STATE OF MICHIGAN

COURT OF APPEALS

D & T CONSTRUCTION COMPANY,

Plaintiff-Appellant,

V

CHARTER TOWNSHIP OF HARRISON, BOARD OF TRUSTEES OF THE CHARTER TOWNSHIP OF HARRISON, PAMELA A. WEEKS, RONALD J. NOWAK, SHERRI M. MURPHY, KATHLEEN M. LYON, PATRICIA D. SWITZER, BARBARA C. URBAN and JAMES T. SENSTOCK,

Defendants-Appellees.

UNPUBLISHED
July 26, 2002

No. 229494
Macomb Circuit Court
LC No. 96-005052-CZ

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

In this case involving an alleged regulatory taking of private property, plaintiff appeals as of right from a judgment entered following a bench trial that dismissed its claims for damages. We affirm.

I

Plaintiff contends that defendant Harrison Township's decision to rezone its property from multiple family residential to single family residential constituted an illegal taking and violated its right to substantive due process. We review de novo a trial court's ruling on a constitutional challenge to a zoning ordinance. We give considerable weight, however, to the trial court's factual findings. *Bell River Assoc's v China Charter Twp*, 223 Mich App 124, 129; 565 NW2d 695 (1997). Assessing credibility and weighing testimony are the prerogatives of the trier of fact. *Kelly v Builders Square, Inc*, 465 Mich 29, 40; 632 NW2d 912 (2001).

II

Both the state and federal constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000). Land use regulations may effectuate a taking when (1) the regulation does not substantially advance a

legitimate state interest or (2) it denies an owner economically viable use of his land. *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998).

To establish that a regulation does not substantially advance a legitimate state interest, and thus violates a landowner's substantive due process rights, the landowner must prove that the present zoning classification advances no reasonable governmental interest, or that the regulation is unreasonable because it comprises an arbitrary, capricious and unfounded exclusion of other types of valid land use from the subject area. *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998); *Bell River Assoc's*, *supra* at 133. Three basic rules of judicial review govern a court's analysis of a substantive due process claim: (1) the ordinance is presumed valid, (2) the challenger bears the burden of proving that the ordinance is an arbitrary and unreasonable restriction on the landowner's use of the property; that the provision in question is an arbitrary fiat, and (3) a reviewing court gives considerable weight to the findings of the trial judge. *Frericks*, *supra*, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).

A regulation that denies an owner economically viable use of his land occasions a taking in violation of the Just Compensation Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment. *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37, amended 439 Mich 1202 (1991).

> 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).
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> 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. [*K & K Constr*, *supra* at 576-577.]
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> . . . . While there is no set formula for determining when a taking has occurred under this test, it is at least "clear that the question whether a regulation denies the owner economically viable use of his land requires at least a

> comparison of the value removed with the value that remains." [*K & K Constr, supra* at 588, quoting *Bevan, supra* at 391.]

"Mere diminution in value does not amount to taking. Rather, a plaintiff who alleges that he was denied economically viable use of his land 'must show that the property is either unsuitable for use as zoned or unmarketable as zoned.'" *Bell River Assoc's, supra* at 133, quoting *Bevan, supra* at 402-403.

III

We first address plaintiff's claim that Harrison Township's enactment of its current single family residential zoning ordinance deprived plaintiff of its substantive due process rights. We initially note plaintiff's concession that it does not intend to challenge that the present zoning classification advances a reasonable governmental interest. Plaintiff instead argues that the single family residential zoning ordinance arbitrarily and unreasonably restricted its use of its property.

After reviewing the record, we conclude that ample evidence supported the trial court's finding that the township had demonstrated a rational basis for its rezoning decision in light of the land uses surrounding plaintiff's property, the physical characteristics of the property, and the township's master plan. The trial court referred to the testimony of Dennis Meagher, a professional community planner employed by Harrison Township. Meagher testified that the township's 1981 and 1992 master plans reflected the projected development of the land including plaintiff's parcel and the surrounding parcels as single family residential. Meagher further testified that the properties surrounding plaintiff's property all had been developed as single family residential and all were currently zoned single family residential.

In light of this testimony that the current zoning of plaintiff's parcel was consistent with the existing uses and zoning of nearby properties, and the testimony of licensed professional engineer James Rabine regarding the feasibility of a single family unit development on plaintiff's property, we cannot characterize as clearly erroneous the trial court's finding that "the Township has demonstrated a rational basis for the classification in light of the surrounding land use, the physical characteristics of the property, and the Township Master Plan." *Schwartz v City of Flint*, 426 Mich 295, 328; 395 NW2d 678 (1986); *Kropf v City of Sterling Heights*, 391 Mich 139, 163; 215 NW2d 179 (1974). That plaintiff may have raised a "debatable question" or demonstrated a "difference of opinion" regarding the wisdom of the township's zoning scheme is insufficient to establish that the rezoning created an arbitrary and unreasonable restriction of the property. *Kropf, supra* at 162. To the extent that the trial court's conclusion rested on a determination that Meagher and Rabine were credible, we will not revisit this determination. *Kelly, supra*.[1]

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[1] We note that we decline to address plaintiff's suggestion that the township enacted its rezoning ordinance "to prevent people of color from moving into the proposed high-rise project after its completion," because plaintiff gives this issue cursory treatment with no citation to relevant authority supporting its argument. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

IV

We next address plaintiff's argument that the township's rezoning of plaintiff's property from multifamily to single family residential deprived plaintiff of economically viable use of its land. The trial court concluded to the contrary that the evidence failed to establish that the current zoning regulation denied plaintiff economically viable use of its land. The court found that the township's expert witnesses provided credible testimony and documentation concerning the economic viability of developing a single family subdivision on plaintiff's property in satisfaction of all existing township ordinance requirements. The court found unpersuasive the testimony of plaintiff's experts concerning development costs for infrastructure and the related cost of wetlands mitigation. The court also found that the township's recommendation for on site mitigation for the 19- and 15-lot developments appeared consistent with similar plans approved by the Department of Environmental Quality (DEQ) on neighboring subdivisions. The record shows that plaintiff failed to substantiate its speculations that the wetlands on its parcel precluded economically viable development of single family residential units because plaintiff never conducted sufficient studies or sought a wetlands evaluation of its property by the DEQ. Consequently, plaintiff could not show that mitigation would have been impossible on site and could not show the extent or cost of mitigation that the DEQ would require.

Because plaintiff's estimates of mitigation costs lacked support and were insufficient to show that the zoning change precluded any development of its property, we cannot conclude that the trial court's findings regarding the viability of the township's proffered single family housing unit plan were clearly erroneous. To the extent that the trial court's findings rested on its determination of credibility with respect to the expert witnesses proffered by the township, we reiterate that we will not revisit the trial court's credibility determinations. *Kelly*, *supra*. We conclude that plaintiff failed to establish that its property was either unsuitable for use as zoned or unmarketable as zoned. *Bell River Assoc's*, *supra*.[2]

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter

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[2] Although plaintiff apparently concedes in its reply brief on appeal that it did not acquire "a vested right in the prior . . . zoning classification," we nonetheless note briefly the propriety of the trial court's finding that no vested right in the prior zoning classification existed. The record reflects that plaintiff presented no evidence of actual construction or excavation on its property, and the testimony of plaintiff's owner established that the property had remained vacant and undeveloped since plaintiff had purchased it. Meagher testified that plaintiff had not submitted to the township any site plans or engineering drawings for any proposed development. In light of this evidence, the trial court correctly determined that plaintiff had made no tangible change in the land in reliance on the prior multifamily zoning classification. *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 574-575; 398 NW2d 393 (1986).