STATE OF MICHIGAN

COURT OF APPEALS

KENNETH H. JOHNSON,

Plaintiff-Appellant,

v

OAKLAND COUNTY DEPARTMENT OF HUMAN SERVICES,

Defendant-Appellee.

UNPUBLISHED
April 23, 2002

No. 229410
Oakland Circuit Court
LC No. 98-003235-CC

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

In this inverse condemnation action, plaintiff appeals as of right from the circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiff's motion for the same relief. We affirm.

Plaintiff is the owner of a residential lot in the City of Farmington Hills, Oakland County, described as Lot 73, Duke's Forestbrook Hills No. 1 Subdivision. This parcel of property is in the middle of a subdivision and has remained undeveloped for a period of approximately thirty to thirty-five years, despite complete development of the surrounding parcels in the subdivision. The property is zoned single-family residential and cannot be used without a sewage disposal system, either on-site or municipal. Neither the subject property nor the whole subdivision is serviced by a municipal sewage system; therefore, development of the property is contingent on the installation of an on-site sewage disposal system.

On May 24, 1995, plaintiff exercised an option to purchase Lot 73 for the discounted price of $38,000,[1] despite his knowledge that the subject property had failed perk tests and that the prior owner's application for a permit for an on-site sewage disposal system had been denied. At the time plaintiff purchased the subject parcel, there was a requirement that there be forty-eight inches of separation between the natural grade and the water table for the installation of a

[1] In light of plaintiff's allegation in his complaint that the parcel is worth $82,000 as a developable single-family residential lot, it is evident that plaintiff purchased the lot at a considerable discount with the hope that he would be able to rectify the shortcomings of the lot and obtain approval for an on-site sewage disposal system.

traditional septic system. Plaintiff's application and revised plan seeking a traditional on-site system to develop a three-bedroom home on the lot were both denied by defendant in 1995. In March 1996, plaintiff retained the services of an engineering firm that designed an alternative system using sand filtration. As this relatively new technology was being considered for Lot 73, it was also being scrutinized by defendant county as an alternative to a traditional septic system. As a result, sand filter guidelines were promulgated by defendant in May 1996, requiring that the "water table [must be] greater than 48" below natural grade."[2] In other words, defendant's regulation required four feet of separation between the ground water and such a newly developed sand filtration disposal system on site. Plaintiff's third application based on the proposed use of a sand filtration system was denied by defendant in February 1997 because of the dense clay composition of the soil, a high water table (borings revealed groundwater at two feet), and the fact that the area was subject to ponding and/or flooding. A subsequent appeal to the Sanitary Code Appeals Board was likewise unsuccessful.

In January 1998, plaintiff filed the present suit seeking a writ of mandamus directing defendant to issue an on-site septic permit for the disposal system contained in plaintiff's third application. Plaintiff alleged that he was entitled to the permit because defendant's requirements relating to septic systems were "unreasonable, overly-restrictive, and unnecessary." Plaintiff alternatively sought damages in the amount of $82,000, the estimated value of the lot as a residential building site, as a result of defendant's alleged inverse condemnation of his property.

At the close of discovery, the parties filed competing motions for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff claimed that defendant's separation requirement rendered the subject property devoid of all economically beneficial and productive use and that the policies and guidelines of defendant failed to have a rational relationship to a legitimate public interest. Defendant, on the other hand, argued that there were no genuine issues of material fact that plaintiff's property was not devoid of all economically beneficial and productive use. Defendant claimed that plaintiff could petition for installation of a municipal sewer system, construct sewage holding tanks and/or partition his property and sell it to adjacent neighbors as additional yard space. Defendant also argued that there was no genuine dispute of fact that plaintiff knew that he could not use the property when he purchased it.

Following oral argument on each party's motion, the trial court denied plaintiff's motion and granted defendant's motion. In so doing, the trial court held that the forty-eight inch separation requirement between the natural grade and the water table promulgated by defendant advanced a legitimate public interest because it was "designed to keep unsanitary and unsafe conditions from seeping into the groundwater below the county on which the residents rely for drinking water." The trial court further held that

> The next question is whether the regulation denies the Plaintiff and owner economically viable use of the land. Now Plaintiff alleges that since he cannot

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[2] At the time plaintiff purchased the lot, the state of Michigan's requirement for ground water table with a sand filtration system was 24" above natural grade, and defendant county had no regulation for these systems.

> build a residence on his property, there's no other economically viable use for it. Defendant asserts that Plaintiff has failed to prove that this is true.
>
> Affidavits, depositions, admissions, or other documentary evidence are required when a judgment is sought based on MCR 2.116(C)(10), pursuant to Michigan Court Rule 2.116(G)(3)(b). Now although Plaintiff has provided documentary evidence, [in opposition to the motion for summary disposition brought by defendant] including depositions and affidavits, none of it establishes that there's no other economically viable use of his land.
>
> Plaintiff's affidavit does state that he attempted without success to convince the other owners to consider a special assessment for sewers, but that is the only evidence. Thus, the plaintiff has failed to support the issues he has identified as provided in MCR 2.116(G)(4), and the motion must be denied.
>
> I'll grant Defendant's motion and deny Plaintiff's motion.

Plaintiff's motion for reconsideration was subsequently denied by the trial court and this appeal followed.

This Court reviews de novo motions for summary disposition. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324; 559 NW2d 86 (1996). A motion brought pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. A reviewing court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The 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. *Id.*; *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); MCR 2.116(C)(10), (G)(4).

Both our federal and state constitutions prohibit the taking of private property for public use without just compensation. See US Const, Am V and Const 1963, art 10 § 2. The United States Supreme Court has recognized that the government effectively "takes" a person's property by overburdening that property with regulations. *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 2d 322 (1922). Generally, there are two situations where a land use regulation will effect a taking: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land. *K & K Construction, Inc v Dept of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998). As the *K & K* Court further explained:

> 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).

> 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 . . . , 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). 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*, 438 US 124. [*Id.* at 576-577.]

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

In the instant case, we find no error in the trial court's ruling that the governmental regulation in question — the requirement with regard to sand filtration disposal systems that there be a forty-eight inch separation between the natural grade and the water table — serves a legitimate government interest. Ample and persuasive evidence, in the form of a report and data provided by an environmental engineer, was introduced showing that, given the soil conditions in the area in question, the separation requirement was necessary to prevent the introduction of contaminates into the groundwater. Plaintiff has failed to establish a genuine issue of material fact regarding the legitimacy or necessity of such a requirement. Thus, the trial court correctly concluded that the first type of taking set forth in *K & K*, *supra*, based on the failure of the regulation in question to advance a legitimate state interest, has not occurred under the present circumstances.

Moreover, to the extent we interpret the trial court's summary conclusion, without accompanying explanation, that plaintiff failed to establish "that there's no other economically viable use of his land," as holding that the challenged regulation does not rise to the level of a categorical taking, we agree that the proofs support this conclusion. In order for a categorical taking to occur, the property owner must be completely deprived of *all* economically beneficial uses of his property. *K & K*, *supra* at 586. Otherwise stated, the subject property must be rendered worthless or economically idle. *Id*. at 587. Plaintiff has not conclusively demonstrated such deprivation, or shown the existence of a factual dispute, so as to fend off defendant's motion for summary disposition in this regard. As the trial court noted, although plaintiff did produce some documentary evidence indicating that certain potential uses of the property may have been foreclosed by defendant's regulation — i.e., one adjacent property owner affied that he was not interested in purchasing the subject parcel as additional yardage, plaintiff affied that, based on his attendance at a neighborhood meeting, there was no current interest on the part of his neighbors in allowing a special assessment for installation of a municipal sewer system, and evidence indicated that no on-site sewage disposal system could be constructed on the property and holding tanks would not be permissible — plaintiff has not conclusively demonstrated that

all other alternative uses not requiring an on-site sewage disposal system have been precluded by defendant's forty-eight inch separation requirement.[3] "[W]hile the regulations may have diminished the value of plaintiff['s] land, this diminution in value would not give rise to a categorical taking." *K & K, supra* at 587, n 13. Thus, we conclude that the above evidence produced by plaintiff is insufficient to create a factual dispute with regard to a categorical taking.

We likewise conclude that plaintiff is unable to withstand summary disposition pursuant to the traditional balancing test applicable to a claim of noncategorical deprivation, under which the reviewing court engages in an ad hoc, factual inquiry of "(1) the character of a 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 at 124. See *also Palazzolo v Rhode Island*, 533 US 606; 121 S Ct 2448, 2457; 150 L Ed 2d 592 (2001); *Adams Outdoor Advertising, supra* at 24, 26-27; and *K & K, supra* at 577, 587-588. Plaintiff cannot prevail under the first two prongs of the test because, as we have concluded above, he has not established that the forty-eight inch separation requirement is unreasonable or that the parcel is either unusable or unmarketable in light of that regulation.

The third prong of the test also weighs against plaintiff because he has not demonstrated that he had reasonable investment-backed expectations that he could build a dwelling on the parcel:

> Reasonable, investment-backed expectations are an element of every regulatory takings case. See *Loveladies Harbor* [*Inc v United States*], 28 F3d [1171 (1994)] at 1179. See also *id*. at 1177 ("In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the risk, so that a purchaser could not show a loss in his investment attributable to it."); *Creppel* [*v United States*], 41 F3d [627 (1994)] at 632 ("One who buys with knowledge of a restraint assumes the risk of economic loss."). [*Good v United States*, 189 F3d 1355 (1999)].

In the instant case, it is significant that at the time plaintiff purchased the subject parcel, there was an existing requirement that there be forty-eight inches of separation between the natural grade and the water table for the installation of a traditional on-site sewage disposal system. The record indicates that plaintiff was well aware of this requirement, as well as the prior owner's inability to obtain a permit for the installation of such a system, when he purchased Lot 73. This recognition is reflected in the discounted price plaintiff paid for the lot – $38,000

[3] We note that when plaintiff filed his motion for reconsideration with the trial court, he presented for the first time the affidavit of a licensed real estate appraiser which concludes that the only economically viable use for plaintiff's property is as a building site for a single family residence. However, this evidence should have been available to plaintiff at the time the original motions for summary disposition were considered by the trial court and hence did not constitute new evidence. In any event, mere conclusory allegations contained within an affidavit that are devoid of detail are insufficient to create a question of fact, *Quinto, supra* at 371, or conversely, from the perspective of plaintiff's posture as the moving party, to eliminate a factual dispute.

compared to the $85,000 value plaintiff claims the parcel possesses as a single-family residential lot.

Moreover, when defendant county subsequently issued its sand filtration guidelines, the forty-eight inch separation requirement remained. As defendant astutely notes, "The bottom line is that [plaintiff] gambled [unsuccessfully] that the county would relax the forty-eight inch separation requirement when it considered sand filtration technology for on-site sewage disposal systems." Under the circumstances, we cannot conclude that plaintiff had any legitimate expectation, that should now be guaranteed by defendant, that the forty-eight inch separation requirement would be relaxed as a result of new and untested technology so as to permit development of the subject parcel.

We therefore conclude that the trial court did not err in denying plaintiff's motion for summary disposition and granting defendant's similar motion.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin