STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

ELSIE C. KLOOTE,

Plaintiff,

and

ROBERT D. WAALKES and LAVERNE S. WAALKES, husband and wife; JEAN WEENER; DALE HULST and LOIS HULST, husband and wife; KATHY CUSIMANO; EDWARD D. KITA and LEON WITTEVEEN and HERMINA WITTEVEEN, husband and wife,

Plaintiffs/Appellants,

vs.

CITY OF HOLLAND, a Michigan municipal corporation,

Defendant/Appellee.

Supreme Court Docket No. 115372

Court of Appeals File No. 202691

Circuit Court File No. 95-235513-CH

BRIEF *AMICUS CURIAE* OF THE MICHIGAN MUNICIPAL LEAGUE

Respectfully submitted,

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STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae, Michigan Municipal League, adopts the Statement of Basis of Jurisdiction stated by Appellee, City of Holland.

COUNTER STATEMENT OF STANDARD OF REVIEW

Amicus Curiae, Michigan Municipal League, adopts the Counter Statement of the Standard of Review of Appellant, City of Holland.

Moreover, Amicus Curiae brings to the Court's attention that the matter of the *standard of review* is of particular importance in the present case. Factual findings made by the trial court are crucial in determining the outcome of the case, focusing particularly on whether there had been any action taken by the proprietor of the plat, or the proprietor's successors, that could be interpreted to have caused a withdrawal of the right-of-way dedication made as part of the subdivision plat at issue.

Contrary to the position taken by Plaintiffs, this Court has held that it must accept findings of fact by the trial court unless such findings are *clearly erroneous*. *Beason v Beason*, 435 Mich 791, 801-803; 460 NW2d 207 (1990).

COUNTER STATEMENT OF QUESTION INVOLVED

In 1959, the Plat of Central Park was first made a part of the City by way of annexation. The trial court found that two resolutions were adopted in conjunction with such annexation: (1) a resolution by the City, by which it "accepts jurisdiction over all former County roads and streets within the City of Holland"; and (2) a resolution by the Road Commission, by which it relinquished jurisdiction to the City of Holland, specifically listing the right-of-way at issue. The trial court also found that the legal effect of these 1959 resolutions amounted to a *formal acceptance* of the dedication, and that, prior to the 1959 acceptance of dedication, there had been "no use inconsistent with Beach Drive West," the right-of-way at issue in this case. The issues presented in this case are whether Appellants have demonstrated that the findings of the trial court represent *clear error*, and whether Appellants have provided a rational basis for its urging for the Court to legislate an arbitrary and retroactive period for the *lapse* of a dedication.

INTRODUCTION

The context and essence of this case involves an interpretation of the law enacted by the Michigan legislature to govern the dedication of property intended to ***benefit the public***. The cardinal rule for the interpretation of this law is to discern and give effect to the intent of the legislature, *Drouillard v Stroh Brewery Co*, 449 Mich 293; 536 NW2d 530 (1995), and to give effect to the purpose sought to be achieved. *Sun Valley Foods Co. v Ward*, 460 Mich 230; 596 NW2d 119 (1999). *Omne Financial, Inc. v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999).

In terms of the intent of the statutory scheme making provision for subdivision dedications, the court, in its recent pronouncement in *Kraus v Department of Commerce,* 451 Mich 420, 426; 547 NW 2d 870 (1996), held the following in response to a claim that an arbitrary "lapse" period should be judicially legislated:

> The plaintiffs contend that the offer to dedicate lapsed automatically after fifteen years (the statutory period of limitation for adverse possession), absent actions by either the granting proprietor or the donee public authority. We disagree, because such a rule would ***harshly deprive the public of land that was originally intended for its use merely because the public authority did not act*** in situations in which public necessity had not yet required that the offered property be placed into public service or in which the funds available for such development were insufficient (emphasis supplied).

Given that the fundamental intent and purpose of the law is to make provision for a *benefit to the public*, Appellants' position contradicts the cardinal rule of statutory construction. Appellants characterize the notion of a dedication more in terms of a *fleeting offer* which, if not accepted within some arbitrary period of time, defaults into the hands of private owners, *thereafter forever barring any resulting public benefit.*

The Michigan legislature has established no rule providing for the lapse of a dedication. Moreover, the court has clarified that it would be arbitrary to apply a specified year limit or timeline

retroactively. *Kraus, supra, at 427.* Appellants nonetheless ask this Court – not the Michigan legislature – to pronounce the duration of the arbitrary period within which acceptance must occur in order to avoid a summary withdrawal of the dedication without regard to the circumstances involved.

It is of no small moment that, if Appellants' theory is accepted, the court's recent pronouncement in *Kraus*, the fundamental intent and purpose of the legislature, and the fundamental intent of the plat proprietor in making the dedication to the public, will all be totally contradicted. In this case, a right-of-way, intended to be dedicated for *public benefit and use,* would be forfeited to the exclusive private benefit and use of Plaintiffs, notwithstanding that the overwhelming evidence shows a formal acceptance of the dedication in 1959, and continuous actions of adjoining property owners consistent with such acceptance.

ARGUMENT

In 1959, the Plat of Central Park was first made a part of the City by way of annexation. The trial court found that two resolutions were adopted in conjunction with such annexation: (1) a resolution by the City, by which it "accepts jurisdiction over all former County roads and streets within the City of Holland"; and (2) a resolution by the Road Commission, by which it relinquished jurisdiction to the City of Holland, specifically listing the right-of-way at issue. The trial court also found that the legal effect of these 1959 resolutions amounted to a *formal acceptance* of the dedication, and that, prior to the 1959 acceptance of dedication, there had been "no use inconsistent with Beach Drive West," the right-of-way at issue in this case. Appellants have not demonstrated that the findings of the trial court represent *clear error*, and Appellants provide no rational basis for its urging for the Court to legislate an arbitrary and retroactive period for the *lapse* of a dedication. Accordingly, the presumption of acceptance of dedication provided by statute applies in this case, and the lower courts should be affirmed.

SUMMARY OF AGRUMENT

In 1890, the Plat of Central Park was recorded with an express provision that, "the streets and alleys as shown on said plat are hereby dedicated to the use of the public." The plat also expressly depicts the disputed right-of-way, thereby placing all lot purchasers on notice of its existence.

The trial court found that, in approximately 1940, the County Road Commission "took into the County road system the 'dedicated streets and alleys in recorded plats.'" In 1959, when the Plat of Central Park was first made a part of the City by way of annexation, the trial court found that two resolutions were adopted: (1) a resolution by the City, by which it "accepts jurisdiction over all former County roads and streets within the City of Holland"; and (2) a resolution by the Road Commission, by which it relinquished jurisdiction to the City of Holland, specifically listing the right-of-way at issue.

The trial court also found that the legal effect of these 1959 resolutions amounted to a *formal acceptance* of the dedication. Although the trial court did find that the planting of a certain hedge on

Beach Drive East in 1926 had the legal effect of withdrawing the dedication on that street, the trial court found that, prior to the 1959 acceptance of dedication, there had been "no use inconsistent with Beach Drive West," the right-of-way at issue in this case. Consequently, the trial court did not find that the dedication in question had been withdrawn prior to the 1959 acceptance.

The Michigan Legislature has not specified an arbitrary period within which an acceptance of dedication must be made, and this Court has recently indicated that it would be arbitrary for the Court to apply a specified timeline retroactively

By the terms of Section 255b of the Land Division Act, MCL 560.255b; MSA 26.430 (255b), the Michigan legislature in 1968 pronounced that, for dedications effective prior to 1968, a dedication to the use of the public "shall be presumed to have been accepted on behalf of the public", and that such presumption shall be conclusive of an acceptance of dedication unless rebutted by competent evidence before the circuit court that the dedication was withdrawn by the plat proprietor, nor was any clear error shown on the part of the trial court in such regard. No facts were found to exist by the trial court that would represent competent evidence for overcoming the presumption specified in Section 255b of the Land Division Act, nor was any clear error shown on the part of the trial court in such regard.

Therefore, based upon clear Michigan law, the decisions of the trial court and court of appeals must be affirmed, holding that the dedication of the right-of-way in question to the public was accepted.

THE PLATTING PROCESS

The Land Division Act, MCL 560.101, *et seq.*, MSA 26.430(101), *et seq.* (formerly, the Subdivision Control Act), makes provision for the orderly division of land into lots intended to be utilized for building purposes. The Act contemplates the division of land primarily by way of the

creation of a plat, which is a plan or map of the proposed subdivision, showing the configuration of lots and roads, along with other features relating to the development. The plat, once approved by all applicable governmental entities, is duly recorded with the Office of the Register of Deeds for the county in which the property is situated.

Section 137 of the Act, MCL 560.137, MSA 26.430(137) provides that, "all public or private grounds, streets, roads, and alleys included in the plat shall be shown . . .". In addition, the proprietor of the plat must sign a certificate, not surprisingly known as the "proprietor certificate". The proprietor certificate on the plat must include "a statement that the streets, alleys, parks, and other places shown on it which are usually public are dedicated to the use of the public". MCL 560.144, MSA 26.430(144).

With the plat being recorded at the Office of the Register of Deeds, a prospective purchaser of a subdivision lot is placed on notice with regard to the existence and location of a street in relation to the lot to be purchased. In addition, the prospective purchaser is placed on notice with regard to whether the street has been dedicated to the public.

THE PLAT IN THIS CASE

The Plat of Central Park was created in 1890. At the time, the Plat was situated in a township (prior to the 1959 annexation of the property into the City). Accordingly, the dedication to the public went to the local township. Subsequently, by operation of the so-called *McNitt Act*, jurisdiction of all roads not situated within cities and villages were transferred to the respective county road commissions, thus giving rise to the finding by the trial court that, in approximately 1940, the County Road Commission "took into the county road system the 'dedicated streets and alleys in recorded plats'".

The next relevant event relating to control over the roads within the Plat of Central Park occurred in 1959, when the City of Holland annexed that portion of the Township which included the subdivision in question. By way of annexation, the respective portion of a township comes under the control and jurisdiction of the incorporating city. *See, Home Rules Cities Act*, MCL 117.1, *et seq.*, MSA 5.2071, *et seq.*

Among other relevant legal effects of annexation, jurisdiction of certain streets and roads, including subdivision streets, may be transferred from the county road commission to the incorporating city. Thus, in 1959, when the Plat of Central Park was made a part of the City of Holland by annexation, resolutions of the City of Holland and the Road Commission were adopted. The trial court made findings accordingly. First, the trial court found that there had been a resolution by the City, by which it "accepts jurisdiction over all former county roads and streets within the City of Holland". Second, trial court found that there had been a resolution by the County Road Commission, by which it relinquished jurisdiction of the streets to the City of Holland, with such resolutions specifically listing Beach Drive West, the right-of-way at issue.

On the basis of these 1959 resolutions by the City and County Road Commission, the trial court found that the dedication of Beach Drive West contained in the Plat of Central Park had been *formally accepted.*

A DEDICATION SHOULD NOT "LAPSE" BY OPERATION OF LAW

Appellants advocate that the Court should legislate a "lapse" period, that would operate to withdraw a dedication at the end of some arbitrary period of time, regardless of the circumstances of the case. The Michigan Legislature has not specified a period within which an acceptance of dedication must be made, and this Court has recently indicated that it would be arbitrary for the Court to apply a specified timeline retroactively. *Kraus, supra*, at 427.

The essential legal context before the Court is the statutory scheme by which land is dedicated for public use and benefit in conjunction with the creation of a subdivision plat. The cardinal rule for the interpretation of this law is to discern and give effect to the intent of the legislature, *Drouillard v Stroh Brewery Co*, 449 Mich 293; 536 NW2d 530 (1995), and to give effect to the purpose sought to be achieved. *Sun Valley Foods Co. v Ward*, 460 Mich 230; 596 NW2d 119 (1999). *Omne Financial, Inc. v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999).

In terms of the intent of the statutory scheme making provision for subdivision dedications, the Court, in its recent pronouncement in *Kraus v Department of Commerce,* 451 Mich 420, 426; 547 NW 2d 870 (1996), held the following in response to a claim that an arbitrary "lapse" period should be judicially legislated:

> The plaintiffs contend that the offer to dedicate lapsed automatically after fifteen years (the statutory period of limitation for adverse possession), absent actions by either the granting proprietor or the donee public authority. We disagree, because such a rule would ***harshly deprive the public of land that was originally intended for its use*** merely because the public authority did not act in situations in which public necessity had not yet required that the offered property be placed into public service or in which the funds available for such development were insufficient. (Emphasis supplied)

Thus, with the fundamental intent and purpose of the law being to make provision for a *benefit to the public*, Appellants position contradicts the cardinal rule of statutory construction. A dedication is not a *fleeting offer* which, if not accepted within some arbitrary period of time, defaults into the hands of private owners, *thereafter forever barring any resulting public benefit.* To accept Appellants' theory of this case would give rise to a *forfeiture*, i.e., would amount to "a deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition". Black's Law Dictionary (5th ed.), pp. 584-585. It has long been held that "equity abhors a forfeiture." *Hull v Hostettler*, 224 Mich 365, 369; 194 NW 996 (1923).

Within a related context, the Michigan Legislature has expressed the intent that the public benefit of roads and other public property should not to be lost by mere non-use, even in the face of inconsistent private use. Specifically, subsection (2) of MCL 600.5821; MSA 27A.5821 provides as follows:

> "(2) Actions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations."

In light of the Court's recent pronouncement in *Kraus*, that it should not establish an arbitrary and retroactive lapse period, and given that the essence of this case involves the fundamental intent and purpose of the legislature concerning dedications for the public benefit, and, also considering that the establishment of a lapse period would result in a *forfeiture*, regardless of the circumstances involved, Appellants' argument for lapse entirely contradicts Michigan law and public policy.

LACK OF INCONSISTENT ACTS

Of some significance, this case included a dispute with regard to Beach Drive West, as well as Beach Drive East. In the case of Beach Drive East, the trial court made a finding that a certain hedge had been planted in a location that had the effect of blocking use of the street. The trial court concluded that this planting, made in 1926, was sufficiently inconsistent with the dedication of the street to the public that it had the effect of withdrawing the dedication. Accordingly, the trial court found that, when the formal acceptance of dedication occurred in 1959, that portion of the dedication relating to Beach Drive East had already been withdrawn. Thus, the 1959 formal acceptance could not include the acceptance of Beach Drive East.

On the other hand, with regard to Beach Drive West, which is the subject matter of this case, the factual findings of the trial court were quite different. Although Appellants present argument with regard to a planting made on Beach Drive West, on the basis of the evidence presented, the trial

court rejected this factual claim, and made an express finding that there was "no use inconsistent with Beach Drive West".

These findings by the trial court are, perhaps, the most crucial determinations bearing upon the outcome of this case. As noted, above, this Court has held that it must accept findings of fact by the trial court unless such findings are *clearly erroneous*. *Beason v Beason,* 435 Mich 791, 801-803; 460 NW2d 207 (90). At stake in making findings of fact based upon the presentation of testimony is the critical element of credibility. In view of this recognition, in *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1966), footnote 23, the court quoted from the Seventh Circuit the following graphic and olfactory standard for reviewing factual findings made by the trial court:

> FN 23. As the United States Court of Appeals for the Seventh Circuit has so graphically explained, "to be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish". *Parts and Electric Motors, Inc. v Sterling Electric, Inc.*, 866 F2d 228, 233 (CA 7, 1988).

In this case, the record certainly does not meet the necessary test required in order to reach the conclusion that there was *clear error* in the trial court's finding that there was "no use inconsistent with Beach Drive West".

The thrust of this finding by the trial court, and the necessary conclusion which must follow, is that the offer of dedication with regard to Beach Drive West continued until 1959 when the formal acceptance of the dedication occurred.

ADEQUATE STATUTORY GOVERNANCE

Although Appellants would like this Court to legislate a change in Michigan law, § 255b of the Land Division Act already serves as the appropriate and adequate legislative basis to govern this case. Section 255b, MCL 560.255b, MSA 26.430(255b), provides as follows:

560.255b. Presumption of acceptance; dedicated land

(1) Ten years after the date the plat is first recorded, land dedicated to the use of the public in or upon the plat shall be presumed to have been accepted on behalf of the public by the municipality within whose boundaries the land lies.

(2) The presumption prescribed in subsection (1) shall be conclusive of an acceptance of dedication unless rebutted by competent evidence before the circuit court in which the land is located, establishing either of the following:

(a) That the dedication, before the effective date of this act and before acceptance, was withdrawn by the plat proprietor.

(b) That notice of the withdrawal of the dedication is recorded by the plat proprietor with the office of the register of deeds for the county in which the land is located and a copy of the notice was forwarded to the state treasurer, within 10 years after the date the plat of the land was first recorded and before acceptance of the dedicated lands.

Section 255b of the Land Division Act was enacted in 1967, effective in 1968. Reading this section as a whole as applied to pre-1968 plats, the Michigan legislature has pronounced that, for subdivision dedications made prior to the effective date of the Act, a dedication to the use of the public "shall be presumed to have been accepted on behalf of the public", unless it is demonstrated by competent evidence before the Circuit Court that the dedication was withdrawn prior to 1968. *Vivian v Roscommon County Board of Road Commissioners*, 433 Mich 511, 521-522 (1989).

This statutory guidance provides very clear authority in this case. In the face of the *clear error* standard of review, Appellants have simply not demonstrated that there were pre-1959 inconsistent acts, when formal acceptance of dedication was found to occur. In all events, however, Appellants have not demonstrated sufficient pre-1968 acts inconsistent with the dedication, thus giving rise to a conclusive statutory presumption that the dedication was accepted.

An examination of the record forcefully negates Appellants' theory that the adjoining property owners treated Beach Drive West inconsistently with the recognition that it remained as a public right of way. The following examples serve to demonstrate this point:

- The trial court found that adjoining property owners have historically recognized and allowed the use of the area in question as a public right-of-way. In its Brief, the City of Holland cites several examples.

- Until 1992, Appellants Waalkes used the street to access their property.

- In 1992, a petition to vacate the right-of-way was filed with the City (see Appendix 45b-46b).

- In 1972, merely four years following the effective date of § 255b of the Land Division Act, quoted above, the City installed a sanitary sewer line in the right-of-way without objection. This is particularly significant in that, in the process of installing the sewer facility, vegetation of adjoining property owners was removed. The Court may take judicial notice of the fact that a property owner's trees and other vegetation is a well-guarded interest, and claims would have been made if the right-of-way had been understood to be private property.

- In 1988-1989, the City installed public monuments in the right-of-way.

- In 1988, there was an express acknowledgment by Appellant Hulst of the existence of the City's right-of-way, as reflected in a letter to the City seeking permission to extend a deck into the right-of-way (Appendix 36b). (*Cf*, the acknowledgment cited by the Court in *Kraus v Department of Commerce*), where a property owner testified that he did not believe that he had any rights to exclude people from the right-of-way at issue. 451 Mich at 440.

- Finally, the existence of the public right-of-way was utilized as a basis for seeking a reduction in assessed valuation with regard to adjoining property (see Appendix 15b-24b).

CONCLUSION

As this Court has recognized in the past, "a Court should not abandon the canons of common sense". *Marquis v Hartford Accident and Indemnity*, 445 Mich 638, 644; 513 NW2d 799 (1974), *Bay Trust Company v Agricultural Life Insurance Company*, 279 Mich 248; 271 NW 749 (1937).

The proprietor of the Plat of Central Park expressly provided on the plat, recorded for public notice purposes, that the streets on the plat "are hereby dedicated to the use of the public". Of significance, the right-of-way in question provides the public with a resource that is unduly scarce in Michigan, and elsewhere: property situated to allow public enjoyment of the natural resources and amenities of a lake. As the intensity of development increases throughout the United States, waterfront properties have become of prime interest for private property development. This has resulted in significant legal battles. Such a battle reached the United States Supreme Court in *Nollan v California Coastal Commission*, 482 US 825 107 S Ct 3141, 97 Lawyers Ed 2d 677 (1987), in which the State Coastal Commission conditioned its approval for the reconstruction of a home on the property owner's willingness to transfer to the public an easement across their beach front property.

In the present case, the proprietor of the plat dedicated a public right-of-way providing access to a Michigan inland lake. The entire purpose of the statutory scheme in question is to make provision for dedications intended to be for the public benefit.

The lower courts have concluded that the Appellants have not demonstrated either a factual basis or a legal basis for concluding that the proprietor's dedication had ever been withdrawn. Under such circumstances, although a considerable period transpired prior to the acceptance of dedication, the Court has clarified that an offer of dedication will be treated as continuing unless the plat proprietor or his successor takes steps to withdraw the offer of dedication. *Kraus v Department of Commerce*, 451 Mich 420, 427; 547 NW2d 870 (1996).

The burden of proving a withdrawal of an offer of dedication is on the property owner. *Vivian v Rosscommon County Board of Road Commissioners*, 433 Mich 511, 515-517, Note 10, 446 NW2d 161 (1989). Particularly where the dedication creates a right-of-way adjacent to public waters, the burden of proving a withdrawal should be particularly high. *Cf* MCL 560.255a; MSA

26.430(255a), prohibiting the vacation of a public way that is within 25 meters of a lake except by order of the circuit court.

The lower courts should be affirmed.

SECREST, WARDLE, LYNCH,
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