[Cite as *Independence v. Flannery*, 2006-Ohio-1239.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85463

CITY OF INDEPENDENCE Plaintiff-Appellee vs. MARY ANN FLANNERY, et al. Defendants-Appellants	:	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION:	March 16, 2006
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CV-357154
JUDGMENT:	REVERSED AND REMANDED
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiff-Appellee City of Independence:	MAJEED G. MAKHLOUF GREGORY J. O'BRIEN Taft, Stettinius & Hollister 3500 BP Tower 200 Public Square Cleveland, Ohio 44114
For Appellee Michael and Michelle Suhy:	DONALD P. MCFADDEN McFadden & Associates Co. 1370 Ontario Street Suite 1700 Cleveland Ohio 44113-1726
For Appellee Cuyahoga County	WILLIAM D. MASON

Auditor:

Cuyahoga County Prosecutor
TIMOTHY J. KOLLIN, Assistant
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Broadview Heights, Ohio 44147

ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant-appellant Mary Ann Flannery ("appellant") appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand to the lower court.

I.

{¶ 2} This is a consolidated case involving the zoning of residential property located in Independence, Ohio. According to the case, consolidated Case Nos. 346605 and 357154 involve the property located at 6430 Evergreen Drive, Independence, Ohio, owned since 1958 by Paul Flannery. This property was sold to Michael Suhy on March 6, 1998.

{¶ 3} Case No. 346605 was brought by appellant on January 8, 1998 pursuant to a R.C. 2506 challenge. This case was an administrative appeal in Cuyahoga County Common Pleas Court, challenging the city's board of zoning appeals' denial of variances to permit a parcel split.

{¶ 4} Case No. 357154 was brought by the City of Independence ("city") on June 9, 1998. The city's action was filed against appellant, Mary Ann Flannery, appellees, Michael and Michelle Suhy (the "Suhys"), and the Cuyahoga County auditor and recorder (collectively the "county"). The city challenged the county's assignment of a second permanent parcel number dividing appellant's parcel in the city without the city's approval. The city also challenged appellant's conveyance of a portion of her parcel to the Suhys. This case was later consolidated with Case No. 346605.

{¶ 5} On March 6, 1998, after the city specifically denied the variances, and during the pendency of the appeal in Case No. 346605, appellant sold a portion of the property to Suhy. On June 9, 1998, the city filed its declaratory judgment action, Case No. 357154, naming appellant, County Auditor Frank Russo, County Recorder Patrick O'Malley and the Suhys as defendants. In Case No. 357154, the city challenged the sale by appellant of only a portion of their land to Suhy.

{¶ 6} The Suhys filed a counterclaim against the city and a cross-claim against appellant. On December 7, 2000, the trial court held that in Case No. 346605, the city's board of zoning appeals properly denied appellant's request for a lot split of the property. This decision was appealed by appellant on September 23, 2002. This court dismissed the appeal, stating that because the two cases have overlapping issues, the interests of justice would

best be served by returning these intertwining issues to the trial court to make a full and final determination as to all of the merits of this matter.

{¶ 7} The case went back to the lower court, and it issued its opinion on September 29, 2004. The lower court granted plaintiff's motion for summary judgment, declared that the property has one permanent parcel number, and ordered the Suhys to pay an additional $12,000 plus taxes to appellant. Appellant now appeals from the trial court's opinion.

{¶ 8} According to the facts, Paul and Elizabeth Flannery (now deceased) acquired title to two parcels of land on Evergreen Drive in Independence from Joseph and Nora Meissner on October 28, 1958. The Meissners' deed conveyed two sublot parcels to Flannery.[1] Paul Flannery ("Flannery") owned the property since 1958. When Paul passed away, appellant Mary Ann Flannery became his executrix.

{¶ 9} On October 7, 1958, three weeks before purchasing the property, Flannery requested that the city zoning commission divide the property into two separate lots. The commission denied Flannery's request to split the property. After his death on August 5, 1997, Flannery's heirs requested the lot be split. Flannery's heirs wanted the city commission to subdivide the

[1]See Case No. 346605 record at tab 16.

property into two smaller, nonconforming parcels so they could sell each lot separately.

{¶ 10} The Flannery lot sits between the Bryll home and lot and the Flannery home and lot (562-04-043). The adjacent Bryll lot is 79 feet wide and 175 feet long. The Flannery lot (562-04-043) is 75 feet wide and 175 feet long. Flannery sought a lot width variance (75 feet shown, 100 feet is required) and a lot depth variance (175 feet shown, 200 feet required).

II.

{¶ 11} Appellant's first assignment of error states the following: "The trial court's declaration that two separately described parcels of real estate, with two different permanent parcel numbers, constitute one property is contrary to the weight of the evidence and erroneous as a matter of law."

{¶ 12} Appellant's second assignment of error states the following: "The trial court's declaration that the auditor's assignment of a permanent parcel number to a separately described legal parcel, previously recognized as such by the City of Independence, was contrary to law and beyond the scope of the auditor's authority, is contrary to the weight of the evidence and erroneous as a matter of law."

{¶ 13} Appellant's third assignment of error states the following: "The trial court's declaration that Flannery's conveyance to Suhy consisted of the entire property, instead of the

parcel for which Flannery and Suhy actually contracted, is contrary to the weight of the evidence and erroneous as a matter of law."

{¶ 14} Appellant's fourth assignment of error states the following: "The trial court's totally arbitrary and capricious assignment of a market value of $12,000.00 for land transferred by judicial fiat in this case, without any evidence of value in the record, constitutes an egregious abuse of discretion and reversible error."

{¶ 15} Appellant's fifth assignment of error states the following: "The trial court erroneously granted summary judgment in favor of the city when the material factual issue as to whether the city recognized the two separate Flannery parcels when is [sic] approved the Onders/Flannery lot split and consolidation plat is in genuine dipute [sic] in this case."

III.

{¶ 16} Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come but to one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 17} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356.

{¶ 18} In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Medina, Ltd. of Texas* (1991), 59 Ohio St.3d 108. Under *Dresher*, " *** the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." Id. at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 19} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The

reviewing court evaluates the record *** in a light most favorable to the nonmoving party ***."

{¶ 20} It is with the above standards in mind that we now address appellant's most credible arguments. Because of the disposition of her fifth and fourth assignments of error, we shall address them first. Appellant argues in her fifth assignment of error that the trial court erroneously granted summary judgment. We find merit in her argument.

{¶ 21} In the case at bar, the question as to whether the city acknowledged or approved the existence of two Flannery parcels is the pivotal factual issue. The county engineer's witness testified that the city's approval of the Onders/Flannery lot split and consolidation plat constituted approval or acknowledgment of the parcels pursuant to R.C. 711.[2] The city submitted an affidavit to the contrary from the city's paid engineer as a response.

{¶ 22} The conflicting testimony between the county's witness and the city's witness, as well as additional conflicting evidence, demonstrates substantial dispute as to genuine issues of material fact in the case at bar. There is a genuine issue of material fact as to whether or not the city's approval of the Onders/Flannery plat constituted acknowledgment of Flannery's two separate and distinct sublots. There are genuine factual issues in dispute in

[2]Snezek depo. at 45-48.

this case, and appellant is entitled to a jury's determination as to the value of the land taken by the lower court.

{¶ 23} Appellant's fifth assignment of error is sustained.

{¶ 24} Appellant argues in her fourth assignment of error that the court erred when it arbitrarily assigned a market value of $12,000 to the property in question. We find appellant's argument to be persuasive.

{¶ 25} The lower court did not provide evidence regarding its rationale as to the fair market valuation of the property transferred by order of the trial court. The trial court failed to provide any finding as to the value of the property, cited no evidence as to the value of the property, and gave no explanation as to how it concluded that $12,000 reflects the fair market value of the parcel that the court took from Flannery and gave to Suhy. The trial court's setting of an arbitrary value of $12,000 as to the lot constitutes an abuse of discretion.

{¶ 26} We find the trial court's assignment of a market value of $12,000 for the land transferred in the case at bar to constitute an abuse of discretion.

{¶ 27} Accordingly, appellant's fourth assignment of error is sustained.

Remaining errors are moot. App.R. 12(A)(1)(c).

Judgment reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellees costs herein.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
ANTHONY O. CALABRESE, JR.
JUDGE

MARY EILEEN KILBANE, J., CONCURS;

DIANE KARPINSKI, P.J., CONCURS IN PART AND DISSENTS IN PART. (SEE SEPARATE CONCURRING AND DISSENTING OPINION.)

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85463

CITY OF INDEPENDENCE, ET AL.	:	
	:	
	:	CONCURRING
Plaintiffs-appellees	:	
	:	AND
	:	
	:	DISSENTING
v.	:	
	:	OPINION
MARY ANN FLANNERY, ET AL.	:	
	:	
	:	
Defendants-appellants	:	

DATE: March 16, 2006

KARPINSKI, J., CONCURRING AND DISSENTING:

{¶ 28} I respectfully dissent from the majority on its disposition of appellant's fifth assignment of error.

{¶ 29} The majority and appellant acknowledge that the City's engineer, Donald Elewski, opined that the City never approved a lot split for appellant in 1996. In response to Elewski's testimony, appellant argues that

> "*** the question as to whether the City acknowledged or approved the existence of two Flannery parcels is the pivotal factual issue. The County engineer's

> witness testified under oath that the City's approval of the Onders/Flannery lot split and consolidation plat in 1996 constituted approval or acknowledgment of the parcels pursuant to R.C. 711. In response, the City submitted a self-serving affidavit from the City's paid engineer to the contrary. (Footnote omitted).[1]

Appellant's brief at 18. Reciting this paragraph from appellant's brief almost verbatim, the majority agrees with appellant and thus finds a genuine issue of material fact. I disagree.

{¶ 30} Both appellant and the majority have misread Snezak's deposition testimony on the issue of whether Flannery acquired a lot split, because they have ignored the larger context of his testimony on the question. Snezak testified that in 1996 the Onders obtained a lot split, in fact, three sublot splits. Flannery, on the other hand, acquired only a consolidation, Snezak said. Snezak added, moreover, regardless of what either Flannery or Onders may have thought, there can be no lot split without the City's approval. According to Snezak, the City approved a lot split only for Onders, not Flannery.

{¶ 31} Considering Snezak's testimony in context, I find nothing inconsistent between his expert opinion and that of Elewski who stated that the City never approved a lot split for Flannery.

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[1]In a footnote on page 18 of her appellate brief, appellant cites to the deposition of Cuyahoga County Engineer, Thomas Snezak. Snezak Deposition, at 45-48.

Accordingly, there is no conflicting evidence as to what Flannery had in July 1996 and thus no grounds upon which to reverse the trial court on this issue. I would, therefore, affirm the trial court on this issue and sustain appellant's fifth assignment of error.

{¶ 32} As to the valuation issue described in appellant's fourth assignment of error, I concur with the majority in its judgment, but believe there are more issues that need analysis.

{¶ 33} The trial court did not hold a hearing to determine what the fair market value of that part of the parcel for which the trial court ordered supplemental payment. Without an evidentiary hearing on the parcel's fair market value, the trial court's determination that the Suhys should pay an additional $12,000 to defendant is arbitrary. That the $12,000 figure is arbitrary is underscored by the Suhys' own stated belief that the total parcel is worth an additional $30,000. Suhy Memorandum in Response to Declaratory Judgment, at 1. The City, on the other hand, argues that the Suhys should not have to pay anything more for the subject parcel beyond their original purchase price of $155,000.00, because there was never a lot split.

{¶ 34} Regardless of what the Suhys or the City may believe about the value of the parcel, there is no evidence demonstrating what the parcel's fair market value was when the Suhys purchased their home. Because the court did not hold a hearing and the

Suhys' own valuation of the property exceeds what the court ordered them to pay, there remain genuine issues of material fact on the question of what the parcel is worth. I agree therefore with the majority's analysis up to this point.

{¶ 35} Additionally, there are broad questions of equity to consider. As stated by this court in *Blackwell v. International Union, U.A.W.* (1984), 21 Ohio App.3d 110, 487 N.E.2d 334:

> When the rights of parties are clearly defined and established by law, the courts usually apply the maxim "equity follows the law." Cf. *Assn. of Cuyahoga Cty. Teachers of Trainable Retarded v. Cuyahoga Cty. Bd. of Mental Retardation* (1983), 6 Ohio St.3d 190, 192. However, where the rights of the parties are not so clearly delineated, the courts will apply broad equitable principles of fairness. Such considerations determine the outcome of those cases. Id. Thus, the trial court had broad discretion to fashion a remedy for the particular circumstances of this case. Cf. *Chapman v. Sheridan-Wyoming Coal Co.* (1950), 338 U.S. 621.

Id., at 112.

{¶ 36} In the case at bar, I agree that the trial court can fashion an appropriate and equitable remedy. However, there is a threshold question of whether the Suhys have to pay anything more. According to the City, the Suhys have already paid what they had to for the entire parcel. The trial court has a number of equitable remedies available to it in deciding whether the Suhys should pay any additional monies to Flannery. See, *Stewart v. Gordon* (1899), 60 Ohio St. 170, 53 N.E. 797, syllabus; *Starman,*

Inc. v. Jaftak Realty Inv., Ltd., Ashland App. No. 04-COA-079, 2006-Ohio-779, ¶29.

{¶ 37} In choosing between equitable remedies, the trial court must consider the original sale transaction between Flannery and the Suhys and ask whether the Suhys were good faith purchasers without notice. It must inquire as to whether the parties were operating under a mutual mistake as to exactly what land Flannery could convey to the Suhys. Finally there is the question of Flannery's intent and knowledge when Flannery obtained from the county the lot split, which we have deemed void. See, *Safranek v. Safranek*, Cuyahoga App. No. 80413, 2002-Ohio-5066, ¶19-¶20. The answers to these and other questions will inevitably impact the equitable remedy the trial court fashions in this case. Because of all these competing issues, I would reverse the trial court's judgment which ordered the Suhys to pay appellant $12,000 and remand for a hearing on both the value of the property and the equity issues.

{¶ 38} Finally, I believe it necessary to clarify the distinct nature of the two cases that constitute this consolidated case. The case before the court of appeals consisted of two cases consolidated at the lower court. One was an administrative appeal challenging the denial of a variance (Case No. CV-98-346605). The second (Case No. CV 357154) is a declaratory action requesting the court of common pleas to determine whether the county recorder

and/or auditor properly determined that the property consisted of two separate lots and whether the county properly issued a separate permanent parcel number.

{¶ 39} On December 8, 2000, the lower court affirmed the Board of Zoning Appeals' decision to deny Flannery's variance in Case No. 346605. This decision was then appealed. After the case was remanded for Civ.R. (B)54 language, which was then given, this court decided the issues in the two cases were too intertwined to sever. Specifically, this court explained: "If the County presents evidence that convinces a trier of fact that it had the authority to give the property a second permanent parcel number, then the Flannerys' claims for practical difficulties warranting the granting of the requested variances gains credence and relevance." This court, however, never addressed the question of whether the conditions were met to introduce new evidence.

{¶ 40} Even if Flannery's claims gained credence and relevance, she could not prevail on the zoning question if it was decided on new evidence. Appeals from an administrative agency such as the Zoning Board of Appeals must follow the rules outlined in R.C. 2506.03. When an appeal is taken to the court of common pleas under R.C. Chapter 2506, the hearing is confined to the transcript of the administrative body, unless one of five conditions specified in R.C. 2506 appears on the face of the transcript or by affidavit.

Dvorak v. Municipal Civil Service Com. (1976), 46 Ohio St.2d 99, 346 N.E.2d 157, syllabus.

> The five exceptions include that (1) the transcript is an incomplete record of all the evidence; (2) the appellant was not permitted to appear in person, or through counsel, with respect to the final adjudication and was thus denied the opportunity to present or defend its case; (3) the testimony contained therein was not given under oath; (4) the appellant was unable to present evidence because it lacked the power of subpoena; or (5) conclusions of fact supporting the order being appealed were not filed.

Court St. Dev. v. Stow City Council, Summit App. No. 19648, 2000 Ohio App. LEXIS 3900, *11-*12.

{¶ 41} In the case at bar, appellant does not claim nor do we find that any of the circumstances under which new evidence could be introduced exist in this case. In declaratory actions, on the other hand, the court is able to consider new evidence. Id., at *13, citing *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 16, 526 N.E.2d 1350. In addressing the zoning question on remand, the trial court is required to limit itself to those procedures appropriate for zoning appeals. Although the two cases are related, the procedures followed in determining the declaratory action and the zoning appeal must be clearly separated.