drawdown order prior to the dam's removal, the City passed a Resolution of Necessity, an early step in acquiring private property through eminent domain. The DNR informed the owners that sediment in the soil below and adjacent to the pond contained arsenic and copper residues. The owners retained experts who opined that the City's weed-control activities in a nearby lake and river were the source of the contamination.

¶3 The owners petitioned for a contested case hearing to oppose the drawdown and dam removal. The administrative law judge determined that Zerwekh sufficiently proved that she was entitled to receive the permit to abandon the dam and that the DNR carried its burden regarding the drawdown order. The owners petitioned for judicial review but later dismissed their claims.

¶4 In the meantime, the owners filed this lawsuit against the City,[1] alleging negligence, inverse condemnation, private nuisance and "failure to act,"—*i.e.*, that the Resolution of Necessity obliged it to take ownership of and restore the dam. The inverse condemnation claim generally asserted that the contamination "resulted in a taking" for which the owners were not compensated, in violation of Article I, § l3 of the Wisconsin Constitution and WIS. STAT. § 32.l0 (2011-12),[2] and in a denial of "all or substantially all practical uses" of their property, and that "expensive remediation" would be required to restore the area. The owners claimed damages for loss of use, sediment removal, contaminated sediment removal, and diminished property value.

¶5 The City moved for summary judgment. After the owners voluntarily dismissed the negligence claim, the court granted the City's motion, dismissing the inverse condemnation, private nuisance and failure-to-act claims. The owners sought to have the inverse condemnation claim reinstated, using the vehicle of a motion for reconsideration. They argued that the court had dismissed their claim for a total taking but left unresolved their claim for a partial taking. The court denied the motion. The owners appeal.

¶6 This court has jurisdiction to review an order denying a motion for reconsideration if the motion raised issues separate from those determined in the order from which reconsideration was sought. *See* ***Silverton Enters., Inc. v. General Cas. Co. of Wis.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App.

[1] The owners also alleged claims against Zerwekh. As the owners do not challenge the disposition of those claims on appeal, we do not address them.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

1988). Our jurisdiction is limited, however, to reviewing only the new issues presented on reconsideration. ***Harris v. Reivitz***, 142 Wis. 2d 82, 86-89, 417 N.W.2d 50 (Ct. App. 1987).

¶7 The owners contend that a "partial taking" is a new issue because the circuit court dismissed their claim on the basis that they were not deprived of "all or substantially all" of the beneficial use of their property. That, they argue, pertains to a total taking but when they pled a "taking," they meant both kinds. Although we are not convinced, we will accept for argument's sake that the owners pled a partial taking. Nonetheless, that argument is like the herring used to divert the hounds. Whether examined as "partial" or "total," the circuit court rightly determined that there was no taking at all.

¶8 "The property of no person shall be taken for public use without just compensation therefor." WIS. CONST. art. I, § 13. "Governmental action that merely causes damage to private property is not the basis for [such] compensation." ***Zinn v. State***, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983). Rather, there must be a "taking" of private property for public use. ***Id.*** A taking can occur through two types of governmental conduct: an actual physical occupation or a regulatory restriction on the property that deprives the owner of all, or substantially all, of the beneficial use of the private property. ***E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.***, 2010 WI 58, ¶22, 326 Wis. 2d 82, 785 N.W.2d 409.

¶9 In that case, sewerage district contractors removed groundwater while constructing a trench, causing wood "piles" supporting E-L's building to weaken and rot because they were insufficiently saturated with water. ***Id.***, ¶¶7-9. The building settled and, to repair it, E-L had to replace the wood piles with

concrete. ***Id.***, ¶9. E-L alleged that the sewerage district's conduct amounted to a taking because there was a physical invasion of the piles and the damage deprived it of the piles' beneficial use. ***Id.***, ¶11. The jury concluded there was a taking and awarded E-L over $309,000 and this court affirmed. ***Id.***, ¶¶13, 15. The supreme court reversed. ***Id.***, ¶19. "[I]n the absence of a physical invasion which ousts the owner from full or partial possession or a total deprivation of beneficial use, mere damage to property (or property value) does not constitute a taking." ***Id.***, ¶30 (citation omitted). "Accordingly, what remains are mere consequential damages to property resulting from governmental action, which are not compensable under constitutional takings law." ***Id.***, ¶41.

¶10 The holding in ***E-L Enterprises*** could not be plainer. Neither that case nor the flooding cases the owners cite support their position that they have stated a claim for a compensable taking. The "partial" in "partial taking" does not lower the threshold for finding a taking. There still must be either a physical occupation or the deprivation of all or substantially all of the beneficial use of the taken property. A partial taking simply does not affect the total property. Said another way, the terms "partial" and "total" takings refer to the damage calculations. *See* WIS. STAT. § 32.09(5)(a), (6).

By the Court.—Order affirmed.

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