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IN THE
COURT OF APPEALS OF INDIANA

BRUCE HATFIELD, ROBERT F. HATFIELD, JILL HAYDEN, PAUL J. HAYDEN, HIGHLAND POINTE DEVELOPMENT AND RAY ZELLER,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 82A01-0910-CV-502
AREA PLAN COMMISSION OF EVANSVILLE -VANDERBURGH COUNTY,	)	
Appellee-Defendant.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0612-PL-580

July 28, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Bruce Hatfield, Robert Hatfield, Jill Hayden, Paul Hayden, Ray Zeller, and Highland Point Development (collectively "the Appellants") appeal the trial court's decision limiting their damages for an alleged taking. We reverse.

Issue

The Appellants raise one issue, which we restate as whether the trial court properly limited their damages for an alleged taking to out-of-pocket expenses. We address a dispositive issue, which we state as whether the denial of the Appellants' primary plat application by the Area Plan Commission of Evansville-Vanderburgh County ("APC") constituted a taking.

Facts

In November 2001, Bruce Hatfield, Robert Hatfield, Jill Hayden, Paul Hayden, and Ray Zeller (the "Individuals") entered into an agreement to purchase sixty-eight acres of land in Vanderburgh County from Theodore and Debra Stucki. The agreement provided in part:

> It is expressly understood and agreed that in the event that a proposed residential subdivision plat containing a minimum of two hundred fifty (250) residential building lots submitted by the Buyer to the Evansville-Vanderburgh County Area Plan Commission is not approved by the Evansville-Vanderburgh County Area Plan Commission, the obligation of the Buyer to close on the purchase of the real estate shall be fully and finally excused and the Buyer will be under no obligation to complete the purchase of the real estate which is the subject of this transaction. . . .

Pl. Exhibit 1 p. 2.

In late 2001 and early 2002, the Individuals formed Highland Pointe Development, LLC, and sought primary plat approval of a 270-lot subdivision from APC. On May 1, 2002, APC denied the primary plat application. On May 28, 2002, Bruce Hatfield rescinded the purchase agreement with the Stuckis pursuant to the terms of the agreement.[1]

On May 31, 2002, the Appellants filed a petition for writ of certiorari, challenging APC's denial of the primary plat application. In response, APC alleged that the Individuals lacked standing. On May 28, 2003, the trial court found in favor of the Appellants and ordered APC to approve the primary plat application. On June 4, 2003, APC approved the primary plat application. On June 26, 2003, APC filed a motion to correct error, again alleging the Individuals lacked standing. This motion was denied, and APC appealed.

On appeal,[2] we addressed whether the Individuals were "aggrieved" by APC's denial of the primary plat application for purposes of the certiorari review process. Area Plan Commission of Evansville-Vanderburgh County v. Hatfield, 820 N.E.2d 696, 698 (Ind. Ct. App. 2005) (citing Ind. Code § 36-7-4-1003), trans. denied. Because of evidentiary issues, we did not consider Bruce Hatfield's letter rescinding the purchase agreement. Id. at 699 n.3. We held, "the Individual Members, as signatories to a binding

[1] On November 22, 2002, the Stuckis conveyed the property to TD&T, LLC.

[2] We initially dismissed the appeal as moot. APC sought transfer, which was granted, and APC's appeal was retransmitted to this court.

purchase agreement for the property to be developed, were aggrieved persons for the purpose of challenging the denial of the plat application."

On December 8, 2006, the Appellants filed a complaint for inverse condemnation, alleging that APC's denial of the primary plat application constituted an unlawful taking.[3] On July 2, 2007, APC filed a motion for summary judgment, which the trial court eventually denied. The trial court concluded that the Appellants had standing to pursue their claims against APC, that APC's actions constituted a temporary taking under Indiana law, and that the Appellants had not waived all of their damages claims.

On July 3, 2008, the trial court issued an order regarding the scope of the taking and the measure of damages. The trial court concluded that the Appellants mitigated their damages by rescinding the purchase agreement in May 2002, that the Appellants were not entitled to lost profits on the theory that they would not have rescinded the contract if the primary plat application had been approved, and that the Appellants were only entitled to recover out-of-pocket expenses sustained from November 21, 2001 through May 28, 2002.

On April 13, 2009, a bench trial on the issue of damages was conducted. At the trial, APC filed an "Objection and Limited Stipulation of Damages" in which it reasserted its claim that the Appellants were not entitled to any damages because the denial of the primary plat application did not amount to a taking. Appellants' App. p. 183. If the trial

[3] The complaint only alleged a violation of Article 1, Section 21 of the Indiana Constitution. On appeal, the Appellants do not specify whether the takings claim is based on the Indiana Constitution or United States Constitution. Nevertheless, our supreme court has recently recognized, "the state and federal takings clauses are textually indistinguishable and are to be analyzed identically." State v. Kimco of Evansville, Inc., 902 N.E.2d 206, 210 (Ind. 2009), cert. denied.

court concluded that the Appellants were entitled to out-of-pocket expenses, APC stipulated to $82,564.53 in damages, which consisted primarily of interest payments, engineering fees, and attorney fees. The Appellants submitted a "Motion to Preserve Issues Regarding Presentation of Evidence Pursuant to Indiana Rules of Evidence 103(B)(2)," claiming they should have been permitted to submit evidence establishing that their damages ranged between $2,023,000 and $3,000,000 in lost profits.

The trial court concluded that the Appellants were entitled to $84,189.53 in out-of-pocket expenses. The Appellants now appeal.

Analysis

The Appellants argue that they should have been permitted to introduce evidence of and recover damages for their lost profits. APC responds by arguing that the Appellants did not have standing to bring the inverse condemnation claim because they never owned the property at issue, that the denial of the primary plat application did not constitute a taking, that the Appellants' damages would be limited to those damages incurred during the period of the alleged temporary taking, and that lost profit damages are too speculative.[4]

"The state has inherent authority to take private property for public use." Murray v. City of Lawrenceburg, 925 N.E.2d 728, 731 (Ind. 2010). "The Indiana Constitution and the Fifth Amendment require just compensation if this authority is exercised." Id.

[4] APC's standing and takings arguments could more properly have been framed as issues for cross-appeal. See Ind. Appellate Rule 9(D)("An appellee may cross-appeal without filing a Notice of Appeal by raising cross-appeal issues in the appellee's brief."). Although APC did not specifically raise these arguments as issues for cross-appeal, the Appellants were able to respond to these arguments in their reply brief. Accordingly, we address them.

There are two kinds of takings. One kind of taking involves seizing private land for public use, while the other kind of taking occurs not through acquisition of title but through regulation. Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1225 (Ind. 2000). At issue here is a so-called "regulatory taking." See id.

If the government takes property but fails to initiate eminent domain proceedings, Indiana Code Section 32-24-1-16[5] allows a person having an interest in property that has been or may be acquired for public use to bring a suit for inverse condemnation to recover money damages. Id. There are two stages in an action for inverse condemnation. The first stage involves a determination of whether a taking of property has occurred. Burkhart Adver., Inc. v. City of Fort Wayne, 918 N.E.2d 628, 632 (Ind. Ct. App. 2009), trans. denied. "If the trial court finds that a taking has occurred, then the matter proceeds to the second stage where the court appoints appraisers and damages are assessed." Id.

In determining whether a taking occurred, we assume, without deciding, that the Appellants had standing to bring this suit as parties to an agreement to purchase property.[6] The Appellants argue, "the denial of the plat application destroyed all economic beneficial use of the property interest which [they] possessed at the time of the application: the right to acquire the real estate for development as a residential

[5] Indiana Code Section 32-24-1-16 provides, "A person having an interest in property that has been or may be acquired for a public use without the procedures of this article or any prior law followed is entitled to have the person's damages assessed under this article substantially in the manner provided in this article."

[6] We also assume that the Appellants had a compensable interest in the property even though the purchase agreement permitted them to terminate the contract if they did not receive primary plat approval. In that regard, this case is similar to Burkhart Advertising, Inc. v. City of Fort Wayne, 918 N.E.2d 628, 634 (Ind. Ct. App. 2009), trans. denied, in which we concluded "that the termination of a lease according to the parties' own provisions is not a taking of property." Based on our holding that no taking occurred, we need not conclusively decide this issue.

subdivision." Appellants' Reply Br. p. 4. In making this argument, the Appellants rely on Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992). In that case, two years after Lucas purchased two residential lots, on which he intended to build single-family homes, the South Carolina Legislature enacted a law barring Lucas "from erecting any permanent habitable structures on his two parcels." Lucas, 505 U.S. at 1007, 112 S. Ct. 2889. Based on this legislation, a state court found Lucas's property to be "valueless." Id., 112 S. Ct. 2889. Describing the taking suffered by Lucas as "categorical," the court held:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. at 1019, 112 S. Ct. at 2895.

Unlike in Lucas, the Appellants direct us to no trial court finding that the denial of the primary plat application rendered the property "valueless." Further, even if the denial prevented the Appellants from developing the property in the manner in which they desired, there is no indication that the denial required them to sacrifice all economically beneficial uses in the name of the common good. Because the Appellants have not shown they were required to leave the property economically idle, they did not suffer a categorical regulatory taking.

The Appellants go on to argue that even if they have not suffered a categorical taking, they have still suffered a taking under a general takings analysis, which is an ad hoc, factual inquiry focusing on several factors. See New Harmony, 726 N.E.2d at 1226.

Three factors of particular significance are: "(1) '[t]he economic impact of the regulation on the claimant,' (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations,' and (3) 'the character of the governmental action.'" Ragucci v. Metro. Dev. Comm'n of Marion County, 702 N.E.2d 677, 683 (Ind. 1998) (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978)) (alteration in original).

Regarding the economic impact of the regulation, the Appellants argue that they entered into the purchase agreement for the purpose of developing a residential subdivision. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Penn Cent., 438 U.S. at 130, 98 S. Ct. at 2662. We will not limit our consideration only to the purpose for which the Appellants sought to use the property in determining whether they have suffered a taking. Moreover, the Appellants summarily assert, "At the very least, a significant detrimental impact resulted to that interest[.]" Appellants' Reply Br. p. 4. The Appellants provide no specific analysis regarding this factor. Keeping in mind that the Appellants did not actually purchase the property, their bare assertion is insufficient to show the economic impact of the denial of the primary plat application.

Regarding the Appellants' reasonable investment-backed expectations, they contend they "purchased the property with the intent to develop it . . . ." Appellants' Reply Br. p. 4. We cannot overemphasize the fact that the Appellants did not purchase the property; they rescinded the purchase agreement pursuant to the terms of the

agreement. Nevertheless, the Appellants entered into the purchase agreement with the intention of developing the property, which necessarily includes the expenditure of certain expenses and the risk that development will not proceed as planned. We presume the agreed upon purchase price for the property reflected its undeveloped/unapproved state. See Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570, 582 (Ind. 2007) (observing the investment-backed expectation factor of the taking analysis and noting that the owners purchased at a reduced price, with the knowledge that the bargain rate existed because of airport noise).

As for the character of the government action, the Supreme Court has observed, "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Cent., 438 U.S. at 124, 98 S. Ct. at 2659 (citation omitted). APC's action did not amount to a physical invasion, and the trial court's order reversing APC's denial offers some insight into the character of the governmental action. It provides:

> 25. In this case, the members of the APC obviously and understandably sympathized with the traffic and other concerns expressed by the remonstrators. While these issues may be appropriate for consideration when a public body decides the appropriate zoning classification for real estate, they are not issues which a plan commission may consider when approving or disapproving a subdivision plat. In doing so in this case, the APC exceeded its legal authority.

Appellants' App. pp. 116-17. Although erroneous, the governmental action at issue here was based on an intent to promote the common good. We are not convinced that the erroneous denial of the primary plat application by APC constituted a taking.

Ultimately, the Appellants were not required to, nor did they, purchase the property. Because the Appellants did not establish that they were denied all economic use of the property, they have not established they suffered a categorical taking. Further, based on our consideration of the economic impact of the denial on the Appellants, the extent to which the denial interfered with their investment-backed expectations, and the character of the governmental action, the Appellants have not established that they suffered a taking. Because no taking occurred, the trial court improperly awarded the Appellants any damages.[7] As such, we need not determine the proper standard for the calculation of damages.

Conclusion

Because the denial of the primary plat application did not amount to a taking, the trial court improperly awarded the Appellants damages. We reverse.

Reversed.

MAY, J., concurs.

BAILEY, J., concurs in result with separate opinion.

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[7] The parties cite Area Plan Commission of Evansville v. Major, 720 N.E.2d 391 (Ind. Ct. App. 1999), in their discussions of the proper measure of damages. It is worth noting that in that case we assumed Major had a property interest in a "location permit" and that its revocation was a taking without just compensation. Major, 720 N.E.2d at 395 n.2. We did not address the temporary taking claim on the merits.

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BAILEY, Judge, concurring in result

While I agree with the end result reached by the majority, I believe that this case should have been dismissed long ago. Pursuant to Indiana Code Section 36-7-4-707(a), if a planning commission determines that a plat application complies with the standards in the subdivision control ordinance then it shall issue written findings and approve the plat. In this ministerial function, a planning commission has no discretion to deny an

application that meets the relevant ordinance requirements. Van Vactor Farms, Inc. v. Marshall County Plan Comm'n, 793 N.E.2d 1136, 1144 (Ind. Ct. App. 2003), trans. denied. Here, as concluded by the trial court, the APC failed to approve the Appellants' primary plat that met the subdivision control ordinance requirements. Nevertheless, this erroneous denial does not amount to a taking of property.

As noted by the majority, there are two kinds of takings: the seizure of private land for public use and limiting the use of private property through regulation. Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1225 (Ind. 2000). The land at issue was not seized for public use. Nor was the basis of the APC denial of the plat premised on a land-use regulation. The only obstacle to developing the land into a subdivision was the erroneous decision of the APC; a decision the Appellants successfully appealed to the Vanderburgh Circuit Court. The fact that a party must appeal an erroneous decision to obtain relief is simply not a taking. The availability of appellate process, albeit not an effortless undertaking, is simply the procedural due process mechanism whereby one asserts his or her substantive rights.

Because no taking can result from an erroneous planning commission decision that does not result in land being seized for public use or its use being limited by regulation, I believe this action should have been more appropriately dismissed under Indiana Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted.