STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL ANDERSON,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF YPSILANTI,

Defendant-Appellee.

UNPUBLISHED
December 1, 2000

No. 211997
Washtenaw Circuit Court
LC No. 88-036085-CZ

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this zoning case, plaintiff appeals by right from the trial court's judgment of no cause of action, which dismissed plaintiff's claims that the township's denial of a rezoning request by plaintiff violated substantive due process and constituted an unconstitutional "taking" of a 15.19-acre parcel of property owned by plaintiff. We affirm.

I

Plaintiff owns Anderson Apartments, which are situated on 20 acres of land in Ypsilanti Township zoned for multiple-family residential use. In 1981, plaintiff bought two adjoining vacant parcels—an 8.15-acre parcel zoned for multiple-family residential use and the subject 15.19-acre parcel zoned for light industrial use. In 1988, plaintiff requested that defendant township rezone the 15-acre parcel to multiple-family residential use so plaintiff could build apartments on both the 8- and 15-acre parcels. In a 4 to 3 vote in October 1988, the township board denied plaintiff's rezoning request. Plaintiff did not request a variance or seek other relief from the township zoning board of appeals, but instead directly filed suit in circuit court in November 1988. In his complaint, plaintiff alleged that the township's refusal to change the existing zoning on the 15-acre parcel from light industrial to multiple-family residential use was an unconstitutional taking and violated substantive due process.[1]

[1] Plaintiff also alleged a violation of 42 USC 1983 in his second amended complaint. Defendant removed the case to federal court, but the federal district court remanded plaintiff's state law claims and stayed proceedings on the § 1983 claim pending adjudication of the state law claims. Following the Washtenaw Circuit Court's decision in this case, plaintiff moved the federal court
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In 1993, this Court reversed the trial court's December 1990 grant of summary disposition in favor of the township and remanded the matter for further proceedings. On remand, the township moved for dismissal, asserting that plaintiff's claims were not ripe for judicial review. The trial court conducted the bench trial in this matter in October and November 1994, without deciding the ripeness question. On May 7, 1998, approximately 3½ years after trial ended, the trial court issued its opinion that plaintiff's claims were ripe for review but that plaintiff had not sustained his burden of proof, entitling the township to a judgment of no cause of action.

On appeal, plaintiff claims that the trial court violated his right to procedural due process and erred in failing to find that the township's refusal to rezone the 15-acre parcel constituted an unconstitutional taking and violated substantive due process as an arbitrary and unreasonable restriction upon the use of the property unrelated to a legitimate governmental interest.[2] We disagree with plaintiff's assertions and find each of his claims to be without merit.

II

Procedural Due Process Claim

Trial ended in mid-November 1994, and the parties submitted proposed findings of fact and conclusions of law in December 1994. On several occasions during the next three years, the trial court stated its intent to issue a ruling in the near future, but the court repeatedly failed to render its promised decision. Finally, in April 1998, plaintiff filed a petition and complaint for this Court to take superintending control over the case due to the trial court's failure to issue a decision. Less than two weeks later, while a decision on plaintiff's complaint was pending in this Court, the trial court issued its opinion and order concluding that plaintiff had failed to prove his claims by a preponderance of the evidence. The court entered a judgment of no cause of action.

Plaintiff contends that the trial court issued its decision adverse to plaintiff in retaliation for plaintiff's filing of the complaint in this Court for writ of superintending control over the trial court. Plaintiff argues that the trial court's 3½ year delay in adjudicating this matter denied him his right to procedural due process and caused him actual prejudice including, among other

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to lift the stay. In a decision issued in November 1999, the federal court held that it lacked subject-matter jurisdiction to hear plaintiff's federal claims pursuant to the *Rooker-Feldman* doctrine, which provides that "federal district courts lack subject matter jurisdiction to review final adjudications of a state's highest court or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" *Anderson v Ypsilanti Twp*, 71 F Supp 2d 730, 731 (1999). The court determined that plaintiff's federal claims were inextricably intertwined with his state law claims in this case, precluding adjudication of his claims in federal court.

[2] To the extent that defendant argues that plaintiff's claim is not ripe for judicial review, we disagree. The trial court found that plaintiff's rezoning request was formally denied by Ypsilanti Township's Board of Trustees and that decision constitutes a final decision from a governmental entity. On the facts of this case, we agree with the trial court's conclusion.

things, deprivation of the use of his property during the interim period and increased legal expenses.

"The Due Process Clause requires an unbiased and impartial decisionmaker." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A judge may be disqualified "without a showing of actual bias in situations where 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 498, quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). Disqualification for bias or prejudice is constitutionally required in only the most extreme cases. *Id.* at 498. Our determination whether plaintiff has been afforded due process is a question of law subject to our de novo review. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

Plaintiff has not shown that this was an "extreme" case in which there was such a high probability of bias on the part of the trial court to be constitutionally intolerable. Although the fact that the trial court issued an opinion adverse to plaintiff almost immediately after plaintiff filed for a writ of superintending control admittedly does give rise to *some* appearance of impropriety, we do not find this to give rise to a *strong* appearance of impropriety. Plaintiff has not overcome the heavy presumption of judicial impartiality that we accord the trial court. *Cain*, *supra* at 497. Plaintiff's claims of prejudice due to the delay in the issuance of the trial court's opinion are those which, unfortunately, are not uncommon during the pendancy of litigation. Although some exhibits may have been misplaced, they have not been necessary to our review.

Additionally, plaintiff did not establish that he was deprived of all use of his property while the lower court's decision was pending. No evidence exists in the record that plaintiff was precluded from developing the subject parcel in accord with its *existing* classification of light industrial use. Further, plaintiff's interest in the *proposed* zoning classification was not a protected interest to which the requirements of procedural due process apply. See *Seguin v City of Sterling Heights*, 968 F2d 584, 590-591 (CA 6, 1992). To the extent that plaintiff had a protected vested property interest in his *right of action*, plaintiff was not deprived of procedural due process where he had a meaningful procedural remedy available to him at any time—filing for a writ of superintending control with this Court—of which he ultimately availed himself.

We hold that plaintiff's claim of deprivation of procedural due process is without merit.

III

Unconstitutional Taking Claim

As to his "taking" claim, plaintiff argues that the trial court erred in: (1) ruling that the township's denial of his rezoning request substantially advanced a legitimate state interest, (2) ruling that the township's actions did not deprive him of all economically viable use of his land, i.e., a categorical taking, and (3) failing to consider the traditional balancing approach in deciding whether a taking had occurred. We disagree. We review the trial court's ruling on plaintiff's constitutional challenges to the township's zoning ordinances de novo. *Jott, Inc v Clinton Twp*, 224 Mich App 513, 525; 569 NW2d 841 (1997). We conclude that plaintiff does not prevail on the arguments he presents to support his claim of a taking by the township.

A land-use regulation, such as a zoning ordinance, may amount to a regulatory "taking" if, as applied, (1) the regulation does not substantially advance a legitimate state interest or (2) it denies an owner economically viable use of his land. *Nollan v California Coastal Comm*, 483 US 825, 834; 107 S Ct 3141; 97 L Ed 2d 677 (1987); *Bevan v Brandon Twp*, 438 Mich 385, 391, 397-398; 475 NW2d 37 (1991). The second type of taking is subdivided further into (a) a categorical taking, where an owner is deprived of *all* economically beneficial uses of his land through application of a land-use regulation, *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992), or (b) a land-use regulation that is not a "categorical taking" but is still so burdensome as to rise to the level of a taking, as found by application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). *K & K Const, Inc v Dep't of Nat Resources*, 456 Mich 570, 576-577, 585; 575 NW2d 531 (1998).

Advancement of Legitimate State Interest

The Township Rural Zoning Act gives townships the authority to enact a zoning ordinance, inter alia, to promote the public health, safety and general welfare, to limit the improper use of land, to meet the needs of the state's residents for industry, to insure that uses of land shall be situated in appropriate locations and relationships, to lessen congestion on the public roads and streets, and to facilitate adequate provision for a system of transportation, education, and recreation. MCL 125.273; MSA 5.2963(3). The Ypsilanti Township Zoning Ordinance states similar purposes for its zoning ordinances. § 1.02.

The preamble of the township's zoning ordinance for light industrial districts states that the purpose of that district is primarily to accommodate wholesale and warehouse activities and light industrial applications which do not detrimentally affect a surrounding district. § 15.00. The validity of this ordinance provision is presumed and will be upheld unless the constitutional objections appear on their face or are supported by competent evidence. *Bevan, supra* at 398; *Kropf v Sterling Heights*, 391 Mich 139, 156; 215 NW2d 179 (1974). On its face, § 15.00 of the township's light industrial zoning ordinance promotes the legitimate governmental interest of meeting the need for industry, as stated in MCL 125.273; MSA 5.2963(3). As the party attacking the constitutionality of the ordinance, plaintiff had the burden of showing that the light industrial classification of his property had no real or substantial relation to public health, safety or welfare. *Bevan, supra* at 398. As our Supreme Court aptly noted, it is up to the people of a community, through their legislative body--in this case the township board--to determine "the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits." *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 431; 86 NW2d 166 (1957). After reviewing the record in this case, we conclude that plaintiff did not meet the burden of proof of showing that designation of plaintiff's 15-acre parcel for light industrial use did not advance the legitimate governmental interests of providing industry and employment for residents of this state.

Another provision of the township's zoning ordinance provides that proposed multiple-family residential developments require approval by the township so that the township can minimize adverse effects upon adjacent property and ensure proper relationship between the proposed development and traffic safety and service roads, among other considerations.

§ 20.14(1). On its face, this provision advances public safety and transportation interests and promotes the appropriate location and relationship of land uses, all of which are legitimate governmental interests. MCL 125.273; MSA 5.2963(3); *Bevan, supra* at 399-400; *Kropf, supra* at 160; *Dowerk v Oxford Twp,* 233 Mich App 62, 67; 592 NW2d 724 (1998); *Countrywalk Condominiums, Inc v Orchard Lake Village,* 221 Mich App 19, 24-25; 561 NW2d 405 (1997); *Pearson v Grand Blanc,* 961 F2d 1211, 1224 (CA 6, 1992). The record reflects that the township's denial of plaintiff's rezoning request was based largely on public opposition to the rezoning request and upon legitimate concerns related to transportation and public safety issues and of limiting adverse impacts by new development upon the existing single-family residential neighborhood.[3] Plaintiff did not carry his burden of showing that the township's denial of his rezoning request was not in furtherance of legitimate state interests.

Categorical Taking

Plaintiff likewise did not establish a categorical taking. For a categorical taking to exist, the zoning classification must deprive the property owner of *all* economically beneficial or productive uses of the land, that is, completely prohibit the landowner from developing his land, leaving it economically idle. *K & K, supra* at 576-577, 586-587. Plaintiff did not show that the value of the 15-acre parcel had been *destroyed* by the existing ordinance or that he is precluded from using the land as zoned for any purposes to which it is reasonably adapted—i.e., that the land was either unsuitable for use as zoned or unmarketable as zoned. See *Bevan, supra* at 402-404; *Kirk v Tyrone Twp,* 398 Mich 429, 444; 247 NW2d 848 (1976). While the value of the 15-acre parcel may have been greater under a multiple-family residential zoning classification, the evidence revealed that it was not rendered worthless. See *K & K, supra* at 586-587. Mere disparity in value between potential uses for property does not meet the threshold necessary to establish a taking. *Bevan, supra* at 402-403; *Paragon Properties Co v Novi,* 452 Mich 568, 579, n 13; 550 NW2d 772 (1996). See, e.g., *Cryderman v Birmingham,* 171 Mich App 15, 27-28; 429 NW2d 625 (1988).

Contrary to plaintiff's assertion on appeal, the fact that he might have to apply for a variance to extend the road that provides access to the 15-acre parcel beyond that permitted by ordinance before he could develop the parcel for light industrial use does not establish a taking. Rather, plaintiff is *required* to seek a variance and other available relief from the zoning board of appeals before he can bring a taking claim. See *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City,* 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985); *Paragon, supra.*

Balancing Test

Plaintiff also has not demonstrated that he should prevail under the traditional "balancing test," under which the reviewing court engages in an ad hoc, factual inquiry of "(1) the character

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[3] We specifically note that it was appropriate for the township board to consider public opposition to plaintiff's proposed rezoning classification. *A & B Enterprises v Madison Twp,* 197 Mich App 160, 164; 494 NW2d 761 (1992).

of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." See *Penn Central, supra,* 438 US at 124; *K & K, supra* at 577. Plaintiff fails on the first two prongs of this test because, as we concluded above, he did not establish that the 15-acre parcel's classification of light industrial use is unreasonable, or that the parcel is either unsuitable or unmarketable under that classification. Plaintiff also fails on the third prong because he did not demonstrate that he had reasonable investment-backed expectations that he could build multiple-family housing on the 15-acre parcel of property.

We hold that the trial court did not err in determining that the township's refusal to rezone the 15-acre parcel did not constitute an unconstitutional taking.

IV

Substantive Due Process

Finally, we hold that plaintiff's claim that the township's refusal to rezone the 15-acre parcel from light industrial use to multiple-family residential use violates substantive due process is without merit.

In contrast to a regulatory taking claim, a substantive due process claim "does not require proof that all use of the property has been denied." *Electro-Tech, Inc v H F Campbell Co,* 433 Mich 57, 94-95; 445 NW2d 61 (1989) (Brickley, J., dissenting) (citations omitted). Rather, for a successful challenge to a zoning classification on substantive due process grounds, a plaintiff must show "first, that there is no reasonable governmental interest being advanced by the present zoning classification itself [here a light industrial zoning classification], or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question." *Kropf, supra* at 158; *Frericks v Highland Twp,* 228 Mich App 575, 594; 579 NW2d 441 (1998). There are four rules for applying the above principles, three of which apply to substantive due process claims:

1. The ordinance is presumed to be valid. *Kirk, supra* at 439; *Kropf, supra* at 162.

2. The party attacking the ordinance has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the use of his property. "It must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit,* and that there is no room for a legitimate difference of opinion concerning its reasonableness." *Brae Burn, supra* at 432.

3. This Court conducts a de novo review but gives considerable weight to the findings of the trial judge. *Kirk, supra* at 444; *Kropf, supra* at 163.

Plaintiff failed to meet his burden of proving that the township's refusal to rezone the 15-acre parcel was unrelated to a legitimate governmental interest or was an arbitrary and unreasonable restriction upon the use of his property, thus violating substantive due process. *Kirk, supra* at 441; *Kropf, supra* at 162-164. As noted, the light industrial use classification is

rationally related to legitimate governmental interests. MCL 125.273; MSA 5.2963(3); *Bevan, supra* at 398-400; *Kropf, supra* at 160-161; *Countrywalk, supra.* Additionally, the record reflects that the classification is reasonable as applied to the parcel in question, given the proximity of the subject parcel to existing industrial and commercial development and in light of the continuing growth of industry in that particular area. Plaintiff did not show that the light industrial zoning classification was "a whimsical *ipse dixit"* or that there was no room for a legitimate difference of opinion concerning the reasonableness of the classification. *Kirk, supra* at 439; *Kropf, supra* at 162; *Brae Burn, supra* at 432.

Plaintiff further argues that in addition to possible legitimate concerns, the township expressed an improper concern that plaintiff's proposed development would attract transients to the area. Generally, absent considerations based on unlawful discriminatory motivation or fraud, corruption or personal interest, additional possible motives of the board members are immaterial if a reasonable and lawful basis supports the decision of the township board in denying a rezoning request. See *Square Lake Hills Condominium Ass'n v Bloomfield Twp,* 437 Mich 310, 317; 471 NW2d 321 (1991); *Sheffield Development Co v Troy,* 99 Mich App 527, 530-533; 298 NW2d 23 (1980); Crawford, Michigan Zoning and Planning (3rd), § 2.02, p 73. We agree with the trial court that, even assuming that one or more township board members may have had a discriminatory motive in denying plaintiff's request for rezoning, plaintiff does not prevail where the township established by a preponderance of the evidence that the same decision would have been reached in the absence of such motives for the legitimate and rational reasons articulated by the township.

Plaintiff contends erroneously that the trial court should have limited its review to evidence actually relied on by the township board at the time it made its decision in 1988. The problem with plaintiff's contention is that he confuses the procedural posture of this case with an appeal from a zoning board of appeals. Were this an appeal from such an administrative body, then the trial court would have been limited to a determination whether the decision was authorized by law and supported by competent, material and substantial evidence on the record. Const 1963, art 6, § 28; MCL 125.293a; MSA 5.2963(23a); *Reenders v Parker,* 217 Mich App 373, 378; 551 NW2d 474 (1996).[4] Here, the township board acted as a legislative body, not an administrative body, in denying plaintiff's rezoning request. See *Paragon, supra* at 580; *Kirk, supra* at 440-441; Crawford, Michigan Zoning and Planning (3rd), § 1.11, p 54. Moreover, plaintiff's complaint was filed as an original action in circuit court, wherein plaintiff filed his complaint for injunctive relief and declaratory judgment challenging the constitutionality of the zoning ordinances as applied to his property. These were matters within the trial court's original jurisdiction, rather than appellate jurisdiction. It was entirely appropriate for the trial court to

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[4] Nor is this a case where the decision of the township board came within the purview of that standard of review because plaintiff could not seek relief from the township zoning board of appeals. See MCL 125.274; MSA 5.2963(4) and MCL 125.289; 5.2963(19), and see Ypsilanti Township Zoning Ordinance § 18.01 and § 21.05 [giving authority to the township zoning board of appeals authority to grant special use permits and variances]. Compare *Carleton Sportsman's Club v Exeter Twp,* 217 Mich App 195; 550 NW2d 867 (1996), and *Rental Property Owners Ass'n of Kent Co v Grand Rapids,* 455 Mich 246, 268-270; 566 NW2d 514 (1997).

receive all material and relevant evidence up to the time of trial, rather than conduct the limited review accorded administrative decisions.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey