COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2004

Cornelia G. Clark
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. 03-2399 **Cir. Ct. No. 02CV000140**

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

JAMES R. SCHILLING, DIANE T. SCHILLING, AND DR. S.H. VAN GORDEN,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dr. Schuyler Van Gorden and James and Diane Schilling appeal an order dismissing their case against the Department of Natural

Resources. They complain the court dismissed the case without a hearing and without reference to the DNR's pleadings. We affirm the order.

Background

¶2 Patrick and Adele O'Halloran owned Government Lots 6 and 7 in Hunter Township. The property abuts the Chippewa Flowage, an artificial reservoir. The O'Hallorans had an easement over an access road for reaching their property. The road crosses land owned by the State and by the United States, which holds its portion in trust for the Lac Courte Oreilles Band of Lake Superior Chippewa (LCO). The access road is the only way of reaching the O'Halloran property by ground.

¶3 The O'Hallorans sold most of Lots 6 and 7 to Walter Tibbitts, ostensibly transferring their interest in the easement as well. Tibbitts then sold a portion of Lot 7 to Van Gorden, who in turn sold a portion of his property to the Schillings. Tibbitts, Van Gorden, and the Schillings all used the access road.

¶4 In October 2000, the Schillings applied for and received from Sawyer County a land use permit so they could build a house on their property. The permit had also been subject to DNR approval. At about the same time, a DNR warden observed what she classified as unauthorized timber cutting and construction along the access road.

¶5 One violation appeared to be the filling in of the "lakebed" with concrete to extend the access road to the "island" that was Lot 7. Sawyer County revoked the Schillings' land use permit, allegedly at the DNR's request as a reaction to the road work. The DNR then informed the Schillings that there could be no further subdivision of their property. The Schillings dispute the

characterization of Lot 7 as an island and argue that the road work was mere maintenance on the easement. They argue that the recharacterization of their land, the stop-work order on the road, and the revocation of their permit at the DNR's request work to deprive them of "all economically beneficial uses of their property."

¶6 After dealing with the Schillings, the DNR asked Van Gorden to file after-the-fact applications for grading, installing a bridge, and use of the O'Halloran easement. Van Gorden paid for and submitted the applications, which the DNR has yet to approve. He complains it was improper to make him file the additional applications, and that the DNR has held them too long without action.

¶7 Also around this time, the parties learned the O'Hallorans never had a right to convey an interest in the easement, despite assurances from the title insurance company. The easement had been granted solely to the O'Hallorans with no rights to transfer it to their heirs or assignees. Consequently, Van Gorden and the Schillings filed two actions. This case, No. 02-CV-140, seeks a determination that the DNR had either made determinations beyond the scope of its legal authority or that it had made compensable takings against the Schillings and Van Gorden. Sawyer County case No. 02-CV-139 sought a right to use the O'Halloran easement based on forty years of adverse use.

¶8 The United States, a defendant in the easement case because of the LCO land, had the case removed to federal court, where it was subsequently dismissed based on sovereign immunity. As a result, the Schillings and Van Gorden have no enforceable right to use the access road.

¶9 Meanwhile, the DNR filed its answer in this case, along with a motion to dismiss based on, among other things, failure to state a claim on which

relief could be granted. When briefing was completed in February 2003, the circuit court wrote to the parties asking what the status of the Schillings' and Van Gorden's access to the property was. Both parties responded with the results from federal court. The circuit court concluded that "Plaintiffs may not have use of their land, but it is not the State that is preventing that use" but rather the federal court judgment, and granted the motion to dismiss. The Schillings and Van Gorden appeal, raising only the question of the dismissal's propriety.

Discussion

¶10 We review a motion to dismiss de novo. ***Turkow v. DNR***, 216 Wis. 2d 273, 280, 576 N.W.2d 288 (Ct. App. 1998). A complaint should be dismissed as legally insufficient when it is clear from the pleaded facts and inferences reasonably derived therefore that under no circumstances or factual situation could the nonmoving party prevail. ***Id.***

¶11 The Schillings and Van Gorden complain that the trial court considered materials outside the pleadings when it corresponded with the attorneys, converting the motion to dismiss into one for summary judgment. *See* WIS. STAT. § 802.06(2)(b) (2001-02). They argue the trial court failed to notify them of the conversion and failed to give them a hearing to present relevant evidence. *See* ***id.***; ***CTI of NE Wis. LLC v. Herrell***, 2003 WI App 19, ¶8, 259 Wis. 2d 756, 656 N.W.2d 794.

¶12 We do not believe the motion was converted by the court's inquiry. The DNR had affirmatively alleged that the parties could not access their land

except by trespassing on State land and federal tribal land,[1] and that a formal determination was pending in case No. 02-CV-139. The court's inquiry as to the status of the federal case did nothing more than allow it to take judicial notice of events already referred to in the pleadings.

¶13 Even if the trial court had converted the motion to summary judgment, the Schillings and Van Gorden have made no mention of what additional evidence they hoped to submit. Indeed, they conceded that the federal action left them without enforceable easement access to their property—an undisputed fact upon which the trial court ultimately relied.

¶14 A dismissal for failure to state a claim is a judgment on the merits of the case. ***Juneau Square Corp. v. First Wis. Nat'l Bank***, 122 Wis. 2d 673, 686, 364 N.W.2d 164 (Ct. App. 1985). In order for there to be a compensable regulatory taking,[2] a government action "must deny the landowner all or substantially all practical use of a property." ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 374, 548 N.W.2d 528 (1996). In other words, there is a taking if a restriction "practically or substantially renders the land useless for all reasonable purposes." ***Howell Plaza v. State Hwy. Comm'n***, 92 Wis. 2d 74, 85, 284 N.W.2d 887 (1979) (citation omitted).

¶15 Thus, the trial court was correct when it concluded it was not the DNR preventing the plaintiffs from using their land. It is the federal judgment that

[1] In addition to the case taken to federal court, the LCO apparently passed a tribal resolution stating it considers use of the access road to be a trespass.

[2] Takings that do not involve physical invasion of the land are "regulatory takings." *See* ***Hoepker v. City of Madison Plan Comm'n***, 209 Wis. 2d 633, 651, 563 N.W.2d 145 (1997). Van Gorden and the Schillings have not alleged any physical invasion of the land.

"practically or substantially renders the land useless for all reasonable purposes" by preventing access. Thus, Van Gorden and the Schillings could not succeed on their takings claim.

¶16 Moreover, if we concluded that the DNR's actions were without merit, or if we remanded for a hearing on that issue, the Schillings and Van Gorden fail to demonstrate what relief they could seek. Even if the DNR were ordered to grant the after-the-fact permits to Van Gorden, reinstate or reapprove the Schillings' land use permit and reclassify Lot 7 as mainland, the plaintiffs do not show how they could use their land in any meaningful way.[3] The case was properly dismissed for failure to state a claim upon which relief can be granted.

By the Court.—Order affirmed.

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

[3] The Schillings argue that with their permit reinstated and the land reclassified, they could still build because the county zoning regulations do not prohibit building on a landlocked parcel. They do not, however, explain how they will access their parcel.