STATE OF MICHIGAN

COURT OF APPEALS

SHELBY OAKS, LLC, Plaintiff-Appellant, v CHARTER TOWNSHIP OF SHELBY and CHARTER TOWNSHIP OF SHELBY ZONING BOARD OF APPEALS, Defendants-Appellees.	UNPUBLISHED February 5, 2004 No. 241135 Macomb Circuit Court LC No. 99-002191-AV
SHELBY OAKS, LLC, Plaintiff-Appellant, v CHARTER TOWNSHIP OF SHELBY and CHARTER TOWNSHIP OF SHELBY ZONING BOARD OF APPEALS, Defendants-Appellees.	No. 241253 Macomb Circuit Court LC No. 99-0002191-AV

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In Docket No. 241135, plaintiff appeals by leave granted from the circuit court's affirmance of a decision by the zoning board of appeals (ZBA). In Docket No. 241253, plaintiff appeals as of right from the trial court's dismissal of count I of the complaint, challenging the constitutionality of the zoning.[1] In both cases, we affirm.

[1] In accordance with MCR 7.216(A)(7), and for reasons of judicial economy, these actions were consolidated by order dated January 27, 2004.

Up until October 1997, a parcel of approximately ninety-nine acres of land, located at the southwest intersection of 23 Mile Road and M-53, was designated as follows: twenty-four acres zoned as C-2 commercial (linear retail business district) and the balance of the property zoned as R-9 (multifamily residential district). At that time, the property was "down-zoned" with the commercial acreage reduced to eight or nine acres, and the balance zoned as R-1-B (single family residential district). Although plaintiff contemplated the purchase of the property at least two years before the change in zoning, the purchase did not occur until June 24, 1998, approximately eight months after the zoning change.[2] Plaintiff was aware of the change in zoning at the time of purchase. Plaintiff initially sought a rezoning of the parcel, then requested a use variance. Specifically, plaintiff proposed a 29.4-acre commercial development and 69.9 acres of R-9.

The planning commission entertained plaintiff's request first and denied it, concluding that: (1) the introduction of multiple family development was inconsistent with the land use pattern, (2) the proposed change was not consistent with the master plan, (3) the movement of the commercial zoning boundary would adversely impact the abutting single family neighborhoods and their property values, (4) the failure to demonstrate a demand for the additional retail zoning, and (5) plaintiff failed to demonstrate substantial reasons why the property could not be used as currently zoned. When the request for a use variance was submitted to the ZBA, it was also denied.

Plaintiff filed an action in circuit court challenging the validity of the zoning ordinance. Specifically, plaintiff alleged that the zoning classification resulted in a taking, the zoning was invalid on its face and as applied to the land, and the zoning violated the township zoning act. Plaintiff also appealed the decision of the ZBA.[3] Defendant moved for summary disposition of the count challenging the decision of the ZBA. Ultimately, the circuit court ordered a remand to the ZBA for an articulation of the reasons for the denial of the zoning request.[4] On remand, the ZBA gave the following reasons for the denial: (1) the applicable zoning was known at the time of purchase, and therefore, any hardship was self-created, (2) the variance would be an injustice to the nearby property owners and not in harmony with the existing region or the master plan, (3)

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[2] Plaintiff repeatedly alleges that these facts, cited by defendants, are not part of the record on appeal. On the contrary, this information was submitted before the planning commission and reduced to writings contained in the administrative record on appeal. The parties stipulated that the certified record on appeal was prepared by the township clerk. These documents are found in the stipulated record. See MCR 7.210(A)(1). Moreover, the planning commission noted that it was forwarding information to the zoning board of appeals.

[3] A second count alleging superintending control was dismissed and is not at issue on appeal.

[4] In the opinion and order clarifying the basis for the remand, the trial court's opinion acknowledged the constitutionality claim, stating: "In compliance with MCR 2.602(A)(3), the Court states that since this Opinion and Order only disposes of the claim of appeal and count I challenging the validity of the zoning ordinance remains, this action shall remain open pending the results of the remand."

the variance would afford special privileges not afforded other parties, and (4) the property can be developed as zoned.

After reviewing the conclusions of the ZBA, the trial court issued an opinion and order affirming the decision of the ZBA. Specifically, the trial court held that "the ZBA's denial of plaintiff's requested variance complies with applicable law, is supported by competent evidence and does not evidence caprice, abuse of discretion or arbitrary action."

The trial court's opinion and order also disposed of count I of the complaint, stating: "Having failed to establish the property can not reasonably be developed in a manner consistent with the current zoning, plaintiff has not demonstrated the current zoning is invalid or affected a taking of the property." Plaintiff moved for reconsideration or relief from judgment from the order, asserting that it was entitled to a trial on the issue of the constitutionality of the zoning of the parcel. The trial court denied the requested relief. These appeals followed.

I. Docket No. 241135

Plaintiff alleges that the decision of the ZBA must be reversed because: (1) it was not supported by competent, material and substantial evidence on the record, (2) it was contrary to the uncontested evidence that the land, as zoned, would not yield a reasonable rate of return, and (3) the denial of the request for a use variance was erroneous as a matter of law. We disagree. This Court's review of an appeal from a zoning board decision to the circuit court is de novo. *Cryderman v Birmingham*, 171 Mich App 15, 20; 429 NW2d 625 (1988). "The decision of the zoning board should be affirmed by the courts unless it is (1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion." *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996). The party seeking the variance from the zoning board bears the burden of proof to establish record facts, which demonstrate that the requested finding should be made. *Lafayette Market & Sales Co v Detroit*, 43 Mich App 129, 133; 203 NW2d 745 (1972). Deference is to be given to a municipality's interpretation of its own ordinance, *Macenas v Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989), with considerable weight given to the findings by the trier of fact, who occupies a better position to test the credibility of the witnesses. *Id*. at 392. In determining whether a decision was based on competent, material, and substantial evidence, this Court must give due deference to the regulatory expertise of the agency and may not invade the province of the exclusive administrative fact finder by displacing an agency's choice between two reasonably differing views. *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405-406; 534 NW2d 143 (1995). Furthermore, the competent, material, and substantial evidence standard requires a knowledge of the facts justifying the board's conclusion. *Reenders, supra*. The zoning board may not merely repeat the conclusionary language of a zoning ordinance without specifying the factual findings underlying the determination. *Id*. A "skimpy" record made by the zoning board is sufficient if there is factual support for the findings made, and we will not substitute our judgment for that of the board. *C & W Homes, Inc v Livonia Zoning Bd of Appeals*, 25 Mich App 272, 274; 181 NW2d 286 (1972). "The primary reason for this deference to the findings of the board of appeals is obvious-its members are local residents who reside in the township and who possess a much more thorough knowledge of local conditions, current land uses, and the manner of future development desirable for those who reside in the township." *Szluha v Avon Twp*, 128 Mich App 402, 410; 340 NW2d 105 (1983).

"A use variance permits the utilization of land in a manner otherwise proscribed by a zoning ordinance." *Szluha, supra* at 405. "A township zoning board of appeals has the authority to vary or modify any zoning ordinance to prevent unnecessary hardship if the spirit of the ordinance is observed, the public safety is secured, and substantial justice is done." *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002). A zoning board may conclude that a property owner has established unnecessary hardship where substantial evidence supports the finding that: "(1) a property cannot reasonably be used in a manner consistent with the existing zoning, (2) the landowner's plight is due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning, (3) a use authorized by the variance will not alter the essential character of a locality, and (4) the hardship is not the result of the applicant's own actions." *Id*.

Following de novo review of the entire record, plaintiff's challenge to the decision of the ZBA on the grounds raised is without merit. *Cryderman, supra*. When the issue of the propriety of rezoning was before the planning commission, the members of the planning commission discussed the soil condition, high water table, wetlands, sump pumps, tree removal, land changes to existing drains, and retail tenant occupancy. A planning commission member commented that a majority of the homes in the area had sump pumps, and a resident in the community with a sump pump supported that assertion. In response to the inquiry regarding sump pumps, the minutes indicate that plaintiff did not believe it was "appropriate for this site." It was also noted that the proposed zoning change would triple the recommended density, contrary to the master plan. Ultimately, the planning commission denied the application for rezoning for the following reasons: (1) the introduction of multiple family development was inconsistent with the land use pattern, (2) the proposed change was inconsistent with the master plan, (3) the movement of the commercial zoning boundary would adversely impact the abutting single family neighborhoods and their property values, (4) the failure to demonstrate a demand for the additional retail zoning, and (5) plaintiff failed to demonstrate substantial reasons why the property could not be used as currently zoned. It was noted in the meeting minutes that the planning commission was a recommending body, and the remarks were entered into the record for the township board evaluation.

Despite the issues that were raised before the planning commission, plaintiff's presentation before the ZBA was not responsive to these issues. Rather, the sole focus of the information presented to the ZBA involved the financial aspect of the current zoning. Plaintiff's experts testified that the property as zoned was "worthless" and could not be "given away." Plaintiff's experts further testified that, based on the soil analysis and the cost involved in preparing homes with basements, the purchase of the property would not be recommended. That testimony raised the question why the property was purchased with knowledge of the existing zoning. In response, plaintiff's counsel stated, "a developer has the *right to undertake a certain risk* on the assumption that the property is not properly zoned, and that's exactly what happened here." (emphasis added). Additionally, plaintiff's experts did not respond to the ZBA's question regarding the suitability of the development of this parcel in accordance with the manner of development of a site at a nearby location. Moreover, the ZBA indicated that its experience regarding the sale of neighboring homes was not consistent with the testimony given by plaintiff's expert. While plaintiff acknowledged that the parcel might be suitable for a motel, restaurant, fast food or gas station configuration, plaintiff stated that the zoning was not appropriate for those uses. More importantly, plaintiff did not seek this type or any other type of

modification to the zoning for the development of the parcel in order to obtain a return on the land.

Simply put, plaintiff's proofs did not respond to or address the concerns raised before both the planning commission and ultimately the ZBA. Plaintiff did not present comparative studies regarding neighboring communities and whether those homes were build under the same soil conditions, with or without sump pumps. Plaintiff also did not present evidence regarding neighboring retail configurations and the appropriate zoning. While plaintiff contends that its evidence was uncontroverted, the lack of an apparent controversy is insignificant because the ZBA was free to reject the credibility of the testimony presented. *Macenas, supra*. Defendants did not present evidence to contradict the purported financial losses, but could reject it based on credibility. *Id*. Additionally, members did contradict the suitability of plaintiff's proposed build in light of their knowledge and experience and the future plan for the community. *Szluha, supra*. Plaintiff presented no proofs to contradict the ZBA's expression of its knowledge of the community and, in turn, its doubt upon the validity of the information presented for review. Therefore, giving due deference to the regulatory expertise of the ZBA and its exclusive fact finding function, *Davenport, supra*, plaintiff failed to meet the burden of proof with regarding to the request for a use variance. *Lafayette Market, supra*. The decision was based on competent, material, and substantial evidence on the record, and the ZBA was entitled to determine that the financial projected losses were not credible. Consequently, the challenge to the decision of the ZBA is without merit.

II. Docket No. 241253

Plaintiff also alleges that the trial court erred in sua sponte dismissing the constitutional claim regarding the property because it was entitled to a trial on the merits, erred in relying upon the variance hearing record to support the dismissal, and erred in dismissing the claim where genuine issues of material fact were presented. We disagree. Constitutional issues present questions of law. *Mahaffey v Atty General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). Challenges to the constitutionality of a zoning ordinance are reviewed de novo on appeal. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995). Furthermore, even if technically unpreserved, a legal question may be reviewed by this Court where all necessary facts for resolution are presented. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Because this claim involved a challenge to the constitutionality of the statute, the issue presented a question of law for resolution by the trial court. *Mahaffey, supra*. Thus, the trial court was entitled to address this legal question.[5] Moreover, we may address legal questions for which all necessary facts are presented. *Miller, supra*.

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[5] We note that in the trial court's opinion for remand, the court acknowledged that the constitutional claim was pending, but further stated that the case would remain open "pending the results of the remand." A formal motion may not be required for an issue to properly be before the court when the position of both parties is presented to the court. See *Alpine Construction Co v Gilliland Construction Co*, 50 Mich App 568, 572 n 2; 213 NW2d 824 (1973). We need not decide whether the trial court's statement that the matter remained open
(continued…)

At the hearing regarding relief from judgment, it was alleged that "plaintiff was entitled to a trial on the issues in connection with the reasonableness or validity of the zoning ordinance," relying on *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650; 645 NW2d 50 (2002). However, plaintiff's reliance on the *Arthur* decision is misplaced. In *Arthur*, the trial court concluded that the standard of review for constitutional issues was similar to the statutes that control review in zoning appeal cases. Therefore, the trial court relied on the record generated in the zoning process where the plaintiff was given a full and fair opportunity to present its case. *Id*. at 660-661. This Court noted that a zoning appeal was governed by a legislative act, whereas a constitutional challenge to a zoning ordinance was within the trial court's original jurisdiction. *Id*. at 661-664. Therefore, the plaintiff was entitled to raise, in a *hearing* de novo, the constitutional issues and erred in limiting the proofs to the existing appellate record. *Id*. at 665. Thus, the error in the limitation of proofs and confusion regarding the appropriate legal standard served as a basis for a new *hearing*. The *Arthur* Court did not declare that a challenge to the constitutionality of a zoning ordinance results in an entitlement to a trial.

Irrespective of the procedural posture of this case, we may review the constitutionality of a zoning ordinance as a question of law where all necessary facts are presented. *Mahaffey, supra*; *Miller, supra*. Moreover, review of the brief filed on appeal and the pleadings filed in the record reveals that plaintiff merely resubmits its evidence presented at the ZBA hearing, and the proofs submitted by plaintiff do not address the criteria for assessing the constitutionality of a zoning ordinance. Plaintiff does not allege that additional discovery is necessary or that resolution of this issue is premature.

Property need not be zoned for its most lucrative use. *Equitable Building Co v Royal Oak*, 67 Mich App 223, 227; 240 NW2d 489 (1976). A challenge to the constitutionality of a zoning ordinance is not established by the fact that the land would be worth more if rezoned. *Albert v Kalamazoo Twp*, 37 Mich App 215, 217; 194 NW2d 425 (1971). To successfully challenge a zoning ordinance, the ordinance is presumed to be valid, and it is the burden of the party attacking it to affirmatively prove that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property. *Kropf v Sterling Heights*, 391 Mich 139, 162; 215 NW2d 179 (1974). The aggrieved property owner must also demonstrate that if the ordinance is enforced the "consequent restrictions on his property *preclude its use for any purposes to which it is reasonably adapted*." *Id*. at 162-163. (emphasis added). In the present case, plaintiff presented proofs of financial loss if the parcel was not rezoned as requested. However, the proofs submitted by plaintiff did not address whether the restrictions on the property precluded use for any purpose to which it is reasonably adapted. Accordingly, plaintiff did not present documentary evidence to overcome the presumption of constitutionality of the zoning. Therefore, the trial court's dismissal of this claim was also proper.

(…continued)

pending the decision on remand apprised the parties of an intent to resolve the constitutional challenge simultaneously with resolution of the ZBA issue.

Affirmed.

/s/ Karen M. Fort Hood
/s/ William B. Murphy
/s/ Janet T. Neff