

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

NAZUR N. SARAFA, M.D., and FATEN A.  
SARAFA, D.D.S.,

UNPUBLISHED  
June 26, 2001

Plaintiffs-Appellees,

v

CITY OF STERLING HEIGHTS CITY COUNCIL  
and CITY OF STERLING HEIGHTS,

No. 223571  
Macomb Circuit Court  
LC No. 96-004304-CE

Defendants-Appellants.

---

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

In this zoning dispute, defendant City of Sterling Heights (City)<sup>1</sup> appeals as of right from a judgment permitting plaintiffs to develop certain property, zoned as R-70 (single-family residential) by the City, “for C-1 (local convenience business) purposes consistent with Plaintiffs Plan No. 6.” We reverse.

The instant case is one of two cases decided by the same judge of the circuit court (hereafter “trial court”) regarding the zoning of the plaintiffs’ property. The subject property is located at the corner of Fifteen Mile, a major road, and Morningdale Drive, which provides access to a residential subdivision. When plaintiffs acquired the subject property, they also held an ownership interest in abutting property that was zoned C-1 and developed for commercial use. The subject property was zoned R-70 and included a residential dwelling which plaintiffs rented to tenants. Plaintiffs would prefer to demolish the dwelling and expand the adjacent commercial structure onto the subject property.

In a prior related case, the trial court upheld the Zoning Board of Appeals decision denying plaintiffs’ request for a special land use variance. In the instant case, the trial court found that the R-70 classification in City’s zoning ordinance, as applied to plaintiffs’ property,

---

<sup>1</sup> Although both the City and city council are designated as appellants in this case, we note that the amended complaint filed by plaintiffs named only City as the defendant and that only City has filed an appeal brief. We will treat any interest of the city council in this appeal as being the same as City.

was unreasonable. The trial court ordered that plaintiffs be permitted to develop the subject property for C-1 purposes consistent with a specific plan offered into evidence by plaintiffs at the bench trial.

On appeal, City requests that this Court dismiss plaintiffs' constitutional claim that the zoning ordinance constituted a taking of private property without just compensation. City argues that plaintiffs failed to prove this claim and that the trial court failed to address it. We find it unnecessary to address whether this claim should have been dismissed. We deem the claim abandoned because plaintiffs failed to seek a decision on it from the trial court and failed to file a cross-appeal challenging the lack of a compensatory award. See *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998) (cross-appeal is necessary to obtain decision more favorable than rendered in the trial court), and *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979) (failure to follow through on motion and request answer from trial court deemed abandonment of issue).

City also claims that the trial court erred in finding that plaintiffs carried their burden of proof on their substantive due process challenge to the R-70 classification in the zoning ordinance as applied to the subject property. We agree.

We review a trial court's findings of fact made during a bench trial under the clearly erroneous standard of review. MCR 2.613(C); *Frericks v Highland Twp*, 228 Mich App 575, 583; 579 NW2d 441 (1998). However, we review questions of law de novo. *Id.* A substantive due process challenge to a zoning ordinance requires proof that: (1) there is no reasonable governmental interest being advanced by the present zoning classification, or (2) the ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question. *Id.* at 594, citing *Kropf v Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974); *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995).

In *Frericks*, this Court also explained that three basic rules should guide an appellate court's review of a substantive due process challenge to a zoning ordinance:

(1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Frericks, supra* at 594, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162, 494 NW2d 761 (1992).]

Based on the evidence in the case at bar, and upon giving due weight to the trial court's factual findings, we conclude that the trial court erred in finding that the R-70 zoning classification was unreasonable as applied to the subject property.

In essence, the trial court appears to have focused on plaintiffs' claim that the subject property could be developed into a more aesthetically pleasing and financially profitable use

under C-1 zoning than under R-70 zoning. The trial court considered three proposed development plans for the subject property: (1) plaintiffs' proposed expansion of the abutting commercial structure, (2) City's proposed development of three residential structures, and (3) a composite of proposed commercial and residential uses. The trial court ultimately preferred plaintiffs' proposed commercial development over the other proposals, citing traffic concerns and concluding that plaintiffs' proposed development was most consistent with City's master land use plan.

It is true that the city council relied on the City's master land use plan as one reason for denying plaintiffs' rezoning request. However, the "reasonableness of a zoning ordinance is determined in light of the zoning ordinance as it now stands [and] we consider the master plan only as a general guide for future development." *Id.* Hence, the trial court should have focused on whether the R-70 classification was reasonable (i.e., rationally related to the community's public health, safety, welfare and prosperity). Instead, it appears that the trial court erroneously focused on which of several proposed plans for developing plaintiffs' property would best further the master land use plan's goal of a smooth transition from commercial to residential uses. *Id.* at 608.

In any event, plaintiffs' own community planning expert testified that the development surrounding the subject property was progressing in accordance with the master land use plan. Although he expressed a preference for plaintiffs' proposed commercial development of the property, he did not testify that development under the R-70 classification was unreasonable. Although plaintiffs' expert also expressed concern regarding the increased traffic that would be created if plaintiffs replaced the existing residential dwelling with three residential dwellings fronting Morningdale Drive, he was not qualified by the trial court to testify as a traffic expert. Further, plaintiffs failed to offer traffic studies or other evidence from which the trial court could infer that a single-family residential classification created an unreasonable safety risk.

We reject plaintiffs' claim on appeal that the instant case is comparable to *Rogers v City of Allen Park*, 186 Mich App 33; 463 NW2d 431 (1990). In *Rogers*, the plaintiffs demonstrated unreasonable safety risks to their existing homes and an inability to sell their property as result of those risks. *Id.* at 35-36. This Court summarized those risks and the economic harm that it created for the residential property owners as follows:

Plaintiffs own homes and property along Southfield Road in Allen Park, Michigan. This portion of Southfield is a divided highway and serves as a major exchange connecting I-94 and I-75. The Southfield Expressway is two blocks away. Vehicles use Southfield Road as if it, too, were the expressway, often traveling at fifty to sixty miles per hour. As a result, pedestrians rarely attempt to cross the street. The residents, plaintiffs, feel compelled not to open their windows because of noise and diesel fumes. Vibrations from the traffic cause cracks in the plaster. From time to time, motorists lose control and veer onto plaintiffs' front lawns. Some plaintiffs have narrowly escaped injury. They have tried and been unable to sell their homes as residences. Those interested in purchasing want the property rezoned. It is currently zoned residential. [*Id.*]

In the case at bar, the evidence showed that plaintiffs were renting the existing dwelling on the property. There was no evidence that they had difficulty finding tenants or that tenants faced the types of safety risks presented in *Rogers*.

Even giving due consideration to the potential redevelopment of the subject property as three single-family residences, we conclude that the trial court clearly erred in finding that the increased traffic for Morningdale Drive would make residential development unfeasible. MCR 2.613(C). The parties did not present any expert testimony regarding traffic hazards. Further, we believe that common sense dictates a conclusion that any development more intensive than the existing single dwelling would lead to increased traffic in the area where the subject property is located. Even though plaintiffs' community placement expert relied on the increased traffic for Morningdale Drive to explain his preference for plaintiffs' proposed commercial use, his testimony did not indicate that either the existing residential use or proposed residential uses would be unfeasible. Further, his testimony did not establish that the existing residential zoning was unreasonable.

While we give a trial court's findings considerable weight when reviewing the lawfulness of a zoning ordinance, we conclude that the trial court erred in declaring that the R-70 classification in City's zoning ordinance was unreasonable as applied to the subject property. Plaintiffs failed to meet their burden of proving that the residential restriction on their property was arbitrary and unreasonable. *Frericks, supra* at 594. Neither plaintiffs' interest in expanding their adjacent commercial use nor the desirability of plaintiffs' proposed use renders the existing residential zoning classification unreasonable.

Because the R-70 zoning classification for the subject property does not violate substantive due process, we find it unnecessary to address City's claim that the trial court's remedy does not comport with *Schwartz v Flint*, 426 Mich 295; 395 NW2d 678 (1986).

Reversed.

/s/ Michael R Smolenski  
/s/ Gary R. McDonald  
/s/ Kathleen Jansen