STATE OF MINNESOTA
IN COURT OF APPEALS
A07-848

Richard Theusch, et al.,
Appellants,

vs.

Tad Berg, et al.,
Respondents.

Filed May 6, 2008
Affirmed in part, reversed in part, and remanded
Willis, Judge

Todd County District Court
File No. 77-C3-05-000492

Richard and Sharon Theusch, 22308 Gateway Drive, Osakis, MN 56360 (pro se appellants)

Gordon H. Hansmeier, Gregory J. Haupert, Rajkowski Hansmeier Ltd., 11 Seventh Avenue North, P.O. Box 1433, St. Cloud, MN 56302 (for respondents)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

In this appeal from a judgment in a bench trial, appellants argue that the district court erred by concluding that certain of their claims are time-barred and that the district court's computation of damages on another claim is not supported by the evidence and is

the result of an error of law. By notice of review, respondents challenge the district court's award of damages. We affirm in part, reverse in part, and remand.

FACTS

Pro se appellants Richard and Sharon Theusch own property in Todd County. Gateway Drive,[1] a township road, forms the northwestern boundary of the Theusches' property. In 1990, respondent Leslie Township held a public hearing on a resolution to record the township's easements for "township roads and road rights-of-way." The township mailed notices of the hearing to affected property owners, but the Theusches were not on the mailing list, and, thus, did not receive notice of the hearing. The resolution proposed establishing a right-of-way for Gateway Drive that extended 25 feet to either side of its centerline. The township passed the resolution in July 1990, and it was recorded with the Todd County Recorder in February 1991.

In the fall of 2003, Todd County, which contracts with the township for snowplowing on Gateway Drive, requested that the township clear "some of the brush and overhanging branches" along the edge of Gateway Drive because they were interfering with the county's snowplows. The township hired respondents Tad and Everett Berg to do the work that the county had requested, and on November 14, 2003, the Bergs removed approximately 135 trees from a portion of the Theusches' property

[1] At some point during the road's existence, Gateway Drive was known as Bambi Trail. Throughout the record and in the parties' briefs, the road is at times referred to as Gateway Drive and at other times as Bambi Trail. For convenience, we will uniformly use Gateway Drive.

that was within 25 feet of Gateway Drive's centerline. The township gave no notice to the Theusches of its plan to remove the trees.

On July 11, 2005, the Theusches filed a complaint against respondents, asserting claims of (1) trespass to their property, (2) the unlawful removal of trees, (3) a failure to give the required statutory notice of the removal of trees, and (4) compensation for a taking of their real property. Following a bench trial, the district court dismissed all of the Theusches' claims on the ground that they are time-barred. The Theusches moved for amended findings, and the district court issued amended and restated findings of fact, conclusions of law, and order for judgment, reaffirming its ruling that the Theusches' claims of trespass and compensation for a taking of their real property are time-barred but concluding that the Theusches were entitled to $5,600 on their claim for damages resulting from the township's failure to give them notice that it was going to cut down the trees, as required by Minn. Stat. § 160.22, subd. 5 (2006). This appeal follows.

D E C I S I O N

On appeal from a judgment following a bench trial, this court's scope of review is confined to determining whether the district court's findings are clearly erroneous and whether it erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990); *Foster v. Bergstrom*, 515 N.W.2d 581, 585 (Minn. App. 1994). This court will affirm the district court's findings if they are "reasonably supported by the evidence as a whole, or not manifestly contrary to the weight of the evidence." *Foster*, 515 N.W.2d at 585.

I. The district court did not err by concluding that certain of the Theusches' claims are time-barred.

The district court determined that Gateway Drive, which includes its supporting slopes and structures, had been established as a public road through statutory dedication under Minn. Stat. § 160.05, subd. 1 (2006). The Theusches argue that the district court erred in its application of the statute, claiming that (1) the district court's finding that there had been public use and maintenance of Gateway Drive for the required statutory period is clearly erroneous and (2) the district court's determination of the width of the road exceeds the portion actually used by the public and maintained by a road authority.

Under section 160.05, subdivision 1:

> When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

Dedication of a public road under this statutory provision requires (1) "use by the public" and (2) "maintenance by an appropriate government agency," both of which must be shown to have occurred "over a continuous period of at least six years." *Foster*, 515 N.W.2d at 585-86. The proponent of statutory dedication, here respondents, bears the burden of proof. *See Ravenna Twp. v. Grunseth*, 314 N.W.2d 214, 217 (Minn. 1981). And the standard of proof is a preponderance of the evidence. *Rixmann v. City of Prior Lake*, 723 N.W.2d 493, 496 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). The question of statutory dedication is one of fact, and this court will not reverse a district court's determination unless it is clearly erroneous. *Ravenna*, 314 N.W.2d at 217.

Further, this court views the evidence in the light most favorable to the district court's findings. *Id*.

A. The district court's finding that there has been public use and maintenance of Gateway Drive by a road authority for the required statutory period is not clearly erroneous.

The Theusches contend first that there was no evidence from which the district court could have made its finding that there has been public use and maintenance by a road authority of Gateway Drive for longer than the required statutory period of six continuous years. As an initial matter, we note that the Theusches conceded to the district court that there has been public use and maintenance of Gateway Drive "in excess of six consecutive years, since the early 1970's to the present time." In fact, the finding that the Theusches challenge is identical with their own proposed finding in their motion for amended findings of fact. The fact that the Theusches agreed to a finding that is identical with the district court's finding places them in a difficult position to argue that the finding is clearly erroneous. But we nevertheless will address the claim that they make on appeal.

Use by the public may be established if it is shown that even a comparatively small number of persons used the road for six years continuously. *Town of Belle Prairie v. Kliber*, 448 N.W.2d 375, 379 (Minn. App. 1989). The record shows that Sharon Theusch agreed at trial that the public has been "driving up and down [Gateway Drive] for years and years." Based on this evidence, we conclude that the district court's finding regarding public use for the required statutory period is not clearly erroneous.

We likewise conclude that the district court's finding regarding the maintenance requirement is not clearly erroneous. "To satisfy the maintenance requirement, the maintenance must be of a quality and character appropriate to an already existing public road." *Rixmann*, 723 N.W.2d at 496 (quotation omitted). The supreme court has explained that it is not necessary that every part of a road be worked on during the six years or even that some part of the road be worked on every year during the six years to establish statutory dedication. *Ravenna*, 314 N.W.2d at 217 (citing *Leeper v. Hampton Hills, Inc.*, 290 Minn. 143, 146, 187 N.W.2d 765, 767-68 (1971)). Rather, "it is sufficient if maintenance is performed when necessary." *Rixmann*, 723 N.W.2d at 496; *see also Kliber*, 448 N.W.2d at 379-80 (holding that evidence that the township graded the road annually and that the township had "bills allowed for roadwork" was sufficient to satisfy the maintenance requirement). Here, the evidence shows that the township (1) arranged to have Gateway Drive graded and snowplowed, (2) trimmed trees along the road, (3) performed annual road inspections, and (4) "put[] gravel down where appropriate," and that all of these activities occurred over a period of more than six years.

The Theusches claim that there is no evidence to show that the maintenance activities on Gateway Drive were of a type "similar to that for other public roads." But courts have generally found that activities substantially similar to those here, when performed on more than one or two occasions, are sufficient to satisfy the maintenance requirement. *Compare Leeper*, 290 Minn. at 147, 187 N.W.2d at 768 (concluding that evidence showing that during an eight-year period, a road had been plowed and graded and that weeds had been removed was sufficient), *and Kliber*, 448 N.W.2d at 379-80

(concluding that evidence showing that a township would "drag the road and level it off" once or twice a year was sufficient), *with Ravenna*, 314 N.W.2d at 218 (concluding that the maintenance requirement had not been satisfied when there had been only one instance of maintenance during a 24-year period and no evidence of snowplowing), *and Foster*, 515 N.W.2d at 586 (affirming a finding that the maintenance requirement had not been satisfied when the evidence showed that the city, although it regularly plowed snow off the road, had spread gravel and "laid blacktop" on the road only once).

B. The district court's determination of the width of Gateway Drive does not exceed the width of actual use.

The Theusches challenge the district court's determination of the width of Gateway Drive for purposes of statutory dedication, arguing that the district court "did not determine the dedication according to the land actually used." The width of a road dedicated under section 160.05 is limited to the width of its actual use. Minn. Stat. § 160.05, subd. 1. A dedication beyond the width of actual use is an unconstitutional taking because it does not provide the landowner with notice of the adverse use by the public, which would allow the landowner to take action to bar users from the property. *Barfnecht v. Town Bd. of Hollywood Twp.*, 304 Minn. 505, 508, 232 N.W.2d 420, 423 (1975). But the width is "not limited to that portion of the road actually traveled; it may include the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion." *Id.* at 509, 232 N.W.2d at 423.

The district court found that the dedication of Gateway Drive extended to the road's "supporting slopes and structure," which consists of 25 feet to either side of the

centerline, and that the "down slope area . . . was a supporting part of Gateway Drive." The Theusches contend that the evidence is insufficient to support the district court's finding because there was no "engineering or other competent testimony" that the slopes actually support the roadway. We disagree that expert testimony was necessary to support the district court's finding and find no error in the district court's determination of the width of Gateway Drive.

C. Section 160.05, subdivision 1, bars the Theusches' claims of trespass to land and an entitlement to compensation for a taking of their real property.

In applying Minn. Stat. § 160.05, subd. 1, the provision for statutory dedication of a public road, the Minnesota Supreme Court has explained:

> Section 160.05, subd. 1, provides no method by which government can *take* property. The statute, rather, provides a substitute for the common-law creation of highways by prescription or adverse use. During the running of the six-year statute, the township and the public are adverse users and, at any time during that period, the landowner may seek damages for trespass, he may bar users from the property, or he may force the township, if it wishes to continue to use his property, to condemn it and pay compensation. After six years have passed, however, he is estopped from asserting those rights. The township and the public acquire rights not because they take them, but because the landowner forfeits them by failing to act within the prescribed period.

Shinneman v. Arago Twp., 288 N.W.2d 239, 243 (Minn. 1980) (citation omitted); *see also Barfnecht*, 304 Minn. at 508, 232 N.W.2d at 423 ("The statute provides a statute of limitations, the running of which estops an owner from denying the existence of a public easement."). An affected property owner, therefore, "has no complaint if his request for

relief is held barred by long acquiescence and laches or by the running of a statute of limitations." *Shinneman*, 288 N.W.2d at 244.

Here, the record supports the district court's determination that there has been public use and maintenance of Gateway Drive by a road authority for longer than the required statutory period of six continuous years. The requirements for statutory dedication under section 160.05 have been satisfied and the required statutory period of six continuous years has passed. As a result, Gateway Drive, including its supporting slopes and structures, has been established as a public road. Accordingly, the Theusches are estopped from asserting a right to compensation for a taking, and the district court correctly concluded that their claim is barred by section 160.05. And because the removal of trees along Gateway Drive was limited to the property that had been established as a public road under section 160.05, the Theusches' trespass-to-land claim is likewise barred.[2]

II. The district court erred by concluding that the Theusches were entitled to damages for Leslie Township's violation of Minn. Stat. § 160.22 (2006).

The district court concluded that although the removal of trees from the Theusches' property occurred within the township's right-of-way for Gateway Drive,

[2] The Theusches also argue that the township's recording of Gateway Drive and the accompanying right-of-way in early 1991 is defective because the Theusches were not given notice of the public hearing that was held regarding the resolution to record the road and because the town-road map was recorded more than 90 days after it was passed. *See* Minn. Stat. § 164.35, subd. 4 (2006) (requiring that a township send notice of the hearing by mail to property owners who will be directly affected by the resolution if adopted and requiring that the township record the town-road map within 90 days after adopting the map). But whether the township failed to satisfy the requirements of section 164.35, subdivision 4, is irrelevant because Gateway Drive has been established as a public road by statutory dedication under section 160.05.

they are "entitled to damages in the amount of $5,600.00 for diminution in value of their property as a result of [the township's] failure to provide notice," as required by Minn. Stat. § 160.22. By notice of review, respondents challenge the district court's award of damages.

Section 160.22 provides, in pertinent part:

> Prior to ordering the cutting and removal of trees and hedges not acquired, the road authority shall fix a time and place of hearing . . . to consider the cutting and removal of such trees and hedges. The owners of the abutting land shall be given written notice of the hearing at least ten days prior to the date fixed therefor. At the hearing the abutting owners shall be given the opportunity to be heard.
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> Trees, hedges and other shrubs or plants within the limits of any town road and not acquired by the town . . . may be cut and removed . . . when they interfere with the maintenance . . . of the road or with the safety and convenience of the public; provided that the town gives written notice to the abutting owner of its intention to cut and remove 14 days before taking such action and the abutting owner does not request a hearing during that period. The notice shall plainly advise the abutting owner of the right to a hearing.

Minn. Stat. § 160.22, subds. 5, 10 (2006). Respondents concede that the township's failure to give the Theusches notice violated section 160.22. They contend, however, that there is no private cause of action for such a violation and that the district court erred by awarding the Theusches damages. This is a question of statutory interpretation reviewed de novo. *Hibbing Educ. Ass'n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985).

A statute does not give rise to a private cause of action unless "the language of the statue is explicit or it can be determined by clear implication." *Valtakis v. Putnam*, 504 N.W.2d 264, 266 (Minn. App. 1993). Principles of judicial restraint prevent courts from creating new statutory causes of action that do not exist at common law when the legislature has not provided for a private cause of action either by the express terms of a statute or by clear implication. *Becker v. Mayo Found.*, 737 N.W.2d 200, 207 (Minn. 2007). The express terms of section 160.22 make no provision for a private cause of action; therefore, the question is whether one is clearly implied.

In deciding whether a private cause of action can be clearly implied from a statute, Minnesota courts consider three factors: (1) whether the plaintiff belongs to the class for whose benefit the statute was enacted, (2) whether the legislature indicated an intent to create or deny a remedy, and (3) whether implying a remedy would be consistent with the underlying purpose of the legislative enactment. *Flour Exch. Bldg. Corp. v. State*, 524 N.W.2d 496, 499 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995).

The statute at issue requires that a township give notice to the owners of property abutting the road and an opportunity to be heard before the township removes trees from the property. Minn. Stat. § 160.22, subds. 5, 10. This notice requirement shows that the statute was enacted for the benefit of owners of abutting property. Thus, the Theusches, as owners of property that abuts Gateway Drive, clearly belong to the class for whose benefit the statute was enacted. And implying a cause of action would be consistent with the underlying purpose of section 160.22. The Minnesota Supreme Court, in applying a statute that was a predecessor to section 160.22—Minn. Gen. Stat. § 2609 (1923)—

commented that the statute "is in recognition of the abutting landowner's ownership to the center of the street and his right to timber growing thereon." *Powell v. Carlos Twp.*, 177 Minn. 372, 374, 225 N.W. 296, 297 (1929). But we conclude that because a separate statutory provision, Minn. Stat. § 561.04 (2006), expressly provides a private cause of action for the conduct that the Theusches complain of, the legislature did not intend to create a private cause of action for a violation of section 160.22. *See Minn. Life & Health Ins. Guar. Ass'n v. Dep't of Commerce*, 400 N.W.2d 769, 774 (Minn. App. 1987) (noting that legislative intent may also be ascertained by considering other statutes concerning the same subject matter).

Minn. Stat. § 561.04 provides:

> Whoever without lawful authority cuts down or carries off any . . . tree . . . on the land of another person, or in the street or highway in front of any person's house . . . is liable in a civil action to the owner of such land . . . for treble the amount of damages which may be assessed therefor, unless upon the trial it appears that the trespass was casual or involuntary . . . .

When the township failed to provide notice to the Theusches before it cut down the trees, it violated section 160.22. Consequently, the township was "without lawful authority" to cut down the trees. Because section 561.04 expressly provides for a private cause of action in such a circumstance, there is no need to imply a private cause of action from section 160.22. We therefore reverse the district court's decision that the Theusches were entitled to damages for the violation of section 160.22.

The Theusches also argue that the district court's award of $5,600 in damages (1) is the result of an error of law because it failed to include compensation for a taking of

their real property and (2) is not sustained by the evidence. We have already determined that the Theusches's claim that they are entitled to compensation for a taking is barred by section 160.05. And because the district court improperly based its award of damages on the violation of section 160.22, we remand for further proceedings to consider the Theusches' claim under section 561.04.

Affirmed in part, reversed in part, and remanded.