Circuit Court for Calvert County
Case No. 04-C-12-001031

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

No. 2151, September Term, 2016

No. 1187, September Term, 2018

V. CHARLES DONNELLY, ET AL.

v.

STATE OF MARYLAND, ET AL.

Meredith,
Berger,
Salmon, James P. (Senior Judge,
Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: November 14, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

These consolidated appeals arise from a dispute between V. Charles Donnelly ("Donnelly"), appellant/cross-appellee, the Board of County Commissioners for Calvert County (the "County"), appellee/cross-appellant, and the Maryland Department of the Environment (the "MDE"), appellee/cross-appellant. In 2012, the County denied Donnelly's application to build a commercial pier on Solomons Island. In response, Donnelly appealed to the Calvert County Board of Appeals, which found that Donnelly had a contractual right to build a pier based on a 1957 agreement between his predecessor in interest and the State Highway Administration. Donnelly subsequently filed a complaint in the Circuit Court for Calvert County seeking a declaratory judgment. The circuit court ruled that both the County and MDE's denial of Donnelly's application constituted a breach of contract. On appeal, we affirmed the judgment of the circuit court and remanded the case for further proceedings on damages.

Before the case proceeded to trial, the circuit court orally granted the MDE summary judgment on the issue of damages. Donnelly, the MDE, and the County each appeal from the circuit court's entry of summary judgment. That case is captioned as *V. Charles Donnelly v. State of Maryland, et al.*, No. 1187, Sept. Term 2018.

The case then proceeded to trial. At the trial for damages, Donnelly sought to introduce expert testimony on the value of a new development plan, rather than the 2012 plan that had been denied by the County. The circuit court excluded the expert testimony, granted judgment in favor of the County, and further ordered that the County could not extinguish Donnelly's pier right. Donnelly noted an appeal of the circuit court's grant of judgment for the County, and the County noted a cross-appeal of the circuit court's

determination that Donnelly's pier right is not subject to the County's zoning authority. That case is captioned as *V. Charles Donnelly, et al. v. State of Maryland, et al.*, No. 2151, Sept. Term 2016. Thereafter, we consolidated both cases.

Donnelly, the MDE, and the County present three issues for our review, which we have rephrased as follows:

1. Whether the circuit court erred in granting the MDE's motion for summary judgment.

2. Whether the circuit court erred in ruling that the County cannot extinguish Donnelly's pier right.

3. Whether the circuit court abused its discretion in excluding Donnelly's expert testimony.

For the reasons explained below, we affirm the circuit court's judgment.

FACTS AND PROCEEDINGS

Factual Background

In 1957, the State Highway Administration ("SHA") pursued a right of way over numerous parcels of land abutting the Patuxent River on Solomons Island for the improvement of MD Route 2. As part of its improvements, the SHA proposed to construct a bulkhead along the Patuxent River and extend the shoreline to the bulkhead. Instead of condemning the properties, the SHA entered into an option contract with each property owner. One of those property owners was Harold Leon Langley ("Langley"), who owned two adjacent parcels along the shoreline. Each option contract specified that the grantor and his successors would retain the right "to construct, maintain or repair any pier structure they may desire to erect outside the proposed bulkhead to be built by the Commission under

this contract."[1] Pursuant to the contract, Langley executed a deed on June 12, 1957 conveying a right of way to the SHA over both of his parcels. Eventually, Langley's parcels passed to Donnelly and Solomons One, LLC ("Solomons One"), respectively.

In 1998 and 2001, the SHA executed road transfer deeds that transferred control of the MD Route 2 bulkhead, including the right of way obtained from Langley, to the County. Each deed specified that the conveyance was

> SUBJECT TO and excepting from the operation and effect of this deed any and all rights and reservations that may have been granted or reserved by former owners of this property or their predecessors in title and/or covenants or restrictions which may have been established with respect to said land by such former owners or their predecessors in title.

At the time of the conveyance, Solomons Island was subject to a 1986 zoning ordinance that imposed a moratorium on the construction of new commercial piers. In 2009, Calvert County enacted the Solomons Town Center Master Plan ("2009 Master Plan") and Zoning Ordinance ("2009 Zoning Ordinance"). The 2009 Master Plan adopted a general policy against "the proliferation and duplication of private commercial piers along the public bulkhead" on the Patuxent River. In accordance with this policy, the 2009 Zoning Ordinance prohibited the construction of new commercial piers longer than 117 feet in "the C3 Sub-area located along the public boardwalk."

In 2012, Donnelly and Solomons One submitted a joint application to build a commercial pier on the Patuxent River bulkhead (the "2012 Application"). The County

[1] The contract specified that any pier project would be "subject to the approval of the U.S. War Department." The parties agree that the U.S. Army Corps of Engineers is the successor to the War Department for the purposes of the contract.

and the MDE both denied the 2012 Application on the grounds that the proposed pier, which would be attached to the C3 sub-area, would violate the 2009 Zoning Ordinance.

Procedural Background

Donnelly appealed the County's denial of the 2012 Application to the Calvert County Board of Appeals ("Board of Appeals"). The Board of Appeals held that Donnelly had a contractual right to construct a pier subject to the approval of the U.S. Army Corps of Engineers. On August 22, 2012, Donnelly, Solomons One, and other owners of property along the shoreline filed a complaint against the MDE and the County in the Circuit Court for Calvert County seeking declaratory judgment. The complaint alleged that, in denying the 2012 Application, the County and the MDE had breached the contract rights of the applicants and had repudiated the contract rights of the other property owners.

On July 12, 2013, the circuit court granted summary judgment in favor of the plaintiffs. In its order, the circuit court declared that the plaintiffs had contractual rights to construct piers on the Patuxent River, subject to approval from the U.S. Army Corps of Engineers, by virtue of the 1957 agreements between the SHA and the plaintiffs' predecessors in interest. The circuit court further ruled that the MDE and the County had breached Donnelly's contract rights when they denied the 2012 Application. The County appealed to this Court, which affirmed the circuit court's judgment and remanded the case for further proceedings on damages.[2]

[2] That opinion was captioned as *State of Maryland v. Donnelly*, No. 1446, Sept. Term 2013 (filed Apr. 20, 2015).

On remand, Donnelly elected a remedy of monetary damages.[3] Before the case proceeded to trial, the MDE filed a motion for summary judgment on the issue of damages. On July 14, 2016, the circuit court orally granted the MDE's motion. The circuit court, however, did not enter an order granting the MDE's motion. Donnelly's case then proceeded against the County.

At trial, Donnelly's first expert witness, Douglas Seuss ("Seuss"), presented concept drawings for a new pier project that allegedly represented the "highest and best use" of Donnelly's pier right. Upon objection by the County, the circuit court ruled that Seuss's testimony was inadmissible, explaining, "This is a different plan from the time of the breach." Donnelly informed the court that the testimony of his other expert, Robert Greenlee, was effectively excluded because it was based on Seuss's design and estimates. Donnelly asked the court if he could proffer the reports of his experts, and the court permitted the proffer. Donnelly appeared to close his case, and the County moved for a directed verdict. The court released the jury and directed the parties to return the following day.

When the parties returned to court, Donnelly argued again for a calculation of damages based on the "highest and best use" principle. The County then moved for judgment on the grounds that the jury had been dismissed and no substantive evidence of

[3] Solomons One was dismissed as a party to the lawsuit after it sold its pier right pursuant to a bankruptcy proceeding.

damages had been admitted. The circuit court denied the County's motion[4] and instructed the parties to submit written offers of proof. Subsequently, Donnelly filed a number of post-trial motions and the County renewed its motion for judgment.

On November 28, 2016, the circuit court denied Donnelly's motion for a new trial and granted the County's motion for judgment.[5] The court ordered, however, that

> the Plaintiff may elect a monetary remedy for the fair market value of the pier right breach at the time of the breach, in this case June 13, 2012, said damages and not condemnation values.

The court further ordered that

> the County may not exercise its zoning authority to extinguish Plaintiff's vested contract right to build a pier for any purpose.

Donnelly timely appealed the circuit court's grant of judgment for the County. The County timely filed a cross-appeal challenging the circuit court's ruling that Donnelly's pier right is not subject to the County's zoning authority.

After the parties submitted their briefs, we discovered that the circuit court did not enter an order awarding summary judgment to the MDE. We, therefore, remanded the case to the circuit court for it to enter an order on MDE's summary judgment motion. On July 16, 2018, the circuit court entered an order granting summary judgment to the MDE.

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[4] In denying the County's first motion for judgment, the circuit court referred to the expert reports proffered by Donnelly, even though those reports were inadmissible under the court's earlier ruling. Because the subject of this appeal is the circuit court's subsequent grant of judgment for the County, we need not delve into the basis of the circuit court's earlier ruling.

[5] The circuit court also granted the plaintiffs' motion to sever their damages claims, thereby allowing a separate trial on damages for each plaintiff.

Donnelly, the MDE, and the County each appealed from the circuit court's entry of judgment. We then consolidated both cases.

DISCUSSION

I. Standard of Review

The "admissibility of expert testimony is within the sound discretion of the trial court, and its action will seldom constitute a ground for reversal." *Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199, 252 (2002) (quoting *Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 76 (1996)). A trial court's decision to exclude expert testimony may be reversed "if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Id.* "An appellate court will only reverse upon finding that the trial judge's determination was both manifestly wrong and substantially injurious." *Id.* (quoting *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 641 (1997)).

We review the grant of a motion for summary judgment *de novo*, "considering the evidence and reasonable inferences drawn from the evidence in the light most favorable to the non-moving party." *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 393-94 (2011); *see also* Md. Rule 2-519(b). In so doing, we must conduct "the same analysis as the trial judge." *Id.* at 294 (citing *C & M Builders, LLC v. Strub*, 420 Md. 268, 291 (2011)). When a defendant moves for judgment based on the legal insufficiency of the plaintiff's evidence, "the trial judge must determine if there is 'any evidence, no matter how slight, that is legally sufficient to generate a jury question,' and if there is, the motion must be denied and the case submitted to the jury." *Id.* (quoting *C & M Builders, LLC v. Strub*, 420 Md. 268, 290

(2011)). If the facts and circumstances permit only one inference, "the issue is one of law for the court and not one of fact for the jury." *Id.* (quoting *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503 (2011)).

II. Donnelly's Pier Right Can Be Extinguished by the County Because Donnelly's Pier Right is Riparian in Nature.

In *State of Maryland v. Donnelly*, we addressed whether Donnelly had the right to build a pier on the Patuxent River bulkhead.[6] *Donnelly*, slip op. at 13-21. In holding that Donnelly did have such a right, we refrained from deciding whether Donnelly's pier right could be modified by subsequent regulation:

> Nevertheless, we express no view on whether the State of Maryland, under any other legal theory, has the power and authority to regulate the piers that Appellees desire to construct pursuant to their contractual rights.

Id. at 21. We are now presented directly with the question of whether the County may exercise its zoning authority to modify or even extinguish Donnelly's right to build a pier for any purpose. Critically, Donnelly's pier right is riparian in nature. Accordingly, for the reasons we explain herein, we hold that Donnelly's rights are subject to the valid zoning authority of the County.

[6] Under Maryland Rule 1-104, this Court may cite an unreported opinion when relevant to the doctrine of the law of the case. Under that doctrine, "once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." *Reier v. State Dep't of Assessments & Taxation*, 397 Md. 2, 21 (2007). Our prior opinion in *State of Maryland v. Donnelly* is relevant to the current appeal under the law of the case doctrine.

A. The County May Exercise Its Zoning Authority to Alter or Even Extinguish Donnelly's Pier Right.

In *State of Maryland v. Donnelly*, we determined that Donnelly's right to build a pier on the Patuxent River bulkhead is a severed riparian right:

> Appellees' predecessors in interest presumably acquired this right when they became riparian landowners on Solomons Island, as the right to construct a pier or wharf out from one's property is a riparian right. . . . Having been severed from the riparian land, this right to construct a pier or wharf became a contractual right that Appellees' predecessors in interest were free to assign to third parties.

Slip op. at 20-21. Notably, we concluded that the pier right in question retained its riparian character after severance:

> Appellees' predecessors in interest were riparian landowners who, after conveying the Right of Way to the SHA in 1957, retained the riparian right to construct a pier onto the Patuxent River from their property.

Id. at 21. Indeed, the riparian nature of the pier right was essential to our holding that the right had not been superseded by the Tidal Wetlands Act of 1970.[7] The relevant case law, moreover, provides no basis for concluding that riparian rights, once severed, lose their riparian character.[8]

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[7] The Tidal Wetlands Act of 1970 provides that "a riparian owner may not be deprived of any right, privilege, or enjoyment of riparian ownership that the riparian owner had prior to July 1, 1970." Md. Code (1996, 2014 Repl. Vol.), § 16-103(a) of the Environmental Article. Because Donnelly's predecessor in interest possessed the riparian right to build a pier on the bulkhead prior to 1970, we reasoned that Donnelly's right had not been superseded by the Act.

[8] In *Conrad/Dommel, LLC v. W. Dev. Co.*, for example, we held that severed riparian rights can be reunited with the original parcel and merged back into the parcel owner's

Riparian rights "may be included in and made subject to any valid zoning ordinance." *Harbor Island Marina, Inc. v. Bd. of Cty. Comm'rs of Calvert Cty., Md.*, 286 Md. 303, 319 (1979). Riparian improvements are subject to the same local zoning restrictions as the mainland to which they are attached. *Holiday Point Marina Partners v. Anne Arundel Cty.*, 349 Md. 190, 204 (1998) ("Furthermore, a county's zoning authority ordinarily encompasses piers and wharves that are attached to the land."); *see also Assateague Coastal Tr., Inc. v. Schwalbach*, 448 Md. 112, 126 (2016) ("Thus, it is well established that the property owner has the right to make a landing, wharf or pier to provide access to navigable water *subject to general rules and regulations … necessary to protect the rights of the public.*") (emphasis added) (quoting *Causey v. Gray*, 250 Md. 380, 387 (1968)).

Indeed, the State of Maryland and its municipalities may extinguish unexercised riparian rights without compensating the owner. *Harbor Island Marina, Inc.*, *supra*, 286 Md. at 319 ("On the other hand, prior to their exercise, these riparian entitlements could have been altered or extinguished by the State, or its duly authorized agents, without the need to compensate the riparian owner."). Until the riparian improvements are actually completed, the riparian "has no vested interest in any particular imagined, proposed, or even partially finished construction project." *Wicks v. Howard*, 40 Md. App. 135, 140 (1978); *see also People's Counsel for Baltimore Cty. v. Md. Marine Mfg. Co.*, 316 Md.

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general property rights. 149 Md. App. 239, 271 (2003). The possibility of merger suggests that the riparian character of such rights survives the act of severance.

491, 502 (1989) ("The right to construct riparian improvements is also subject to revocation at any time before the improvement is actually completed.").

In the instant case, the County may exercise its zoning authority to alter or even extinguish Donnelly's right to build a pier on the Patuxent River bulkhead.[9] Prior to 2001, the bulkhead was not subject to the County's zoning authority because it was owned by the SHA. Once the County acquired the bulkhead, the County was authorized to apply its general zoning ordinances to alter or extinguish any riparian rights appurtenant to that land.[10] Because Donnelly has not actually completed any riparian improvement on the Patuxent River bulkhead, he has no vested interest in any such improvement, and his pier right may be extinguished without compensation. We, therefore, hold that the County may, under the circumstances of this case, exercise its zoning authority to extinguish Plaintiff's right to build a pier.

Similarly, the MDE may exercise its regulatory authority to alter or extinguish Donnelly's right to construct a pier on the Patuxent River bulkhead. *Harbor Island*

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[9] Notably, the Court of Appeals has specifically held that Calvert County has the authority to subject riparian owners to its zoning regulations. *See Harbor Island Marina, Inc.*, *supra*, 286 Md. at 318-19.

[10] The 2001 deed provides that the conveyance was "subject to … all rights and reservations" held by the former owners. This language is most naturally construed as a *caveat* alerting the County to possible encumbrances on the property. Indeed, we are reluctant to interpret a quitclaim deed as creating substantive and permanent exceptions to local zoning laws.

Marina, Inc., *supra*, 286 Md. at 319. Accordingly, we hold that the circuit court did not err in granting the MDE's motion for summary judgment.[11]

B. The County May Not Enter Into an Agreement to Suspend Its Zoning Authority.

Donnelly contends, nonetheless, that he has a "vested contract right" pursuant to *Mayor & City Council of Baltimore v. Crane*, 277 Md. 198 (1976). *Crane* involved a local ordinance that, in essence, allowed property owners to give a portion of their property to the City without lowering the maximum density allowed for the remainder of the property. *Id.* at 200-02. After the enactment of the ordinance, the Cranes submitted a development plan for 4.6 acres of their property, which was certified by the Planning Commission and conditionally approved by the Zoning Commissioner. *Id.* at 202. Thereafter, the Cranes conveyed the 4.6 acres to the City without compensation. *Id*. A few years later, the City enacted a new zoning ordinance that imposed new density requirements on the Cranes'

[11] Instead of disputing the circuit court's summary judgment order, Donnelly raises the following arguments: (1) the MDE may not relitigate its claim that Donnelly's pier right is preempted by the Tidal Wetlands Act of 1970; (2) the MDE's contentions are barred by collateral estoppel and the law of the case doctrine; and (3) the MDE is improperly appealing a judgment in its favor. We disagree.

First, the MDE does not assert that Donnelly's pier right is preempted by the Tidal Wetlands Act of 1970. Rather, the MDE avers that it has the authority to regulate Donnelly's right. Second, the MDE's arguments are not barred by collateral estoppel or law of the case doctrine because this Court has not determined whether Donnelly's pier right is subject to the State's regulatory authority. Finally, the MDE may argue that it can regulate Donnelly's pier right, notwithstanding the fact that it was awarded summary judgment. Although a party may not appeal from a favorable judgment, that party "may argue as a ground for affirmance matters resolved against it at trial" where, as here, "the losing party appeals." *Paolino v. McCormick & Co.*, 314 Md. 575, 579 (1989). Because the circuit court rejected the MDE's assertion that it could regulate Donnelly's pier right, the MDE may certainly argue that the circuit court erred in reaching that determination.

property. *Id.* When the Cranes submitted a new development plan, the City denied the plan on the grounds that it did not comply with the new zoning ordinance. *Id.* at 203-04. The Cranes sued, arguing that the new zoning ordinance could not supersede their earlier agreement with the City. *Id.* at 204. The trial court sided with the Cranes. *Id.* The case eventually reached the Court of Appeals, which held that the Cranes had "acquired a vested contractual interest, which was derived from their acceptance of the offer contained in Ordinance No. 48 and their compliance with its terms." *Id.* at 206.

Crane must be viewed in the context of Maryland's policy against contract zoning. In general, local governments may not contract away the exercise of zoning power. *Montgomery Cty. v. Revere Nat. Corp.*, 341 Md. 366, 385 (1996) (quoting *Attman/Glazer P.B. Co. v. Mayor & Aldermen of Annapolis*, 314 Md. 675, 686 (1989)); *see also Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 578 (2002) ("Part of the reason why the governmental authority may not enter into such a contract is because the governmental unit may not bargain away its future use of the police power.") (quoting *People's Counsel for Baltimore Cty. v. Beachwood I Ltd. P'ship*, 107 Md. App. 627, 668-69 (1995)).

In *Crane*, the Court of Appeals identified a narrow set of circumstances in which a municipality is estopped from enforcing a zoning ordinance by virtue of a prior agreement with a property owner. Critically, the Cranes conveyed their property to the City *after* they had submitted a specific development plan and received approval from the Planning

Commissioner.[12] The Cranes bargained, therefore, for the right to construct a particular project; they did not bargain for the right to construct **any** project they may desire at any point in the future. Indeed, the Court of Appeals held that the Cranes were "generally confined to a development of the sort which was contemplated in the plan of development approved in 1964." *Mayor & City Council of Baltimore v. Crane*, 277 Md. 198, 211 (1976). The Cranes were not entitled to proceed on the development plan that they submitted *after* the zoning ordinance was enacted. *Id.* The Court further held that the Cranes' contractual right was "only limited by reasonableness." *Id.* at 210.

In the case *sub judice*, Donnelly would have us hold that the County is permanently estopped from exercising its zoning authority to prevent him from building *any pier he desires* on the Patuxent River bulkhead. Such a ruling would go well beyond *Crane* and would, in essence, allow municipalities to contract away their zoning authority. Under *Crane*, a municipality may commit itself, by contract, to applying a particular zoning standard to a specific development project for a reasonable amount of time. Nevertheless, a municipality may not agree to suspend its zoning authority so that a property owner may

[12] The other cases that Donnelly cites also involved agreements to build specific projects. In *Farmer v. Jamieson*, a developer had a contract with a municipality to build a sewage plant, and the developer "spent substantial sums in reliance thereon" before the municipality decided to delete the subject property from the Master Water and Sewage Plan. 31 Md. App. 37, 39-41 (1976). In *Cty. Comm'rs for Carroll Cty. v. Forty W. Builders, Inc.*, a municipality issued "concurrency management certificates" allowing a developer to move forward with specific residential subdivision projects. 178 Md. App. 328, 349 (2008). After the developer had incurred preliminary costs in reliance on the certificates, the municipality adopted an ordinance mandating a 12-month deferral of all projects under review. *Id.* at 352.

make any improvement she desires. Even if such an agreement were permissible in certain circumstances, it is not at all clear that the successors to the agreement would be bound in perpetuity. Accordingly, the Court's opinion in *Crane* is limited to certain circumstances not present in the instant case.[13]

III. The Circuit Court Did Not Abuse Its Discretion In Excluding Donnelly's Expert Testimony.

At the trial for damages, Donnelly sought to introduce expert testimony based on a completely new pier plan featuring an 18-unit residential townhouse, which was designed by Seuss for the purposes of the trial. Donnelly justified this method of valuing his damages on the grounds that he was entitled to the fair market value of the "highest and best use" of his pier right. The circuit court disagreed, ruling that the appropriate measure of Donnelly's damages was the fair market value of the original pier plan submitted by Donnelly in 2012. The circuit court reasoned that the "highest and best use" principle, which is generally used in condemnation proceedings, is inappropriate in these circumstances. We agree.

In an action for breach of contract, the non-breaching party may recover damages for "the losses proximately caused by the breach, that were reasonably foreseeable, and

[13] It is also significant that the Cranes took advantage of a general ordinance that offered the same benefit "to all similarly situated property owners." *Id.* at 206. Indeed, the Court of Appeals noted that, if this had not been the case, the agreement would have constituted impermissible contract zoning. *Id.* Here, the SHA did not make a general offer; instead, it made separate -- albeit identical -- offers to each property owner. It is possible that, in doing so, the SHA effectively offered the same benefit "to all similarly situated property owners." We are reluctant, however, to apply *Crane* in the absence of an offer made to the general public by statute or ordinance.

that have been proven with reasonable certainty." *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594-95 (2007) (numerals omitted). The "highest and best use" principle, which applies to the fair market value of property, has been used to determine damages where a breach of contract proximately caused a depreciation in the market value of some property. *See Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1, 17 (1998); *see also Asibem Assocs., Ltd. v. Rill*, 264 Md. 272, 277 (1972).

Turning to the case at hand, Donnelly argues that the County extinguished his pier right when it applied the 2009 Zoning Ordinance to his 2012 Application. As a preliminary matter, it is not clear that the County extinguished Donnelly's pier right. The circuit court ruled -- and we affirmed -- that the breach of contract occurred when the County denied the 2012 Application. The County's denial, however, merely prevented Donnelly from exercising his pier right in a particular manner. The County did not purport to alter or extinguish the underlying right. To be sure, the County may have extinguished Donnelly's pier right earlier, when it enacted the 2009 Zoning Ordinance. In that event, Donnelly's pier right would have been extinguished *before* it was breached, which would leave Donnelly with no legal claim whatsoever.

Assuming *arguendo* that the County's denial extinguished Donnelly's pier right, Donnelly still may not recover the fair market value of that right. Because Donnelly brought a contract claim and not a condemnation action, he is only entitled to recover those damages proximately caused by the County's breach. Donnelly appears to argue that the County was in breach *because* it extinguished his pier right. As we explain *supra*, the County cannot be bound by an agreement to suspend its zoning authority. If the County

had extinguished Donnelly's pier right, such an action could not constitute a breach of contract entitling Donnelly to damages. Even if Donnelly had brought a condemnation action, he would not be entitled to recover the value of his pier right, because a municipality may extinguish a riparian's unexercised pier right without compensation. In short, Donnelly could not recover the value of his pier right because the deprivation of that right would not entitle him to damages.[14] He could only recover those losses proximately caused by the denial of the 2012 Application.[15] We hold, therefore, that the circuit court's decision to exclude Donnelly's expert testimony was legally correct.

After the circuit court ruled that Donnelly was restricted to a valuation based on the 2012 Application, Donnelly elected to close his case and submitted a written offer of proof based on the excluded pier plan designed by Seuss. At the close of trial, no evidence had been admitted on the value of the 2012 pier project. Because Donnelly failed to meet his

[14] For the same reason, Donnelly's claim that he "must base his valuation on his pier right alone" is incorrect. Donnelly is not entitled to recover the value of his extinguished pier right. It is irrelevant, therefore, that the 2012 Application represented a joint venture by Donnelly and another property owner with a separate pier right. There was nothing preventing the fact-finder from properly apportioning the damages suffered by each applicant.

[15] In holding that Donnelly could have sought damages on the basis of the 2012 application, we do not suggest that he would have prevailed. Because Donnelly's pier right is subject to valid regulation, Donnelly would have to show that the 2012 project was in compliance with all federal, state, and local regulations then in effect, including lateral line setbacks. Donnelly would also have to show that the 2012 project was reasonably certain to be approved by the Army Corps of Engineers.

burden of production, the circuit court properly granted judgment for the County.[16] We, therefore, affirm the circuit court's grant of judgment for the County.[17]

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT/CROSS-APPELLEE.

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[16] Indeed, Donnelly appears to concede this point, as he presents no argument on appeal to show that the evidence admitted at trial was sufficient to submit the case to the jury. *See Giant Food, Inc. v. Booker*, 152 Md. App. 166, 176 (2003); *see also* Md. Rule 2-519.

[17] In light of our holding, the County's cross-appeal of the circuit court's entry of summary judgment in favor of the MDE is moot. Indeed, a "case is deemed moot when there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *State v. Crawford*, 239 Md. App. 84, 112 (2018) (citations and quotations omitted).