2012 IL App (2d) 111318-U
No. 2-11-1318
Order filed August 6, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GLENN E. DAVIS CONSTRUCTION COMPANY, INC., NORTH STAR TRUST COMPANY under the authority of Harris Bank Trust No. 7155, GLENN E. DAVIS, and PAT DAVIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellees,	)	
v.	)	No. 10-MR-982
THE VILLAGE OF LAKE ZURICH,	)	Honorable Jorge L. Ortiz,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The trial court's grant of summary judgment in favor of plaintiffs was improper where there were questions of material fact.

¶ 1 Defendant, The Village of Lake Zurich, appeals the trial court order that granted summary judgment in favor of plaintiffs, Glenn E. Davis Construction Company, Inc., North Start Trust Company under the authority of Harris Bank Trust No. 7155, Glenn E. Davis, and Pat Davis. At issue in this case is whether the Village was required to accept dedication of a certain wetland area

in an annexation and development agreement related to a subdivision that plaintiffs were developing, known as the Westberry subdivision. Defendant argues that the trial court exceeded its authority when it granted plaintiffs' motion for summary judgment based on its conclusion that the parties intended that the Village have an easement over the disputed wetland area. We reverse and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 On September 27, 2010, plaintiffs filed a complaint for declaratory relief and specific performance pursuant to section 701 of the Code of Civil Procedure (735 ILCS 5/2-701 (West 2010)), alleging the following facts. On September 18, 2000, the Village adopted an ordinance approving the annexation of property owned by plaintiffs into the Village. The property consisted of 15 residential lots and an area marked on the proposed plat as "Natural Resources Protection Area" (the "wetland area"). The residential lots were developed and sold, and the wetland area remained in a land trust. According to the complaint, the annexation agreement provided that the wetland area was to be dedicated to the Village, but the Village refused to accept the dedication. Plaintiffs refer to section 9, paragraph E(2) of the annexation agreement in support of its position. Section 9, paragraph E(2) provides:

> "Dedication and Acceptance of Specified Improvements. The Developer shall dedicate to the Village the Improvements set forth in the schedule attached hereto as Exhibit J. Neither the execution of this Agreement nor the approval or recording of the Final Plat shall constitute an acceptance by the Village of any of the Improvements, including without limitation any streets or other public facilities that are depicted as 'dedicated" on the Final Plat. No Improvement shall be accepted by the Village except by a resolution duly adopted

by the President and Board of Trustees of the Village specifying with particularity the Improvement or Improvements being accepted."

¶ 4 The Index of Exhibits to the agreement lists Exhibit J as "Improvements to be Dedicated to the Village" and Exhibit I-2 as "Improvements to be Maintained by Owner." However, Exhibit J itself is titled "Improvements To Be Maintained By The Owner And Standards For Maintenance," whereas Exhibit I-2 is titled "Improvements To Be Dedicated To The Village." Exhibit J lists the following items:

"1. Sanitary Sewer Services

2. Water Main Services

3. Detention Pond Facility

4. Wetland Area

5. Field Tile"

¶ 5 The Village filed a motion for summary judgment on February 28, 2011, arguing that the annexation agreement does not refer to a "Natural Resources Protection Area," and that the Village never accepted any dedication to a "Natural Resources Protection Area." It rejected plaintiffs' argument that the caption title of Exhibit J was a mistake, and that the Village had accepted dedication of all the items in Exhibit I-2. The mistake, the Village argues, was in the reference in section 9(E)(2) and 9(E)(3). The Village also pointed to a section of the final plat that it argued showed that the Village did not have a duty or obligation to the wetland area. That portion of the final plat provided that the "Village of Lake Zurich shall have, and the Declarant hereby grants, the right, but not the duty or obligation to enter onto and within the Protected Property to inspect, maintain, alter, or otherwise act upon the Protected Property in any manner as previously stated."

The Village also attached a November 6, 2006, letter sent from Ed Lebbos, the Assistant Village Engineer, to Glenn Davis. In that letter, Lebbos stated that his letter served as permission "to remove all the dead trees within the Isolated Wetland on your property. Again, we are requesting that the dead trees north of the main entrance be removed."

¶ 6 The Village attached an affidavit from David Heyden, the Public Works Director for the Village. Heyden stated that the Village accepted the following items from plaintiffs: roadway improvements, stormwater conveyance system, sidewalk improvements, water mains, sanitary sewer mains, and parkway landscaping and parkway trees adjacent to the roadways. The Village did not accept sanitary sewer services or water services, which were the pipes leading from the sewer main or water main to a residence or commercial building. Heyden also stated that the Village did not accept any wetlands, field tile, or retention area within the subdivision. He stated that when property was dedicated in fee simple title to the Village, the final plat would contain specific and explicit language citing the property to be dedicated in fee simple title to the Village. The final plat, to Heyden's knowledge, contained no such language.

¶ 7 Plaintiffs filed a motion for summary judgment on May 13, 2011. In the motion, they argued that there was an area marked on the proposed plat as "Natural Resources Protection Area/Wetlands Conservation Easement/Storm Water Detention Easement." That area of the plat contained the detention pond facility, wetland area, and field tile, which are listed in Exhibit J of the annexation agreement. Thus, plaintiffs argue that the annexation agreement is unambiguous in its intention that these items were to be dedicated to and accepted by the Village. Plaintiffs attached a copy of the plat of the Westberry Subdivision to their motion. Additionally, an affidavit from Anthony Mancini, a principal in Nichols Grove Properties, the original developer of the Westberry Subdivision, provided

that the Village presented the original and subsequent drafts of the annexation agreement. Mancini stated that he recalled that the Village required that upon completion of the subdivision, the developer dedicate the wetlands and storm water detention area to the Village. He recalled that the Village would own that area and be required to maintain it, and that the Village was going to request subdivision owners to contribute towards the maintenance of the area.

¶ 8 On November 30, 2011, the trial court issued its written memorandum, finding that the Village must accept the dedication of an easement in the wetland area. The trial court described the plat, which depicted the wetland area as the "Natural Resources Protection Area." Underneath that label, the plat shows half the area as the "wetlands conservation easement (nonbuildable)" and the other half as the "storm water detention easement." On the bottom of the plat, the Natural Resources Protection Area is described in a paragraph:

> "DECLARATION OF NATURAL RESOURCES PROTECTION AREA
>
> The Declarant hereby declares and dedicates the Protected Property as a natural resources protection area for the establishment of wetlands and other natural resources and as drainage and stormwater detention areas. The Protected Property shall, at all times, remain in a natural condition to protect and preserve its natural function as general habitat for aquatic and land species and as water purification and recharge areas. No building or other structure intended for permanent use shall be constructed or maintained for any purpose within the Protected Property except for stormwater management purposes with the grading, clearing, and excavation approved in writing in advance by the Village of Lake Zurich for drainage control purposes. No dumping, mowing, filling, excavating, or transferring of any earth material or yard clippings shall be permitted with [*sic*] the Protected Property. The Village

of Lake Zurich shall have, and the Declarant hereby grants, the right, but not the duty or obligation to enter onto and within the Protected Property to inspect, maintain, alter, or otherwise act upon the Protected Property in any manner as previously stated."

¶ 9 The trial court also noted that the plat reflects a "20 FT. PUBLIC UTILITY AND DRAINAGE EASEMENT" that runs along the perimeter of the subdivision. The easement is interrupted on the north side by the wetland area, and there is no drainage easement shown within the Natural Resources Protected Area. The plat also contains several paragraphs regarding a stormwater and drainage restrictive covenant. The trial court also described the relevant parts of the annexation agreement.

¶ 10 The trial court then stated that the Village's arguments pertaining to statutory dedication were misplaced because plaintiffs argued only that a common-law dedication was at issue. The court then considered whether the annexation agreement was ambiguous. It determined that the agreement was a multi-page document that by its terms incorporated 13 exhibits, including a proposed plat outlining the plan for the subdivision. It acknowledged that the annexation agreement did not reference the Natural Resources Protection Area, but it did refer to "improvements." It further acknowledged that some of the provisions appeared to be in conflict. However, regarding the issue of dedication, it concluded that it was clear that the Declaration concerning the Natural Resources Protected Area was not intended to result in a statutory dedication, but rather a common-law dedication, which conveys an easement rather than a fee simple title. The trial court, considering the annexation agreement in its entirety, determined that the Village was required to accept the common-law dedication of the Natural Resources Protection Area so long as the area had been completed according to the plans for the subdivision. The trial court, therefore, granted plaintiffs' motion for summary judgment,

ordering the Village to take the proper actions to accept dedication of the wetland area. It also denied the Village's motion for summary judgment. The Village timely appealed.

¶ 11 II. ANALYSIS

¶ 12 We review a grant of summary judgment *de novo*. *Bank of America National Ass'n v. Bassman FBT, LLC*, 2012 IL App (2d) 110729, ¶ 3. Summary judgment should be granted only if the moving party's right to prevail is clear and free from doubt. *Id.* A grant of summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* A material fact is one that might affect the outcome of a case. *Id.* When considering a motion for summary judgment, a court must construe the record strictly against the movant and liberally in favor of the opposing party. *Id.* All reasonable inferences are to be drawn in favor of the opponent of the motion. *Id.*

¶ 13 In interpreting an annexation agreement, the basic rules of contract interpretation apply. *The Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676, ¶ 39. The primary objective in contract construction is to give effect to the intent of the parties, and a court will first look to the language of the contract itself to determine the parties' intent. *Id.* A contract must be construed as a whole, viewing each provision in light of the other provisions. *Id.* The parties' intent is not ascertained by viewing a clause or provision in isolation of the other provisions. *Id.* The court will also give effect to every provision when possible and not construe a contract in a way that would nullify or render provisions meaningless. *Id.* Furthermore, if the words of the contract are clear and unambiguous, they must be given their plain, ordinary, and popularly understood meaning. *Id.* A

contract is not ambiguous merely because the parties disagree on its meaning; ambiguity exists where language is obscure in meaning through indefiniteness of expression. *Id.*

¶ 14 Here, plaintiffs argue the annexation agreement requires the Village to accept dedication of the wetland area, or the Natural Resources Protection Area. The Village argues that the agreement makes no reference to such a dedication and thus, it cannot be required to accept the land. The Village further argues that the court exceeded its jurisdiction by declaring that the parties intended that an easement be accepted by it when plaintiffs only argued that it was an intended dedication of the land. We disagree with the Village's arguments.

¶ 15 We first address whether the trial court exceeded its jurisdiction in deciding that an easement was intended by the agreement. Contrary to the Village's argument that plaintiffs never argued that the Village failed to accept an easement, the trial court's reasoning stemmed from the fact that plaintiffs sought enforcement of a common-law dedication, not a statutory dedication. Plaintiffs' complaint did not allege a statutory dedication. A statutory dedication occurs when: (1) the property owner files or records a plat which has the portions of the premises marked as donated or granted to the public, and (2) the public entity accepts the dedication. *Bigelow v. City of Rolling Meadows*, 372 Ill. App. 3d 60, 64 (2007). A statutory dedication must fully comply with the Plat Act (765 ILCS 205/1 *et seq* (West 2010)), clearly indicating on the plat a donation of the real estate to the public entity. *Id.* at 64-5. When the requirements of a statutory dedication are not met, the facts may still reveal a common-law dedication, in which case the fee remains in the dedicator, subject to an easement for the benefit of the public. *Id.* at 67. For a common-law dedication to be effective, there must be: (1) an intention to dedicate the property for public use; (2) acceptance by the public; and (3) unequivocal evidence of the first two elements. *Id.* The intent to dedicate may be manifested

by a formal dedication or by acts of the donor from which the intent may be fairly presumed as to equitably estop the donor from denying a donative intent. *Id.*

¶ 16 The trial court in this case did not randomly assign an "easement" over the wetland area, but rather considered both statutory and common-law dedications and determined that the annexation agreement satisfied the requirements of a common-law dedication, which involves an easement instead of a fee simple transfer. Thus, we reject the Village's argument that there was no controversy before the trial court regarding an easement as the Village disregards the context in which the easement was discussed.

¶ 17 Moving on, the Village argues that the requirements for a common-law dedication were not met. Specifically, the Village argues that there was no evidence supporting an unequivocal intention to dedicate the property for public use and that the protected area was intended not to be used by the public at all. Plaintiffs obviously intended to dedicate the land or they would not have filed a lawsuit to force acceptance by the Village. Furthermore, the plat was labeled and marked that the land was intended to be preserved as a wetland area and that the Village would have access to the area. The true issue in this case is whether the Village was required to accept dedication because of the annexation agreement.

¶ 18 Acceptance may be proved by evidence of: (1) direct municipal action, such as filing a suit to establish dedication; (2) the municipality's possession or maintenance of the property; or (3) public use for a substantial time. *General Auto Service Station v. Maniatis*, 328 Ill. App. 3d 537, 547 (2002). However, proof of acceptance depends on the facts of each case. *Id.* Where a dedication is beneficial or greatly convenient or necessary to the public, an acceptance of such dedication may be implied from slight circumstances. *Id.* A municipality is not obligated to accept

property simply because a private party has attempted to dedicate that property. *First Illinois Bank v. Valentine*, 250 Ill. App. 3d 1080, 1092 (1993).

¶ 19 In this case, the annexation agreement and the preliminary plat clearly indicate that the parties intended for the Village to have an easement over the wetland area and that the area be protected from development. The protection of wetlands is an obvious public benefit as such areas are rare and important to the ecological system. See 20 ILCS 830/1 *et seq.* (West 2010) (providing State Wetland Mitigation Policy, including that wetlands shall be protected through easements or fee simple transfers to either a public conservation agency or private conservation agency which will protect and manage the area); 525 ILCS 33/1 *et seq.* (West 2010) (citing facts that wetlands are critical habitat for fish and wildlife, in need of protection, and becoming scarcer as reasons for the Department of Natural Resources's open land policy of acquiring real property or conservation easements for natural areas). However, just because the public would benefit from the establishment and maintenance of a wetland area does not necessarily mean the Village was required to accept the dedication of that land.

¶ 20 The Village's signature on the agreement or acceptance of the plat does not constitute acceptance of the wetland area, and whether the Village accepted the dedication involves a question of fact for a fact-finder to decide. See *Valentine*, 250 Ill. App. 3d at 1092 (stating tha thte mere filing of a plat did not amount to a completed common-law dedication); *Stevenson v. Cosgrove*, 38 Ill. App. 3d 672, 677 (1976) (considering various facts, such as maintenance of road, signing of plat, and other acts, to determine whether township accepted dedication of a subdivision roadway, which was a question of fact for jury to decide). In *Valentine*, the matter of whether the township accepted dedication of a road went to trial in the form of the plaintiffs seeking quiet title, and the trial court

concluded that the township did not prove by unequivocal evidence that it timely accepted the intended dedication. *Id.* at 1092. The township had acknowledged that it did not wish to assume the burden of improving the property in question and that it normally would not accept property until the developer had completed improvements. *Id.* Further, from the time of the plat until the lawsuit, the unimproved road had remained unimproved, the township performed no maintenance on the roadway, and there was no evidence that the public used the roadway. *Id.* at 1093. Given the lack of any maintenance, improvement, or public use of the property for over a decade, the appellate court affirmed the trial court's finding that the township failed to prove it accepted the dedication of the roadway. *Id.*

¶ 21 Similarly, in this case, there is no evidence of whether the wetland was developed according to the terms of the original agreement. There is also no evidence as to who was maintaining the wetland area since its development. The Village contends that the letter it attached to its motion, addressed to Glenn Davis and advising him to remove the dead trees located in the wetland, establishes that the Village did not accept the dedication. The response letter from Davis indicates that plaintiffs were required to avoid the wetland area during development of the property and now removing the dead trees would disturb the wetland habitat. A material fact appears to exist as to whether the wetland was developed according to the agreement and which party has been maintaining the wetland area since its development. Whether the Village has accepted an easement over the property by way of the common-law dedication is one issue of fact for a jury to decide. Although unclear from the complaint and the record, it appears from the letters regarding tree removal that the parties' dispute involves whether the Village had a duty to maintain the wetland. However, neither the annexation agreement nor the easement language on the plat contained

language that the Village was required to maintain the wetland and drainage systems. While we reverse for determination of acceptance, we note that the duty to maintain issue may arise, and may or may not be resolved as a matter of law based on the language of the plat; it will depend on whether a question of material fact is presented.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we reverse the judgment of the Lake County circuit court and remand the cause for further proceedings.

¶ 24 Reversed and remanded.