STATE OF MICHIGAN

COURT OF APPEALS

DANIEL J. OAKS and DORIS J. OAKS,

Plaintiffs-Appellants,

v

MONTAGUE TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
November 27, 2001

No. 222401
Muskegon Circuit Court
LC No. 98-038680-NZ

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

Plaintiffs Daniel and Doris Oaks appeal as of right an order granting defendant Montague Township's motion for summary disposition. We affirm.

I. Basic Facts And Procedural History

A. The Oaks' Interest In The Property

This case involves the Oaks' interest in real property located off Old Channel Trail, consisting of approximately 17.73 acres (the property) in Montague Township. The Oaks made the property their permanent residence in June of 1991 and also used it as collateral for the restructuring of various loans they had with Old Kent Bank. The Oaks defaulted on these loans and Old Kent purchased the property at a foreclosure sale. During the redemption period, the Oaks allegedly entered into an agreement with LSL, a Michigan general partnership,[1] whereby LSL would either loan money to the Oaks to redeem the property or purchase the property on the Oaks' behalf. On July 29, 1994, after the redemption period expired, LSL purchased the property from Old Kent.

Apparently, the Oaks remained in physical possession of the property but a dispute arose between them and LSL regarding their agreement and LSL initiated eviction proceedings against the Oaks in October of 1996. The Oaks filed a counterclaim against LSL based on breach of contract, quiet title, and fraud and misrepresentation. The Muskegon County Circuit Court

[1] The Oaks' brief refers to LSL as a Michigan limited liability company while Daniel Oaks' affidavit refers to it as a Michigan general partnership. While there is a definite legal distinction between the two types of entities, it is not significant for purposes of this appeal.

dismissed the Oaks' counterclaims against LSL on a motion for summary disposition, except for the fraud and misrepresentation counterclaim. The Oaks and LSL then entered into a settlement agreement disposing of the case. Pursuant to the settlement agreement, the Oaks had the right to acquire LSL's interest in the property by paying $427,000 before August 31, 1998, with interest accruing thereon at the rate of fifteen percent per annum from February 1, 1998.

B. Montague Township, The City Of Montague,
The Muskegon County Health Department And The Supply Of Potable Water

As with any proposed new construction, a reliable supply of potable water was essential to any development of the Oaks' property. Generally, there are two feasible sources for such water: either connection to a municipal or private water supply system or, alternatively, a well on the property. The City of Montague operates a water supply system; the Muskegon County Health Department regulates the drilling of new wells. Here, however, the existence of groundwater contamination identified by the Department of Natural Resources (DNR) in the area in which the Oaks' property is located, significantly complicated the situation. In 1978, the DNR recommended that all building permits for construction in areas of known or suspected ground water contamination that would require water to be supplied from on-site wells be denied. At some point in time, and apparently in response to this recommendation, Montague Township instituted a moratorium on the issuance of building permits in the area until either a well was authorized by the Muskegon County Health Department or an acceptable alternate source of potable water was made available.

According to Roger Simon, the Montague Township Supervisor, because of the effect of the groundwater contamination, the City of Montague was "induced" to construct a water supply line within Montague Township for the purpose of supplying water to Township residents. In June of 1998, however, the Department of Environmental Quality, the successor agency to the DNR, advised the City of Montague that "additional water main extensions in this area should not be considered" until the results of a study to evaluate current and future demands in the service area and to determinate appropriate improvements necessary to assure adequate service became available. Apparently, this effectively eliminated the City of Montague's water system as a possible source of supply for the Oaks' property.

Shortly thereafter, the Muskegon County Health Department weighed in on the question of drilling new wells in the area. In a letter dated July 1, 1998, the Health Department stated that it "would not want to issue a permit" for drilling new wells even if the owner installed a test well, certified that it was "clean," and submitted a lab report to the Health Department. In a clarifying letter dated July 16, 1998, the Muskegon County Health Department stated that it would not want to issue well permits under these conditions "due to future questions about the up-gradient chemical contamination, periodic sample monitoring, etc."[2] According to Roger Simon, these two letters "restate what has essentially been the County Health Department's policy since

[2] The letter did also state that, "The Health Department will issue well permits in this region of Montague Township if, and only if, the Michigan Department of Environmental Quality clearly delineates on maps those areas where well permits should or should not be issue [sic]." (Emphasis in original). This qualification apparently had no effect on the situation here.

1978." As we understand it, this policy effectively eliminated the drilling of new wells as a possible source of supply for the Oaks' property.

The upshot of this rather complex series of governmental actions is rather simple. As set out in Montague Township's brief, the Township's building code requires a connection to some potable water source. The City of Montague's public water system was not a possible source because it was at capacity and the DNR had effectively precluded it from constructing additional water line extensions in the area. The drilling of private wells was not a possible source because the Muskegon County Health Department's policy had effectively precluded such drilling. Montague Township's moratorium on building permits in the area until either a well was authorized by the Muskegon County Health Department or an acceptable alternate source of potable water was made available effectively meant that the Township would not issue building permits for the development of the Oaks' property.

C. The Oaks' Attempts To Develop The Property

In February of 1998, the Oaks retained a surveyor who sent a letter to the Montague Township zoning administrator regarding the proposed development. In that letter, the surveyor indicated that the property would be developed under the Michigan Condominium Act.[3] According to the surveyor, the proposed development would have 14 single-family residential parcels and a 30,000 square foot minimum area. The surveyor commented that, "There is no approval process implemented at the Township level that I am aware of for this type of property." The surveyor sought a "memo" from the zoning administrator stating that "based on your review of the proposed details that this proposed layout will comply with Township standards for this property as currently zoned."

In furtherance of their plans, the Oaks prepared a proposed survey, master deed, and condominium bylaws for development of the property as a "site condominium." According to the Oaks, Montague Township took the position that the property could not be developed unless it was in compliance with the Township's zoning ordinance, Article XVIII, regarding "Planned Unit or Multiple Use Development." The Oaks alleged that this was improper because the proposed development consisted of only one use of the property, that being residential use. In any event, according to the Oaks, Montague Township refused to approve the Oaks' proposed development as a site condominium and required them to submit an application for a conditional use permit before the Township would even consider the Oaks' proposal.[4] Ultimately, without waiving their claims that no such application was necessary, the Oaks did submit an application for a conditional use permit. At a hearing the Montague Township Zoning Board of Appeals recommended to the Montague Township Board that the application be denied.

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[3] MCL 599.101, *et. seq.*

[4] According to Daniel Oaks' affidavit, "In mid March of 1998, I had a meeting with the Township Supervisor, Roger Simon during which he told me that if I wanted to develop my property as a site condominium, I would have to go through the approval process of a Planned Unit Development (PUD)."

D. The Oaks' Complaint

In July of 1998, the Oaks filed a three-count complaint against Montague Township.

- Count I sought declaratory relief requesting the trial court to find that the Oaks' proposed development fully complied with Montague Township's ordinances without the need for action or approval by the Township before the project could proceed and requested money damages sustained by the Oaks because of the Township's actions.

- Count II alleged a taking of the property, in violation of the United States and Michigan Constitutions, because of Montague Township's unreasonable, arbitrary, and capricious actions in preventing the Oaks from developing the property as a site condominium.

- Count III alleged a violation of the Oaks' substantive due process rights under the United States Constitution because of Montague Township's unreasonable, arbitrary, and capricious actions in preventing the Oaks from developing the property as a site condominium.

Pursuant to counts II and III, the Oaks sought money damages resulting from Montague Township's actions, including the value of the property as a fourteen-site condominium development.

E. The Conditional Use Permit

In July of 1998, after the Oaks filed their complaint, the Montague Township Board rejected the recommendation of the Zoning Board of Appeals and granted the Oaks a conditional use permit. The permit required that future property purchasers be given a disclosure statement containing the following provisions:

> 1. It has been confirmed by Occidental Chemical Corp. that property to the north and east of the site has contaminated water under it.
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> 2. The State of Michigan and the Muskegon County Health Department has [sic] recommended that no private wells be permitted on this property.
>
> 3. The Township has issued a moratorium on building permits for the site until either a well is authorized by the County or an acceptable alternate source of potable water is made available.
>
> 4. The City of Montague at this time has not agreed to supply water to the site.
>
> 5. The Township has no alternate source of water available.

The portion of the property which the Oaks used as a residence did have a potable water supply. However, the remaining portion of the property, where condominiums would be located, did not have access to potable water.

F. The Sale Of The Property

The Oaks claim that they were forced to sell the property to a purchaser on August 31, 1998, for only $700,000, of which $464,201 was paid to LSL to obtain LSL's interest in the property pursuant to the settlement agreement. There were apparently two deeds to the eventual purchaser of the property, one from the Oaks and one from LSL. The deeds contain two different legal descriptions. However, the deed from Old Kent Bank to LSL contained the same legal description as the deed from LSL to the eventual purchaser. The Oaks claim that if it were not for the delays by Montague Township, they could have obtained bank financing for the property or sold enough lots to pay LSL without having to sell the property for a reduced price by the deadline of August 31, 1998.

G. The Motions For Summary Disposition

In August of 1998, Montague Township filed a motion for summary disposition (and subsequently a supplemental motion for summary disposition) pursuant to MCR 2.116(C)(8) and (10). After the hearing, the trial court in December of 1998 issued an opinion holding that Montague Township's ordinances did not require the Oaks to obtain a conditional use permit. Therefore, the trial court did not dismiss count I of the complaint. However, the trial court granted Montague Township's motion for summary disposition regarding counts II and III, on the basis that no taking had occurred. The trial court stated:

> In the case at bar, the Township ordinance and actions do not amount to a taking. First, the Plaintiffs are not precluded from using their land as a single family residence, as zoned, and currently used. In fact, this dwelling has access to potable water through the city waterlines. Second, Plaintiffs have not been deprived of all economically beneficial or productive use of their land. They may sell their land as a condominium site divided in 14 lots. A buyer may choose to purchase the property and wait to develop the lots when the city or the county provides for water access. Although there are no water hookups to the water main available at this time, future connections may materialize. The Plaintiffs' property is zoned as residential and it is still suitable for use as such or marketable as zoned.

In February of 1999, Montague Township filed a second motion for summary disposition as to count I of the complaint pursuant to MCR 2.116(C)(8). Montague Township argued that the Oaks did not have an ownership interest in the property during the period of time in which the conditional use permit application was outstanding. The trial court granted Montague Township's second motion for summary disposition pursuant to MCR 2.116(C)(10). It ruled that the Oaks merely held an option to purchase and, therefore, they had no interest in the property and lacked standing. In its August 1999 opinion, the trial court stated:

> In response to Defendant's motion, Plaintiffs filed a brief and affidavit. Paragraph 6 of the affidavit states that Plaintiffs "had the right to acquire L.S.L.'s interest in the property by paying it the sum of [$427,000] prior to August 31, 1998 . . . ." In essence, Plaintiffs had an option to purchase this property from L.S.L.

> No title of an equitable or legal nature is transferred to the holder of an option. Plaintiffs had no interest in the subject property. *Windiate v Leland,* 246 Mich 659; 225 NW 620 (1929); *Oshtemo Township v Kalamazoo,* 77 Mich 33; 257 NW2d 260 (1977). The Court finds that, based upon the affidavit submitted, the Plaintiffs did not have an ownership interest in the land as alleged in paragraph 4 of the complaint.

The Oaks appealed, contending that the affidavit of Daniel Oaks and the documents attached to Montague Township's motion for summary disposition established that they had an ownership interest in the property. The Oaks also argue that Montague Township's actions constituted an unlawful taking of the property.

II. Standard Of Review

This Court reviews rulings on motions for summary disposition de novo.[5] MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. The Michigan Supreme Court has ruled that a trial court "may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law."[6] In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties is viewed "in the light most favorable to the party opposing the motion."[7] The motion should be denied if a record might be developed that would leave open an issue on which reasonable minds could differ.[8] Review of a trial court's ruling on constitutional issues is de novo.[9]

III. The Oaks' Interest In The Property: An Option To Purchase

The Oaks do not specify the nature of their interest. The documentary evidence presented to the trial court established:

- Old Kent foreclosed on the property due to the Oaks' default on various bank loans, and the bank purchased the property at the foreclosure sale on March 26, 1993.

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[5] *Van v Zahorik,* 460 Mich 320, 326; 597 NW2d 15 (1999) citing to *Spiek v Dep't of Transportation,* 456 Mich 321, 337; 572 NW2d 201 (1998).

[6] *Smith v Globe Life Ins Co,* 460 Mich 446, 454-455; 597 NW2d 28 (1999) quoting *Quinto v Cross & Peters Co*¸451 Mich 358, 362-363; 547 NW2d 314 (1996).

[7] *Id.*

[8] *Skinner v Square D Co,* 445 Mich 153, 162; 516 NW2d 475 (1994) quoting *Farm Bureau Ins Co v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1991).

[9] *Frericks v Highland Twp,* 228 Mich App 575, 599; 579 NW2d 441 (1998) citing to *Scots Ventures, Inc v Hayes Twp,* 391 Mich 139, 158; 215 NW2d 179 (1974).

- Accepting the Oaks' claims as true, they and LSL entered into an agreement whereby LSL promised either to loan them the money required to redeem the property after foreclosure or to purchase the property on their behalf.

- LSL purchased the property after the redemption period from Old Kent Bank.

- The Oaks and LSL reached a settlement agreement in January of 1998 in which the Oaks had the right to acquire the property from LSL by paying $427,000 before August 31, 1998.

- Subsequently, the Oaks submitted the conditional use permit application and filed suit.

We observe that whatever interest the Oaks had in the property at the time they submitted the application for a conditional use permit and filed their complaint would have been dictated by the settlement agreement between them and LSL because all of the evidence *before* the settlement indicated that LSL owned the property. However, there is virtually no documentary evidence as to the details of the settlement agreement. There is only Daniel Oaks' affidavit, which contained statements indicating that LSL owned the property until the Oaks were able to pay the $427,000 by August 31, 1998. We can only speculate that the lack of detail regarding the settlement agreement is the result of a confidentiality provision in the agreement. However, that possibility did not relieve the Oaks from the necessity of submitting sufficient documentary evidence to create an issue of fact for purposes of summary disposition.

The two deeds to the eventual purchaser of the property, one from the Oaks and one from LSL, contain two different legal descriptions. The deed from Old Kent Bank to LSL contained the same legal description as the deed from LSL to the eventual purchaser. These discrepancies are not explained by the Oaks. The Oaks had the burden of proof to establish standing. We conclude that they failed to submit sufficient evidence pursuant to MCR 2.116(G)(4) to establish an issue of fact as to whether they had an ownership interest in the property. In fact, we observe, Daniel J. Oaks' affidavit appears to confirm that the Oaks did *not* have an ownership interest in the property.

We recognize the Oaks' argument that the settlement may have impliedly extended their redemption period to August 31, 1998, thereby giving them a sufficient interest to establish standing. However, the Oaks offer no documentary evidence in support of this proposition. Based on the documentary evidence, we hold that the Oaks simply had an option to purchase the property.

IV. The Status Of An Option And The Oaks' Standing

A. The Status Of An Option

In *Oshtemo Twp v Kalamazoo*,[10] the issue was whether the defendant city could annex land situated in the plaintiff township pursuant to MCL 117.9, which required a city to own land

[10] *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 36-37; 257 NW2d 260 (1977).

before the land could be annexed. The trial court determined that the defendant city was not the "owner" of the property to be annexed, under the statutory language. The trial court reasoned that, although the defendant city owned the property, it had given an option to repurchase the property to some private citizens.[11] This Court stated:

> An option is a preliminary contract for the privilege of purchase and not itself a contract of purchase. An option is basically an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time. An option is, in effect, only an offer which requires strict compliance with the terms of the option both as to the exact thing offered and within the time specified. Failure to so comply results in loss of the rights under the option.
>
> The holder of an option to purchase land does not have any interest in the premises prior to exercising the option. An offer to sell land does not create any interest in that land. The interest attaches only when the condition is performed.
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> * * *
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> We hold on the basis of the foregoing authority that the holder of an option does not have an "interest" as contemplated by the plaintiffs. No interest arises until the option has been accepted and there are no legal or equitable rights in the property given to the optionee.[12]

The *Oshtemo Twp* panel concluded that because the private citizens only held an option, the defendant city was the owner under the statute until the option was exercised. Therefore, the property could be annexed. *Oshtemo Twp* answers the question of whether an option holder has any legal or equitable interest or title in an estate of land. Simply put, the option owner has no such interest or title.

B. The Oaks' Standing

Oshtemo Twp does not, however, answer the question of whether an option holder has standing, or a sufficient interest, to initiate a lawsuit challenging a zoning action. MCR 2.201(B) provides that "[a]n action must be prosecuted in the name of the real party in interest[.]" In *In re Foster*,[13] this Court stated:

> In order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. *Solomon v Lewis*, 184 Mich App 819, 822; 459 NW2d 505 (1990). In *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992), the Supreme Court, quoting 59 Am Jur 2d, Parties, § 30, p 414, noted that:

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[11] *Id*. at 36.

[12] *Id*. at 37-38 (citations omitted).

[13] *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997).

> "[o]ne cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest is generally spoken of as 'standing.'"

We hold that, in the context of this challenge to a zoning action, the Oaks did not have standing during the application process nor at the time the suit was initiated. Our conclusion is, moreover, a practical one because of the potential conflict with the rights of the actual owner. For example, an option holder might seek a modification of a zoning classification, with which the actual owner did not agree, and a court might enforce the option holder's request. If the option holder subsequently failed to exercise the option, the actual owner would be left with land zoned in manner not wished for by that owner and in contravention of that owner's rights. We wish to be clear that in making this observation we are not implying that an option holder who seeks a zoning change *with the express concurrence of the actual owner* might not have standing to initiate a lawsuit contesting a zoning action. We conclude that, based on lack of standing, and pursuant to MCR 2.116(C)(10), the trial court properly dismissed count I of the Oaks' complaint seeking declaratory relief and money damages.

V. Takings

A. The Oaks' Claims

The Oaks contend that an unconstitutional taking occurred. They assert that they could not use their property as zoned, which was residential. According to the Oaks, Montague Township prevented residential use through its moratorium on the granting of building permits in the area. The Oaks claim that Montague Township was fully aware that neither the extension of the waterline of the City of Montague nor the construction of new wells were available options, and that Montague Township failed to provide a potable water source. The Oaks do not, however, argue that the application process for the conditional use permit constituted a taking.

B. The *Adams* Analysis: Categorical Takings And The Balancing Test

The Michigan Supreme Court recently addressed the legal analysis involved in reviewing a "taking" claim in *Adams Outdoor Advertising v City of East Lansing (After Remand).*[14] The Court stated:

> US Const, Am V and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation. Drawing on United States Supreme Court precedent, this Court [Michigan Supreme Court] recently reiterated the appropriate analyses for determining whether a taking has occurred in *K & K Construction, Inc v Dep't of Natural Resources,* 456 Mich 570; 575 NW2d 531 (1998). The *K & K* Court noted that land use regulations effect a taking in two general situations: when they do not substantially advance a

[14] *Adams Outdoor Advertising v City of East Lansing (After Remand),* 463 Mich 17, 23-24; 614 NW2d 634 (2000).

legitimate state interest or when they deny an owner "economically viable use of his land." *Id.* at 576. It then differentiated the second type of taking further at 576-577:

> "The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a 'categorical' taking, where the owner is deprived of 'all economically beneficial or productive use of land,' *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the 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).

The Court stated that *K & K* then defined categorical takings:[15]

> In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas, supra* at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." *Id.* at 1019 (emphasis in original).

The Court then stated that *K & K Construction* next explained the balancing test analysis:

> In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character 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. *Penn Central, supra* 438 US 124.[16]

B. The Oaks' Standing Redux

We held above that the Oaks did not have any ownership interest in the property at the time the suit was filed, or at a minimum, they failed to submit sufficient documentary evidence to create an issue of fact over whether they had an ownership interest. The Oaks were required to establish an interest which they alleged was being taken.[17] This they failed to do. Therefore, we conclude that the Oaks lacked standing to assert a takings claim because they were not real parties in interest pursuant to MCR 2.201 at the time they filed the suit in July of 1998. The record appears to indicate that the Oaks acquired an ownership interest on August 31, 1998, when they apparently exercised their option to purchase, and immediately transferred the property to the ultimate purchaser. The Oaks' ownership interest in the property, therefore, only

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[15] *Id.* at 23-24 .

[16] *Id.* at 24, omissions, alterations, and emphasis in the original.

[17] *Adams, supra* at 24.

existed for one day at most. At the time the trial court rendered its decision granting summary disposition as to the taking claim, the Oaks no longer had any interest in the property. We hold that the Oaks lacked standing to obtain damages for a taking because they held no ownership interest at the time they were seeking redress for the taking.

In addition, because the Oaks obtained an ownership interest in the property only on August 31, 1998, they obtained that interest when they were fully aware of Montague Township's building permit moratorium and the lack of feasible source of supply for potable water. In *Adams,* the Court stated:

> Further, Adams acquired the rooftop signs and leases at issue in 1983 and renewed the leases as recently as 1993 and 1996. In 1983, 1993, and 1996, Adams was aware of the 1975 sign code and could have no reasonable expectation that it could maintain the signs at the rooftop locations after the date designated in the code.[18]

Therefore, the Oaks cannot claim a taking when they exercised their option to purchase the property knowing that there was a moratorium on the issuance of building permits in the area and that there was no feasible source of supply for potable water.

C. Legitimate State Interests

(1) Montague Township's Actions Concerning The Water Supply

The Oaks' taking claim is based on Montague Township's alleged failure to provide a source of potable water to residentially zoned property so that property owners could obtain a building permit. Under the *Adams* analysis, we turn to the question of whether Montague Township's actions substantially advanced a legitimate state interest. The first inquiry is whether it was *the Township's* actions which prevented a water supply to residentially zoned property. The documentary evidence indicates that the City of Montague was refusing any new connections to the city water lines and that the Muskegon County Health Department would not authorize the construction of groundwater wells. A government's actions must be a *substantial* cause of the decline of a property's value and it does not appear that *Montague Township*'s actions are at issue in this case as to the water supply.[19]

(2) The Moratorium On Building Permits; The Obligation To Create A Water Source

The moratorium on building permits, however, certainly did involve an action by Montague Township. We conclude that the moratorium clearly advanced a legitimate state interest. Requiring a water supply to a residential structure before a building permit is issued is a matter of health, safety, and necessity. Prohibiting persons from accessing potentially contaminated water is also a matter of health and safety. The Oaks appear to argue that Montague Township was obligated to solve the water problem by creating a water source (that is,

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[18] *Adams, supra* at 27, footnotes omitted.

[19] *Attorney General v Ankersen,* 148 Mich App 524, 561; 385 NW2d 658 (1986).

by paying the City of Montague to connect their waterlines, by cleaning-up the contamination, or by discovering a new source of water) or be guilty of a taking. The Oaks cite no authority to support this proposition. Issues insufficiently briefed are deemed abandoned on appeal.[20] "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."[21]

The case law does not support the Oaks' implicit argument that Montague Township was obligated to supply water to property in the Township. In *In re Urban Renewal, Elmwood Park Project*,[22] the Michigan Supreme Court stated:

> [A] city may not by deliberate acts reduce the value of private property and thereby deprive the owner of just compensation. Some of the acts charged against the city of Detroit, such as lax police protection, reduction in refuse collections, street cleaning and street repair, go merely to the performance of city services of a general nature.

In re Urban Renewal indicates that a failure to provide services of a general nature, such as supplying water, does not constitute a taking. In addition, Montague Township's alleged failure to provide a water supply is not an *affirmative act* on its part directly aimed at the Oaks' property.[23]

The Oaks cite *Jones v East Lansing-Meridian Water & Sewer Authority*,[24] in support of their position. In *Jones*, the plaintiffs alleged that the defendants interfered with their water supply by drilling wells into the Saginaw Formation aquifer, which was the single largest source of potable water in the area.[25] The plaintiffs alleged a taking of their subterranean water rights.[26] This Court found that a taking had occurred and held that "[d]efendants did impress plaintiffs' private property into serving a public use by unreasonably interfering with plaintiffs' subterranean water rights."[27]

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[20] *Dresden v Detroit Macomb Hosp*, 218 Mich App 292, 300; 553 NW2d 387 (1996) citing to *Impullitti v Impullitti*, 163 Mich App 507, 509; 415 NW2d 261 (1987) and *Guardiola v Oakland Hosp*, 200 Mich App 524, 526; 504 NW2d 701 (1993).

[21] *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[22] *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 317; 136 NW2d 896 (1965).

[23] *Attorney General, supra* at 561.

[24] *Jones v East Lansing-Meridian Water & Sewer Authority*, 98 Mich App 104; 296 NW2d 202 (1980).

[25] *Id.* at 105-106.

[26] *Id.* at 107.

[27] *Id.* at 110.

We conclude that the case here is distinguishable from *Jones* for three reasons. First, if there was any interference with the Oaks' water rights, the interference was by the City of Montague and the Muskegon County Health Department and not by Montague Township. Second, any interference advanced a substantial government interest. Third, the Oaks essentially accuse Montague Township of not *supplying* a water source rather than with *interfering* with a viable water source.

D. Economically Viable Use Of Property

(1) Types Of Takings

Continuing the *Adams* analysis, the next question is whether Montague Township denied the Oaks the economically viable use of their property. Once again, we do not believe that the Township denied the Oaks the use of their land. It was the actions of the City of Montague and Muskegon County Health Department, not Montague Township, that eliminated the possible sources of supply of potable water to the Oaks' property. *Adams* differentiates two types of takings with respect to deprivation of economically viable use of property. The first is a categorical taking, which requires a sacrifice of *all* economically beneficial or productive use of the land.[28] The second type of taking is based on the traditional balancing test which weighs the character of the government's actions, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-backed expectations.[29]

(2) Categorical Takings

We conclude that there was no evidence that the Oaks were required to sacrifice *all* economically beneficial or productive use of the property. The Oaks used a portion of the property as a residence for a number of years and that portion had access to potable water. The fact that the entire property sold for $700,000 certainly demonstrates that the Oaks did not sacrifice all economically beneficial or productive use of the property.

(3) The Balancing Test

We have already addressed the character of Montague Township's actions and concluded that they advanced a legitimate state interest. With respect to the economic effect of those actions the Oaks argue that, because of the delay caused by Montague Township, they were unable to obtain financing or to sell enough parcels to pay off LSL prior August 31, 1998. This is mere speculation by the Oaks. They submitted no documentary evidence regarding their failed financing attempts or prospective purchasers. Similarly, the lack of documentary evidence did not establish an issue of fact regarding the extent of any interference with their investment. (We also note that the complaint, as it relates to the taking issue, focused on Montague Township's failure to properly apply its zoning ordinances with regard to the conditional use permit and not on its failure to supply water to the property. However, the broad, general language in the

[28] *Adams, supra* at 23.

[29] *Adams, supra* at 23-24.

complaint, along with the Oaks' argument at summary disposition, arguably encompasses the water supply issue.)

In *K & K Construction, Inc v Dep't of Natural Resources,*[30] the Michigan Supreme Court stated:

> One of the fundamental principles of taking jurisdiction is the "nonsegmentation" principle. This principle holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. Courts should not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."

In addition, in *Adams,* the Court stated:

> Under the constitution, we do not believe that a property owner, confronted with an imminent property regulation, can nullify such a legitimate exercise of the police power by leasing narrow parcels or interests in his property so that the regulation could be characterized as a taking only because of its disproportionate effect on the narrow parcel or interest leased.[31]

K & K Construction and *Adams* require this Court to look at the property here as a whole and not as fourteen individual parcels as proposed by the development plan. As a whole, the property was a 17.73-acre parcel. The Oaks resided on a portion of the property and they had a potable water source for their residence. The Oaks' claimed, accurately, that there would be no potable water *for the fourteen parcels after division of the property*. When we consider the property *as a whole*, however, we conclude that the Oaks' taking argument lacks merit.

E. Conclusion

We hold that the trial court properly granted Montague Township's motion for summary disposition regarding the taking claim because (1) the Oaks lacked standing; (2) Montague Township's actions did not result in the lack of potable water; (3) the Oaks challenged no affirmative act by the Township; (4) the Township's actions advanced a legitimate state interest; (5) the Oaks were not required to sacrifice all economically beneficial or productive use of their property; (6) the Oaks did not present any documentary evidence to establish that they were unable to obtain financing or to sell the property; and (7) viewing the property as a whole, there was no taking because there was a supply of potable water to a portion of the property. In essence, the Oaks seek to utilize the takings doctrine to hold Montague Township responsible for the actions of other governmental entities and for the Township's own inaction in failing to make available a supply of potable water. As sympathetic as we might be to the plight of property

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[30] *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 578; 575 NW2d 531 (1998).

[31] *Adams, supra* at 25.

owners when faced with the interlocking actions of a number of governmental entities, we simply see no way in which the takings doctrine can be stretched so as to accommodate such claims.

VI. Substantive Due Process

A. The Oaks' Claims

The Oaks contend that the trial court erred in dismissing their substantive due process claim. They argue that Montague Township required them to obtain approval for the proposed site condominium project despite the fact that the project did not require approval under the Township's zoning ordinances. This, they claim, was a denial of their substantive due process rights. The Oaks also claim that Montague Township violated their substantive due process rights by adopting a building code that required them to hook up to a water supply and by then refusing or failing to supply water to their property. Once again, we review a trial court's ruling on constitutional issues de novo.[32]

B. The Elements Of A Substantive Due Process Claim

In *Frericks,*[33] this Court stated:

> [A] substantive due process claim requires the following proof: (1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question.

We begin our discussion of this issue by reiterating our holding that the Oaks lacked standing to sue because they had no ownership interest in the property, or at a minimum, they failed to present sufficient documentary evidence to establish an issue of fact regarding ownership. In any event, we conclude that the Oaks' substantive due process claim fails as a matter of law.

C. Accessibility To Potable Water

With respect to the Oaks' due process claim on accessibility to potable water, we once again note that it was the actions of the City of Montague and the Muskegon County Health Department, and not of Montague Township, that prevented access to potable water.[34] In addition, the Oaks challenged no affirmative act on the part of the Township.[35]

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[32] *Frericks, supra* at 594.

[33] *Id.* at 594, citations omitted

[34] *Attorney General, supra* at 561.

[35] *Id.*

D. Adoption Of The Building Code: Application Of The Zoning Code

We conclude that there clearly was a reasonable governmental interest involved in requiring, through the provisions of the building code, that residential homes have potable water, simply based on health and safety concerns. For that same reason, the Township's zoning code is not arbitrary nor capricious. As to the water supply issue itself, there has been no deprivation of the Oaks' property interest for the reasons discussed above regarding the alleged taking.

E. The Conditional Use Permit

The Oaks claim that Montague Township's requirement of a conditional use permit also had the effect of re-zoning their property. We conclude that this claim has no merit, for several reasons. First, the Township Board did in fact grant the permit in July of 1998. Second, whether or not the conditional use permit was required, or was unreasonable, arbitrary, or capricious, the Oaks did not present any documentary evidence to establish that the delay between their application for the permit and the Township Board's granting of it damaged their ability to obtain financing or to sell the property.

F. Conclusion

We therefore conclude that the trial court properly granted Montague Township's motion for summary disposition regarding the Oaks' substantive due process claim.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper