COURT OF APPEALS DECISION DATED AND RELEASED

July 11, 1996

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2151

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

LEE ROBERTS AND AMY ROBERTS,

Plaintiffs-Appellants,

v.

NORMAN JENNINGS AND THE TOWN OF SPRINGVALE, COLUMBIA COUNTY, WISCONSIN,

Defendants-Respondents.

APPEAL from an order of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Affirmed*.

Before Dykman, Sundby and Vergeront, JJ.

DYKMAN, J. Lee and Amy Roberts appeal from an order affirming a decision by Town of Springvale commissioners to lay a road over the Robertses' property and awarding them $500 in damages. The Robertses argue that §§ 80.17 to .21, STATS., under which the commissioners acted, are

unconstitutionally vague. They also argue that the commissioners took their land without due process of law because they were not a party to the proceedings. We conclude that §§ 80.17 to .21 are not unconstitutionally vague. We also conclude that the Robertses waived their due process claim because they failed to appear at a hearing on their motion to intervene and failed to follow through with this motion. Accordingly, we affirm.

BACKGROUND

In the fall of 1993, Norman Jennings sought to acquire a small parcel of land owned by Lee and Amy Roberts. He regularly crossed this parcel to get to another part of his land, which he claimed was not accessible by any public roadway. The Robertses told Jennings that he could cross their land whenever he wanted but that they did not want to sell him the parcel or grant him an easement.

Jennings sought condemnation of the Robertses' parcel of land to have a public highway built. He executed an affidavit directed to the Town Board of the Town of Springvale pursuant to § 80.13, STATS.,[1] stating that his

---

[1] Section 80.13(1), STATS., provides:

> When any person shall present to the supervisors of any town an affidavit satisfying them that he is the owner or lessee of real estate ... within said town, and that the same is shut out from all public highways, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water, or that he is the owner or lessee of real estate ... and of a private way or road leading from said real estate to a public highway but that such road or way is too narrow, giving its width, to afford him reasonable access to and from said real estate to said public highway, that he is unable to purchase from any of said persons the right-of-way over or through the same to a public highway, or that he is unable to purchase from the owner or owners of land on either or both sides of his way or road land to make such way or road of sufficient width, or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased by him, the said supervisors shall appoint a time

property was landlocked and that he was unable to purchase a right-of-way from any of the owners of the adjoining real estate. The town board rejected his request because the Robertses had offered Jennings unlimited access to his land and because it did not believe that Jennings's real estate was landlocked.

In April 1994, Jennings appealed this order to the trial court pursuant to § 80.17, STATS. On June 3, 1994,[2] the attorney for the town board wrote to the trial court, noting that a hearing had been scheduled for June 22 for the selection of commissioners. By order dated June 10, 1994, the trial court informed the parties and the Robertses' attorney that the hearing to select the commissioners originally scheduled for June 22 had been changed to July 12.[3] On that same date, the trial court wrote to the Robertses' attorney, stating that it had not received a notice of appearance from him in this case. The court added, "it is unclear who you are representing and whether or not your client is involved in these proceedings. If you want anything scheduled before the Court, it will be necessary for you to file a formal motion after serving your notice of appearance."

On July 6, 1994, the Robertses' attorney moved to intervene and stated that he would appear at the July 12 hearing for a decision on this matter. The attorney did not appear at the July 12 hearing, but Lee Roberts was present. The commissioners were selected. The court noted that the Robertses' attorney was not present and told Lee Roberts that, therefore, it was not going to rule on his motion to intervene. Roberts stated that he understood. The motion was never renewed.

At the July 22, 1994 hearing, the commissioners heard testimony from Jennings and from those who opposed the highway, including the

(..continued)

> and place for hearing said matter, which hearing shall be after ten days and within thirty days of the receipt of said affidavit.

[2] The letter was mistakenly dated June 3, 1993.

[3] This document is not of record but is contained in Jennings's appendix. We assume, however, that the Robertses had notice of the change in the court date because their motion to intervene noted a July 12, 1994 court date.

Robertses, their attorney, and the Town Board Chairman. The commissioners also viewed the site. The commissioners reversed the town board and ordered the town to lay a two-rod road and pay the Robertses $500 in damages under § 80.21, STATS. No advantages were assessed with respect to Jennings.

The Robertses sought *certiorari* review of the commissioners' order pursuant to § 80.34(2), STATS. The trial court dismissed the petition. The Robertses appeal.

STANDARD OF REVIEW

We review the decision of the commissioners, and not that of the trial court. ***Berschens v. Town of Prairie du Sac***, 76 Wis.2d 115, 118-19, 250 N.W.2d 369, 372 (1977). Our review is limited to irregularities or legal questions growing out of the commissioners' proceedings, provided the alleged errors appear in the record or the return. ***Id.***

VAGUENESS

The Robertses argue that §§ 80.17 to .22, STATS., are unconstitutionally vague because they contain no rules or standards, thereby making their enforcement impossible. The vagueness, they argue, stems from the procedure that permits three randomly selected townspeople to take land from a person. Specifically, they contend that the statutory scheme is unconstitutionally vague for the following reasons: (1) there are no requirements that the commissioners find that the taking of a person's land serves a public purpose; (2) there is no requirement that the commissioners give deference to the town board; (3) the terms "damages" and "advantages" are not defined in the statutory scheme; (4) there is no mechanism for ensuring that taxpayers are protected from having to pay outrageous damages; (5) there is no mechanism to ensure that a person whose land has been taken is given fair market value or any other measure of "just compensation"; and (6) the statutes contain no rules of evidence or procedure.

The appellant has the burden of overcoming the presumption of constitutionality by demonstrating that the statute is unconstitutional beyond a reasonable doubt. ***Wisconsin Bingo Supply & Equip. Co., Inc. v. Wisconsin Bingo Control Bd.***, 88 Wis.2d 293, 301, 276 N.W.2d 716, 719 (1979). The test for determining whether a civil statute is unconstitutionally vague is the following:

> A statute is not necessarily void merely because it is vague, indefinite, or uncertain, or contains terms not susceptible of exact meaning, or is stated in general terms, or prescribes a general course of conduct, or does not prescribe precise boundaries, or is imperfect in its details, or contains errors or omissions, or because the intention of the legislature might have been expressed in plainer terms, and questions may arise as to its applicability, and opinions may differ in respect of what falls within its terms, or because the statute is difficult to execute.
>
> Unless a statute is so vague and uncertain that it is impossible to execute it or to ascertain the legislative intent with reasonable certainty, it is valid ....

Id.

The Robertses first argue that the statutes are unconstitutionally vague because there are no requirements that the commissioners find that the taking of their land serves a public purpose. We disagree. A public purpose is served by permitting a highway to be laid out over a property owner's land. *See* ***Northern States Power Co. v. Town of Hunter Bd. of Supervisors***, 57 Wis.2d 118, 129, 203 N.W.2d 878, 883 (1972). When adopting § 80.13, STATS., the legislature presumably acted with this public purpose in mind. ***Id.*** The fact that private interests may also be served does not diminish the public nature of the highway and its accessibility to all. The highway is a public highway.

Next, the Robertses argue that the statutes are unconstitutionally vague because the commissioners are not required to give deference to the town board. But constitutional vagueness has to do with being able to understand what a statute means and being able to execute it. The Robertses have no

trouble explaining that the problem they identify implicates standard of review. And they complain of the statute's method of execution, not that they cannot tell from the statute how the statute is executed. This is not a vagueness challenge. If the statutes of which the Robertses complain suffer from constitutional inadequacy, vagueness is not the reason for the inadequacy.

The Robertses also argue that because the terms "damages" and "advantages" are not defined in the statutes, they are unconstitutionally vague. Again, we disagree. The test for vagueness when a civil statute is challenged is that it must be "so vague and uncertain that it is impossible to execute it or to ascertain the legislative intent with reasonable certainty." ***Wisconsin Bingo***, 88 Wis.2d at 301, 276 N.W.2d at 719. Under § 80.13(3), STATS., the commissioners "shall assess the damages to the owner or owners of the real estate over or through which the same shall be laid or from whom land shall be taken and the advantages to the applicant." The town pays damages to the landowner whose land is taken when the highway opens. Section 80.30(1), STATS.

Just because a statutory term is not defined does not mean that the statute is unconstitutionally vague. *See* ***State v. McCoy***, 143 Wis.2d 274, 286, 421 N.W.2d 107, 111 (1988). "A statute is sufficiently definite if the meaning of its terms can be discerned by referring to ordinary sources of construction." ***Id.*** at 286-87, 421 N.W. 2d at 111. Our first step in construing a statute is to examine its language and if it is clear, we apply its ordinary meaning. ***Riverwood Park, Inc. v. Central Ready-Mixed Concrete, Inc.***, 195 Wis.2d 821, 828, 536 N.W.2d 722, 724 (Ct. App. 1995). To ascertain its ordinary meaning, we may resort to a dictionary. ***Borgen v. Economy Preferred Ins. Co.***, 176 Wis.2d 498, 505, 500 N.W.2d 419, 421-22 (Ct. App. 1993).

In Webster's Dictionary, damages is defined as "the estimated reparation in money for detriment or injury sustained : compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1993). Advantage is defined as "benefit, profit, or gain of any kind : benefit resulting from some course of action." ***Id.*** at 30. Using these definitions, we conclude that the legislative intent of § 80.13, STATS., can be determined with reasonable certainty. When the legislature provided that the commissioners "shall assess the damages to the owner or owners of the real estate over or through which the same shall be laid or from whom land shall be taken," it meant that the commissioners should decide how much money would compensate the

landowner whose land has been taken. And when the legislature provided that the commissioners should assess "the advantages to the applicant," we conclude that this refers to how much of a financial benefit has inured to the applicant or the enhancement in value of the applicant's land as a result of the town's decision to lay the highway. *See also* ***Larsen v. Town Supervisors of Spider Lake***, 5 Wis.2d 240, 243, 92 N.W.2d 859, 861 (1959) (applicant pays as advantages the amount that fairly measures the advantages accrued to his or her property by the building of the highway).

The Robertses also argue that the statutory scheme is unconstitutionally vague because there is no mechanism for ensuring that taxpayers are protected from incurring outrageous damages. Again, we believe that the Robertses have incorrectly identified their problem as one of constitutional vagueness. A statute can permit or require outrageous damages without being vague. Though such a statute may offend other parts of our constitutions, it is not unconstitutionally vague.

Similarly, the Robertses argue that the statutory scheme is unconstitutionally vague because there are no mechanisms for ensuring that a person whose land has been taken is given fair market value or any other measure of "just compensation." Though the failure to give just compensation for a taking is prohibited by other sections of our constitutions, just compensation is not a part of a vagueness analysis. The statute is clear that the town board must pay damages to the landowner whose land is taken for a public highway. Whether those damages are constitutionally inadequate or excessive is not decided by considering concepts of constitutional vagueness.

Finally, the Robertses argue that the statutes are unconstitutionally vague because they do not provide rules of evidence or procedure. We disagree. First, § 801.01(2), STATS., provides that the rules of civil procedure set forth in chapters 801 to 847, STATS., govern procedure and practice in trial courts in all civil actions and special proceedings except where different procedure is prescribed by statute or rule. Chapter 80, STATS., sets out that different procedure. Thus, the rules of civil procedure are inapplicable.

Second, § 901.01, STATS., provides that the rules of evidence set forth in chapters 901 to 911, STATS., govern proceedings in courts of the State of Wisconsin except as provided in §§ 911.01 and 972.11, STATS. This proceeding,

however, was not a proceeding before a court but one before commissioners. The "[h]ighway commissioners constitute a tribunal of special and limited jurisdiction, and must act in substantial accord with the statute or order of the court under which they were appointed." ***State ex rel. Zemlicka v. Baker***, 243 Wis. 606, 608, 11 N.W.2d 364, 365 (1943). Indeed, it would be difficult, if not impossible, to apply these evidentiary rules to these proceeding because the commissioners need not know the rules and their application. We conclude that the fact that the legislature intended commissioners, lay persons from the community, to decide this matter means that the rules of evidence are not applicable to these proceedings.

Instead, the commissioners are charged with examining the highway and may hear testimony from interested parties and accept their proofs. Section 80.20, STATS. The veracity of such information is ensured by the requirement that the testimony given to the commissioners be taken only under oath. ***Id.*** We conclude that the statutes set forth sufficient procedural and evidentiary guidelines such that we cannot declare them unconstitutionally vague.

DUE PROCESS

The Robertses argue that their due process rights were violated because their property was taken in a proceeding in which they were not a party. Due process, they note, means that a person must have notice and an opportunity to be heard at a meaningful time and in a meaningful manner. ***Wilke v. City of Appleton***, 197 Wis.2d 717, 727, 541 N.W.2d 198, 202 (Ct. App. 1995).

The trial court's correspondence shows that the Robertses' attorney knew about the proceedings and had contacted the court in some fashion before June 10, 1994. On June 10, the court wrote to the Robertses' attorney and informed him that if his clients wished to be a part of the proceedings, they must file a notice of appearance. That same day, the court also sent an order to the parties and the Robertses' attorney which stated that a hearing to select the commissioners would be conducted on July 12. On July 6, the Robertses' attorney moved to intervene and stated that he would appear at the July 12 hearing. However, while his client appeared, he did not. The Robertses had notice of the proceedings.

With respect to the Robertses' ability to participate in the proceedings, the commissioners heard extensive testimony by the Robertses and the Town Board Chairman opposing the laying of the highway. Insofar as they attempted to offer evidence, they were permitted to do so. They argue that they were unfairly prohibited from intervening and properly representing their interests. The only thing that prevented them from moving to intervene was their attorney's failure to appear at the July 12 hearing to decide the matter. The Robertses never renewed the motion. Accordingly, they waived any right they might have had to intervene in the proceedings by their failure to follow through on their motion. *See* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 917 (Ct. App. 1987) (failure to renew severance motion waived that ground for error).

We have addressed each argument made by appellants, and we conclude that none are meritorious. We have not addressed questions about §§ 80.17-.21, STATS., which the Robertses have not raised. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). We affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 95-2151(C)

SUNDBY, J. (*concurring*). As the respondent notes, the statutes providing relief to an owner whose land is landlocked are "hoary." Section 80.13, STATS., was enacted by ch. 267, Laws of 1873. At that time, the procedures for laying out town highways were relatively unsophisticated. Also, land lying in towns was largely described by metes and bounds. Thus, it was not uncommon for a landowner to discover that his or her land did not have access to a public highway. Residents of towns looked to the town government to solve such problems. Therefore, the legislature prescribed procedures by which a landlocked owner could obtain access to a public highway by action of the town board.

Under § 80.13, STATS.,[4] a landlocked owner may present an affidavit to the town board averring that the owner is "shut out" from all public

---

[4] Section 80.13, STATS., provides in part:

> (1) When any person shall present to the supervisors of any town an affidavit satisfying them that that person is the owner or lessee of real estate (describing the same) within said town, and that the same is shut out from all public highways, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water, or that that person is the owner or lessee of real estate (describing the same) and of a private way or road leading from said real estate to a public highway but that such road or way is too narrow, giving its width, to afford that person reasonable access to and from said real estate to said public highway, that that person is unable to purchase from any of said persons the right-of-way over or through the same to a public highway, or that that person is unable to purchase from the owner or owners of land on either or both sides of that person's way or road land to make such way or road of sufficient width, or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased, the said supervisors shall appoint a time and place for hearing said matter, which hearing shall be after ten days and within thirty days of the receipt of said affidavit.
>
> (2) Notice of the time and place of meeting shall be served as required by s. 80.05 and published as a class 2 notice under ch. 985.
>
> (3) The supervisors shall meet at the appointed time and place and

highways and is unable to purchase a right-of-way from an adjacent landowner. If the town board denies the landowner's request that the board lay out a right-of-way to a public highway, the owner may appeal that order to the circuit judge for appointment of residents of the town to serve as commissioners to review the order or determination. Section 80.17, STATS. The commissioners so appointed are empowered to reverse the decision of the town board. Section 80.21, STATS.[5]; ***Berschens v. Town of Prairie du Sac***, 76 Wis.2d 115, 123, 250

(..continued)

> shall then in their discretion proceed to lay out such highway of not more than three nor less than two rods in width to such real estate, or shall add enough land to its width to make it not less than two nor more than three rods in width, and shall assess the damages to the owner or owners of the real estate over or through which the same shall be laid or from whom land shall be taken and the advantages to the applicant.
>
> (4) But the damages assessed by the supervisors shall in no case exceed the price stated in the affidavit of the applicant; upon laying out such highway, or in adding to the width of a former private way or road, they shall make and sign an order describing the same and file the same with the town clerk together with their award of damages, which order shall be recorded by said clerk; provided, that the amount assessed as advantages to the applicant shall be paid to the town treasurer before the order laying out such highway shall be filed.
>
> ....

[5] Section 80.21, STATS., provides:

> When an appeal has been taken from an order or determination refusing to lay out, widen, alter or discontinue a highway, and such determination shall be reversed, the commissioners shall make and file the order and agreements and awards, which in the judgment of the commissioners should have been made by the highway

N.W.2d 369, 374 (1977). On appeal from the town board's denial of the landowner's application, the commissioners review the necessity or propriety of laying out the road. ***Id***. at 123-24, 250 N.W.2d at 374. They may not, however, review legal questions or irregularities which might exist in the proceedings. ***Id***. Such claimed errors are to be reviewed by the circuit judge under § 80.17. The town board, in exercising its power to lay out a road, must strictly comply with the statutory scheme which confers that power. *See* ***id***. at 123, 250 N.W.2d at 374.

The appellants claim that the procedures for the laying out of an access road to a public highway for landlocked land are so vague as to be unconstitutional. They couple that with a claim that they were denied procedural due process because they were denied a fair opportunity to be heard. They term the "landlocked" procedure "a strange beast." I do not find the procedure vague. First, the owner of landlocked land seeking access to a public highway applies to the town board. Notice of the time and place of the meeting at which the town board will consider the landlocked owner's request must be served and published as required by § 80.05, STATS. The Roberts were served by registered mail as required by § 80.05(2)(a). They do not claim that they did not have an opportunity to appear at the hearing at which the town board considered the respondent's request. Further, they were not damaged by the result of that hearing because the town board denied respondent's request.

I agree, however, that the appeal procedure leaves a great deal to be desired. There is no provision under § 80.17, STATS., requiring that a copy of the notice of appeal be served on the affected landowners. Section 80.18, STATS., provides that the judge shall issue a notice specifying a time and place for the appointment of commissioners. However, there is no statutory requirement that this notice be served on the affected landowners. The statute provides that

(..continued)

authorities whose order or determination has been appealed from.

the notice shall be served on two or more of the supervisors at least six days before the time for appointing commissioners. Section 80.18 assumes that the judge could have reversed the determination of the town board, presumably upon procedural grounds, because the statutes make clear that the judge has no power to determine the merits.

I read the statutory procedure to provide for appointment of commissioners only after the circuit judge has heard any objections to the town board's order based upon procedural defects. However, the Roberts do not claim that the town board failed to follow the statutory procedures when it denied respondent's application. Their claim relates solely to the proceedings before the commissioners. Also, they do not object to the manner in which the commissioners were appointed under § 80.19(1), STATS. They do object, however, that they were not given an opportunity to be heard before the commissioners under § 80.20, STATS.[6] Their principal objection to the procedure followed is that they were not allowed to intervene in the proceedings before the commissioners. Intervention was unnecessary. The statute prescribes that the commissioners "shall hear the parties interested therein and any proofs offered by them." Plainly, the word "parties" does not refer to parties to a civil action or proceeding but to the "parties" interested in the laying out of the highway and the award of damages and the determination of the landlocked party's "advantages."

---

[6] Section 80.20, STATS., provides in part:

> Before proceeding to act under said warrant said commissioners shall be duly sworn justly and impartially to discharge their duties as such commissioners; they shall meet at the time and place mentioned in such warrant and proceed to examine such highway; *they shall hear the parties interested therein and any proofs offered by them* ....

(Emphasis added.)

The commissioners act upon the "warrant" of the trial judge directing the commissioners to review the order or determination appealed from and make return of their decision, not to the court, but to the municipal clerk. When the commissioners are sworn, they are to meet at the time and place mentioned in the judge's warrant and examine the highway and hear all parties interested therein. I find no procedure under these statutes for a petition to intervene. Any person appearing before the commissioners who can demonstrate an interest in the proceedings has the right to be heard.

The Roberts complain that the proceeding was an *ex parte* hearing. I agree that § 80.20, STATS., is defective in that it does not provide for notice to the persons who may be affected by the commissioners' order. However, in this case, the Roberts were aware of the hearing and did appear. I do not believe they can base a due process violation upon lack of notice and an opportunity to be heard when they in fact were given that opportunity. I suggest to the legislature, however, that §§ 80.13 through 80.24, STATS., be amended so that any property owner affected by the decision of the commissioners is given notice and an opportunity to be heard. Because the laying out of a public highway affects the public, I also suggest that notice be given by publication as is done under § 80.05(2)(c), STATS.

The Roberts complain that the statutes do not require that the commissioners find that a public purpose will be served by granting a landlocked owner's petition for the laying out of a public access road. The requirement that land be taken only for a public use and purpose is subsumed in Article I, § 13 of the Wisconsin Constitution. The Roberts had an opportunity to make their "public purpose" argument to the commissioners and to have their decision reviewed by the circuit court and this court. Their rights in this respect were amply protected.

For these reasons, I concur in our decision but I do not join our opinion because I do not believe it adequately addresses the contentions made by the appellants. Hopefully, this separate opinion may provide guidance to municipalities faced with landlocked owners' petitions in the future. It may also suggest to the legislature some improvements in the statutory proceedings to eliminate the ambiguities and deficiencies which presently exist.