STATE OF MICHIGAN

COURT OF APPEALS

TG DEVELOPMENT, L.L.C., and TOBIN GROUP, Plaintiffs-Appellants, v CHARTER TOWNSHIP OF MT. MORRIS, Defendant-Appellee.	UNPUBLISHED March 25, 2004 No. 243019 Genesee Circuit Court LC No. 98-063122-CZ

Before: Kelly, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a directed verdict, more aptly coined an involuntary dismissal, granted in favor of defendant in this action involving plaintiffs' attempt to develop property through the construction of an apartment complex. Defendant township refused to rezone the property, seventy-two acres of vacant farmland, from residential-agricultural (RA) to multi-family residential (R-3), which would have resulted in the property being zoned in a manner consistent with the construction of an apartment complex. Plaintiff[1] filed suit, challenging the constitutionality of the township's RA zoning classification under its ordinance, as applied to plaintiff's property, on taking, due process, and equal protection grounds. Plaintiff also sought monetary damages for the alleged constitutional violations. The case proceeded to trial before a jury, with the trial court to determine whether there was a constitutional violation

[1] Plaintiff TG Development originally executed a sales agreement in December 1997 to purchase the property at issue from CPC, Inc.; however, the sale was contingent on TG obtaining governmental approval of its proposed site plan. In May 1998, TG and CPC filed suit after a rezoning request was denied. In June 1999, plaintiff Tobin Group purchased the property outright and closed on the transaction, after TG had assigned to Tobin its interest in the purchase agreement. The Tobin Group joined in the litigation. TG Development and the Tobin Group are comprised of five siblings who play various roles in both companies. The companies are involved in real estate development. Pursuant to a motion for involuntary dismissal during trial, TG's action was dismissed for lack of standing, and the ruling is not challenged on appeal. In light of these circumstances, and because there is only one actual owner, the Tobin Group, we shall make reference to a singular "plaintiff" for purposes of this opinion.

and the jury to determine the amount of damages if the court indeed found a constitutional violation. The trial court directed a verdict in the township's favor after finding that plaintiff failed to establish a violation of its constitutional rights, failed to show that the township's actions were not supported by competent, material, and substantial evidence, and failed to establish that the action was ripe. We affirm.

I. BASIC FACTS and PROCEDURAL HISTORY

A. Rezoning Request – Planning Commission

In January 1998, TG Development submitted a request to the township planning commission to rezone the seventy-two acre parcel from RA to R-3. The stated reason for the rezoning request was "to develop apt. development." And the application indicated that TG hoped to commence construction in September of 1998. Minutes from a February 2, 1998, planning commission meeting reflect that Michael Tobin, on behalf of TG, spoke to the commission with respect to the rezoning request. Mr. Tobin informed the commission that TG sought to develop the subject property by having apartments with one-car garages constructed. The apartments were to be designed in a manner consistent with the appearance of condominiums. Tobin further informed the commission that rent would be approximately $700 a month, and the apartment complex would not be low-income housing. He also submitted photographs of other TG apartment projects. The matter was scheduled for a public hearing.

On March 2, 1998, a public hearing was held on the rezoning request. Review of the minutes indicates that Mr. Tobin was once again present and divulged additional information about the proposed apartment complex. Tobin stated that the apartments would be similar to condominiums to the north and east of the site, and that each building on the site would have twelve apartment units with eight of the units having two bedrooms and measuring 1,100 square feet. Two of the twelve units would have three bedrooms.[2] Tobin insisted that the apartments would not be subsidized and that the rental cost would be between $700 and $750 per month. Tobin further indicated that outside lights would be controlled by an electrical eye, that each unit would be front-to-back, that some units would have a second story, that there would be streetlights and sidewalks, that there would be three parking spaces for each unit, that the complex would have a pool and clubhouse, and that possibly a lake would be placed in the middle of the development to serve as a detention pond. Tobin was currently unsure how many total units would be constructed because engineering studies were yet to be completed in regard to topography and wetlands.[3] Tobin stated that TG owned and managed numerous apartment developments and wished to own and manage this proposed development. When questioned about roadway access for the property, Tobin indicated that Eastman Drive would provide

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[2] Tobin's testimony at trial indicated that the other two units in the building would be one-bedroom apartments.

[3] The evidence presented at trial established that the complex, under the R-3 classification, could contain a maximum of 898 total units.

ingress and egress for the property. He submitted floor plans of the units to be constructed and photographs of other development projects.

A number of individuals spoke out against the proposed development, including several persons from an adjacent retirement community (Innisbrook Subdivision), which was accessed solely by Eastman Drive.[4] The protesters asserted that the development would not be compatible with the retirement community, property values would drop, and there would be added traffic that would be detrimental to the community. A spokesperson for the retirement community, who submitted a petition from community residents requesting denial of the rezoning application, told the commission that Eastman Drive would not be able to handle the increased traffic flow, thereby creating a dangerous situation especially where many of the elderly residents of the subdivision walked regularly. There were also concerns about interruptions in the quiet nature of the retirement community. A resident of Eastman Drive indicated that the subdivision consisted of eighty-two townhouses with a majority of the homes having two cars.

The planning commission formally recommended denial of the rezoning request on the following bases: poor traffic pattern; one egress for all traffic; objections and concerns from the residents; and poor pattern for emergency vehicles.

B. Rezoning Request – Township Board

On March 9, 1998, a regular hearing of the township board was held, and the board considered the rezoning request. The township board, referencing the reasons given by the planning commission for recommending denial of the request, concurred with the recommendation of the commission and rejected the rezoning application.

C. Matters Presented to the Zoning Board of Appeals

TG Development proceeded to take the matter to the township zoning board of appeals (ZBA) for hearing on May 6, 1998. The minutes of the ZBA public meeting on the rezoning issue indicate that TG sought to overturn the actions of the township planning commission and board and sought a use variance. Counsel for the township opined that the ZBA did not have the authority under the zoning enabling act to grant the requested use variance. Counsel further stated that, as to the appeal facet of TG's argument, no additional evidence would be taken, but evidence could at least be received regarding a variance. The minutes additionally reflect:

> Mr. Sumnick [counsel for TG] stated his client's proposal is reasonable and it fits within the uses already designated for property in the particular area. His client has done nothing to make the property unique in that there is only one means of access to the property.

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[4] Pierson Road was the main road in the area and Eastman Drive extended south off of Pierson and provided the sole ingress and egress to the retirement community subdivision. Plaintiff sought to have Eastman Drive extended to also provide ingress and egress to the proposed development.

> Mr. Sumnick stated they are prepared to show that the use proposed for the property is reasonable and it complies with the master plan usage for the property that is high density residential. Also, it would be an addition to the community and that it would not have a negative impact.

TG submitted some photographs, floor plans, and a development plan, and Mr. Tobin again discussed features of the proposed development. When Tobin and Sumnick were asked whether the property could be developed within the RA classification, Sumnick responded "that a limited development could occur, but they would have to access the project through the single means of egress and ingress, and it would still be faced with the same flaw."

The ZBA denied the request for a use variance on the basis of the township attorney's opinion that the ZBA was not vested with the authority to grant a use variance, and, even if the authority existed, the ZBA concluded that a variance should not be granted. With respect to the rezoning challenge, the ZBA noted that its review must be based on the record created before the planning commission and township board. The ZBA affirmed the decisions of the planning commission and township board "for the reasons stated in the minutes of those meetings[.]"

D. Circuit Court Complaint

On May 29, 1998, TG and CPC filed suit against the township, alleging that the property is vacant, unimproved land that had been for sale for twenty years without results. It was further alleged that the current status of the property had no economically feasible potential for development because of the property's location and configuration, that the township adopted a master plan which sought to promote the systematic growth and development of township land, and that some township representatives had previously informed TG that the property was suitable for development as an R-3 zoned property. TG and CPC additionally alleged that the development was consistent with the township's master plan, and that the proposed use "is located in a high density area designated to accommodate approximately 13 units per acre." Moreover, the township had no evidence of the existence of any market demand for the property under the RA classification, nor was there any evidence that there would be a market demand for the property in the future as an RA zoned parcel.

Count I of the complaint asserted that the township acted in an arbitrary and capricious manner in restricting the zoning to RA, and that the classification did not advance or promote any legitimate, reasonable governmental interest, nor would a rezoning of the property to R-3 detrimentally affect the public health, safety, and welfare. The count alleged that an R-3 zoning classification was the only reasonable classification for the property, and that the township committed substantive due process and equal protection violations in regard to the zoning of the property. Count II of the complaint alleged that the RA zoning classification was so burdensome as to amount to a taking without just compensation. Count III sought declaratory relief in the form of a ruling that the township's actions were unconstitutional. Count IV requested a judgment enjoining the township from interfering with TG's reasonable use and development of the property. The prayer for relief included a request for monetary damages.

E. Pretrial Proceedings

The lower court record contains myriad pleadings, motions, and various documents pertaining to pretrial proceedings. We deem it relevant only to mention that the trial court denied both parties' motions for summary disposition.

F. Trial

Michael Tobin was the first witness to take the stand on behalf of plaintiff. Tobin, a licensed builder, testified that he was a member of TG Development and a partner with the Tobin Group, and that he had a long history in construction, managing apartment complexes, and real estate development, as did other members of the Tobin family. Tobin's two brothers and two sisters were also members of TG Development and partners in the Tobin Group. The Tobin family was currently involved in developing apartment complexes and subdivisions. Tobin testified in regard to the initial conditional purchase agreement (subject to zoning approval) with CPC in December of 1997, and he indicated that a closing on the seventy-two acre parcel located in Mt. Morris Township occurred on June 25, 1999, between CPC and the Tobin Group for a purchase price of $216,000.

Tobin stated that about a month prior to the execution of the purchase agreement, he first visited the site and noticed corn growing on the land, and that it was a nice piece of flat property. He was interested in the property as a location to develop an apartment complex. In January of 1998, Tobin viewed the township's master plan (a/k/a general development plan), obtained copies of the township's zoning ordinance, and reviewed records regarding the location of water and sewer leads in relation to the property, which were suitable for purposes of the proposed development. Subsequently, on January 12, 1998, Tobin discussed the property with township supervisor Larry Foster, and he advised Foster that he wished to build apartments on the property. Tobin indicated in his testimony that he was surprised to learn that Eastman Drive was a county road, and he asked Foster whether there would be any resistance by the township to an apartment development; Tobin asserted that he was not looking for a fight. He informed Foster of the type of apartment units that were planned and assured him that they would not be subsidized housing. According to Tobin, Foster responded in a positive manner to Tobin's proposal, stating that the township would be glad to have the apartments and there should be no problem. Foster informed Tobin that the property "was master planned for . . . multi-family," and it was coded, for purposes of the master plan, as high-density residential. A township official accompanying Foster assisted Tobin in filling out the rezoning application.

Tobin next testified in regard to the township's rezoning application process, which was discussed by us above in the context of the planning commission, township board, and ZBA proceedings. His testimony was consistent with the minutes of those meetings. Tobin testified that, with respect to the February 2, 1998, initial planning commission meeting, he was not told to submit any additional materials for purposes of the March 2 public hearing. He further testified that the planning commission made no contact with him between the February and March meetings. Tobin's testimony went into significant detail in regard to the specifics of the proposed apartment units. Tobin stated that he admitted to the planning commission that there was only one road that could access the proposed development site, i.e., Eastman Drive. Tobin described Eastman Drive as a county road constructed from asphalt with a concrete curb and gutter, which ended at the Tobin property line. He testified that in all of the numerous

developments he had been a part of in the past, there was never a denial of the use of a public road that ended abruptly at the development's property line.

Tobin then testified, through reference to an area map, that some of the property adjacent to the site is zoned R-3, including Innisbrook. Other surrounding property is zoned RA, RU-1A (single family residential), C1 (local business district), C2 (general commercial district), and O (office district). Tobin testified in detail, based on past experience, concerning the process of developing properties for construction of apartment complexes, including financial, construction, environmental, and governmental permit aspects and the financial impact of delays in the development process.

Tobin testified that the property was still being farmed and that plaintiff was receiving one-third of either the crops themselves or the proceeds obtained by the farmer. Tobin indicated that plaintiff only derived a few thousand dollars annually out of the contract with the farmer, and some years only few hundred dollars were received. After paying the property taxes, there was little if any gain, or a loss, for plaintiff.

Tobin was questioned with respect to how the property could be developed under the RA classification, and he stated that it was not worth pursuing. The property could only be developed into five-acre lots, and Tobin testified:

> The costs for land development are normally two hundred and seventy-five dollars a front foot. That's for the part of the lot that's on the road. And the average lot will be about three hundred front feet. And the market wouldn't – that would be high – way high-end lots, which make me have to have high-end homes, and it wouldn't make sense.

Tobin testified that he did not submit a site plan when going through the process of seeking rezoning because the only issue was rezoning and "[s]ite-plan approvals, layout of buildings, and everything else, was really immaterial at that point."

On cross-examination, Tobin acknowledged that simply because the township supervisor thought favorably of the project, it did not necessarily mean that approval was forthcoming and other individuals were involved in the decision-making process. Tobin also acknowledged that simply because a future land use plan indicated a desire to utilize the property as high-density residential, it did not mean that rezoning was automatic or a given; the master or future plan was a guide. The master plan covered the years 1990-2010, and Tobin agreed that the plan is subject to change over time. He testified that while he often heard concerns of traffic congestion, reduction of property values, and negative environmental impact in regard to other developments, Tobin insisted that those issues were a matter of site plan approval not rezoning. He realized from the beginning of this matter that traffic was going to be a big issue because of the single ingress and egress point over Eastman Drive. Tobin noted that besides the mere opinions by local residents regarding possible traffic congestion, there was no hard evidence, such as a traffic study, relied on by the planning commission and township board.

With respect to the conditional purchase agreement, Tobin stated that counsel mistakenly placed it in the name of TG Development when it was supposed to be the Tobin Group. Tobin acknowledged that a risk was taken in subsequently closing on the property outright where

rezoning had not been accomplished and the lawsuit was proceeding. Tobin was questioned about Eastman Drive, and a photograph of the road was admitted into evidence. He conceded that the road did not have sidewalks, and he also conceded that, in the face of concerns about traffic congestion voiced by residents of the retirement community at the planning commission meeting, he offered no solutions and did not ask for additional time to address the concerns. Tobin reiterated, however, that those concerns are typically dealt with during site plan approval. He further stated that he could not recall whether a planned unit development (PUD) was an available option.

James Barnwell, a civil engineer with a focus on site plan developments for commercial, residential, and industrial sites, testified that his company had worked with plaintiff on numerous projects in the past. According to Barnwell, one of the first questions presented when analyzing intended development of a parcel of property is whether it meets the zoning classification, and if not, whether an intent is reflected in the master plan suggesting that the intended use might be allowed. Barnwell opined that plaintiff's intended development of the property was consistent with the township's master plan for the area. Barnwell completed a few different site plans for the property, and he testified extensively about the specifics of the planned development. He stated that he was not asked to address any potential problems concerning the single access over Eastman Drive. Barnwell also testified regarding the increased construction costs, including newly adopted governmental fees, that were resulting from the delay in building the apartment complex. He further testified in regard to the process of site plan approval, which process generally takes between nine and fifteen months. Barnwell indicated that, at the site plan approval stage, issues such as traffic and safety are addressed. Regarding a hearing merely on rezoning, site plans are generally not submitted and the focus is on how an intended project would fit into a particular classification.

Michael Mansfield, director of traffic engineering and permits for the Genesee County Road Commission, testified with respect to the characteristics of Eastman Drive. Mansfield stated that the road consisted of two lanes with the front portion of the road built as a commercial road and the back portion built as a residential street. The difference being that a commercial road is built with a thicker pavement to handle truck traffic. A flashing beacon is located where Eastman and Pierson meet. Mansfield testified that he never received any communications from township officials regarding concerns about Eastman Drive. Mansfield had dealt with Michael Tobin on several other development projects, and he found Tobin to be easy to work with and it was not difficult to resolve matters with him.

Francis Trigger, a member of the township planning commission for approximately forty years and the township fire chief, testified that, according to the master plan, the township wanted plaintiff's property to be developed for high-density residential. Trigger had recommended that the rezoning request be denied, but he admitted that he had no idea how much traffic would be generated if the apartment complex were built.

Charles Sanders, chairman of the planning commission and a member of the commission for twenty-nine years, testified that, while its acceptable to request rezoning simply by way of filling out the application form, most developers normally submit some form of site plan along with the application. Sanders also indicated, however, that not much attention should be paid to the site plan because the focus is solely on rezoning the property; site plan review and rezoning review are two separate issues. According to Sanders, site plan review is when the township

looks into the details of a proposed development such as traffic patterns and impact and reviews topographical maps, not during review of a rezoning request. Site plan review is guided by criteria in the zoning ordinance. But Sanders maintained that the same considerations taken into account during site plan review can also impact the decision-making process on a rezoning request.

Sanders conceded that the proposed apartment complex was consistent with the township's master plan, which is used as a tool in reviewing rezoning applications, and that the township did not obtain any traffic studies prior to rejecting the rezoning request. He stated that the township did not do anything to assess the accuracy of the comments made by protesters at the hearings, and that the township did not know how much traffic would be generated by the project because there was not a site plan showing exactly what was going to be constructed on the property. Sanders testified that the township did not request that plaintiff submit any documentation regarding possible concerns related to the project, nor did the township inform plaintiff that it should or could seek more time.

Sanders further testified that the general safety, health, and welfare of the people living in the township is the main focus on any rezoning requests presented to the planning commission. He called Eastman Drive a glorified driveway and while the commission had no exact numbers on the amount of traffic that might be generated by the proposed development, if the only access was Eastman Drive, traffic problems would be an issue. Plaintiff never requested any additional time to address potential traffic and access issues. Sanders indicated that a traffic study was not necessarily needed, where common sense and experience suggested that traffic and safety would be a problem. He stated that when considering whether to rezone property, the commission keeps in mind all the possible uses that might have to be allowed once rezoning takes place because once a property is rezoned, a property owner could attempt to build anything consistent with the zoning classification even if the construction is different than suggested earlier. Under the RA classification, five-acre lots for a home would be allowed.

Robert Johnson, a member of the township's board of trustees for a little over seventeen years, testified in a manner fairly consistent with the testimony of Charles Sanders. Johnson did indicate that the township's master plan "has a big impact" on a rezoning request.

John Evers, a certified community planner testifying as an expert, when questioned about the factors that a township considers where a request for rezoning is made, opined:

> Some of the major factors – or the – the first factor is whether or not that particular request is in conformance with the Master Plan. Because the Master Plan is to function as the basis for zoning. It also is – is based upon – your review would be based upon what the surrounding land uses essentially are, at the time[,] the proximity to different types of land uses that are compatible, or not compatible with what those land use[s] [are]. Traffic patterns within the community. The population – proposed population growth within the community, would it warrant that type of additional land use. Those are the major things that we would look at.

Evers stated that traffic volumes and impact on surrounding sites should be considered before property is rezoned. Evers indicated that he would expect a planning commission to provide a list of things for the developer to submit regarding such matters as traffic and

environmental impact, but this was not done in the present case. Typically, according to Evers, a planning commission would seek an impact study for purposes of determining whether to rezone property, or do some type of investigation. Greater details would be addressed during site plan review. Under the R-3 designation, up to 898 units could be placed on the property, and Evers testified that if the planning commission rather have less than that for reasons of health, safety, and welfare, the applicant would not be required to adhere to that where the R-3 classification was already in place.

Evers maintained that the focus should be on the master plan, and it would be prudent for a developer to rely on the master plan. Here, Evers review of the minutes of the township meetings indicated that the township made no reference to the master plan. Evers was of the opinion that, considering all of the circumstances, the site at issue lent itself to the development of an apartment complex. With respect to the RA classification, Evers testified that single-family homes could be built, plus ancillary uses such as stables. Taking into consideration the space needed for streets, about twelve five-acre lots could be formed out of the seventy-two acre parcel. Evers thought that a state-licensed residential care facility could also be built on the property. In conclusion, Evers opined:

> [T]he decision by the Planning Commission was really not based upon any – to my determination, any factual analysis of conditions. They didn't refer to the Master Plan. There's no – were no studies undertaken, on behalf of the – the Planning Commission to, basically, make a rational decision as to whether or not this was a good development and what the impact would – would be. There was a lot of conjecture, but there were no facts or data associated with it.

On cross-examination, Evers acknowledged that a master plan is a guide and not the sole determining factor in making a rezoning decision, and that master plans change and evolve over time. Evers again stated that traffic concerns and the lack of sidewalks constitute legitimate and important factors in considering a rezoning application. Evers concluded that if 744 apartment units were constructed on the site, the traffic generated would be 4,500 to 4,600 vehicle trips per day, and obviously the number would be higher if 898 units were constructed. Evers also conceded that a planning commission, in evaluating whether to grant or deny a rezoning application, can rely on experience and common sense. He also acknowledged that it varies from community to community in regard to planning commissions notifying developers of the need to submit supporting materials along with the rezoning application and in regard to the commissions' investigation of various impact concerns depending on the staff and funding level available to the particular commission. Evers further conceded that if a developer is confronted with traffic and safety concerns, he or she should respond to the concerns, or ask for more time to do so, which time extension a commission should grant.

Larry Foster testified that in the nine years as township supervisor, he was not aware of any time that the township tried to restrict access to a county road such as Eastman Drive. He further testified that he voted to deny the request because of health, safety, and welfare concerns predicated on the traffic issue, which was a matter of common sense without the need of a traffic study.

Barry Simon, Executive Vice-President of the Builders Association of Metropolitan Flint, testified, as an expert, about the marketability of housing locations. He stated that the demand

for single-family dwellings in the township was very low, but there had been an increase for apartment permits in the township. According to Simon, the township is not a highly marketable community and has low real estate values. If plaintiff were to build on the property consistent with the RA zoning classification, and taking into consideration a cost of $78,000 to $80,000 to develop each lot as extracted from Mr. Tobin's testimony, Simon opined that typically the house constructed on the lot would go for around $400,000, which would not be viable for that area.

Kenneth Blondell, plaintiff's final witness and a real estate appraiser, testified that he was requested by plaintiff to prepare a feasibility analysis of the property under an RA zoning classification and to prepare a damage analysis to determine damages due to the delay in the construction of an apartment complex. Because the issue of damages is not before us on appeal, we shall focus on Blondell's testimony related to the feasibility analysis. We do note, however, that Blondell arrived at an amount of $14,415,670 in losses because of a delay period running from October 1998 and October 2001. These were the damages sought by plaintiff.

Blondell opined that to develop the site into twelve five-acre lots, the total development cost would be approximately $990,000, or $82,500 per lot. Blondell then looked at comparable lot sales in the area of which he found twelve minimally suitable for comparison. The sales range was between $23,500 and $65,000. The three best comparables were all located in the township, and the one lot most suitable for comparison sold for $23,900. The highest priced comparable lot in the township was $48,000, and even that price should be reduced for comparison purposes because a pole barn was located on the property. Blondell concluded that the price that could be obtained for the five-acre lots was $25,000. In light of the comparisons, Blondell stated that it would not be feasible or sensible to spend $82,500 preparing the lots. Additionally, there were other costs to the developer, including the purchase price of the land, which would raise plaintiff's actual costs to an amount beyond the $82,500 if the lots were prepared for sale. Overall, plaintiff would suffer a loss if it developed the property under the RA classification. Blondell opined that it would not be feasible to develop a twelve-unit, single-family subdivision on the seventy-two acre property. On cross-examination, Blondell stated that he did not do a feasibility study of a residential care facility.

G. Trial Court's Ruling – Involuntary Dismissal

Following the conclusion of plaintiff's proofs, defendant moved for directed verdict, more appropriately coined a motion for involuntary dismissal being that the court was to decide the issue of liability and the jury to determine only damages. The trial court first dismissed any claims presented by TG Development for lack of standing in light of the fact that it no longer held any interest in the property. In regard to the claims of the Tobin Group, the trial court, speaking from the bench, indicated that it was going to grant the motion to dismiss on the basis of subject matter ripeness because plaintiff failed to thoroughly pursue the matter at the township level where other options were possibly available. The trial court also opined that plaintiff failed to satisfy the burden of proof to show wrongful action on the part of the township, and that there was insufficient evidence to show a taking, arbitrary decision-making, or to show that the township's decision was not supported by competent evidence. The trial court, however, indicated that it was going to issue a written ruling in support of the dismissal.

Subsequently, the trial court issued a written opinion in which it ruled that plaintiff's action was not ripe as it failed to meet the rule of finality set forth in *Paragon Properties Co v*

City of Novi, 452 Mich 568; 550 NW2d 772 (1996). The trial court explained that plaintiff failed to explore several options with the township, including a PUD and development of a residential care facility. The court also stated that plaintiff failed to research the township's reasons for denial and reapply or appeal with more and better information, and the court found that there was no proof that the township would reject other options. The trial court further ruled that the township's decision to deny rezoning was supported by competent, material, and substantial evidence, and that plaintiff had the burden, which it failed to meet, to show that the township's concerns about traffic, safety, and emergency access were not valid. In conclusion, the trial court stated:

> Plaintiffs have not shown that they were treated differently than similarly situated property holders. They have not shown that the zoning ordinance is not rationally related to a legitimate governmental interest. They have not eliminated all uses of the land rendering it useless. They cannot claim interference with a reasonable investment-backed expectation because the zoning change was already denied when they bought the property. They were merely gambling on this lawsuit.
>
> Plaintiffs may have a good and valid development plan, but they ran to the courthouse too soon. The mere fact that the ordinance decision at issue deprives Plaintiffs of their most profitable use of the land does not satisfy Plaintiffs' burden of proof or make any constitutional claims ripe for review. [Citation omitted.]

II. ANALYSIS

A. Standard of Review

In a civil action, this Court treats a motion for a directed verdict as a motion for involuntary dismissal brought pursuant to MCR 2.504(B)(2), where the trial court is sitting as the trier of fact. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). The trial court may dismiss a plaintiff's cause of action after the close of the plaintiff's case if the court determines that the plaintiff has not shown a right to recovery under the facts and the law. *Id.*, citing MCR 2.504(B)(2). Contrary to the standard utilized by a trial court in addressing a motion for directed verdict, i.e., viewing the evidence in a light most favorable to the nonmoving party, the court judges credibility, weighs the evidence, and decides the case on the merits. *Warren v June's Mobile Home Village & Sales, Inc*, 66 Mich App 386, 389; 239 NW2d 380 (1976). A trial court's findings of fact on a motion for involuntary dismissal are reviewed to determine if the findings are clearly erroneous. *Begola, supra* at 639. A trial court's findings of fact are clearly erroneous only where we are left with a definite and firm conviction that a mistake has been made. *Id.*

A trial court's ruling on a constitutional challenge to a zoning ordinance is reviewed de novo. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995). The trial court's underlying factual findings, however, are accorded great deference. *English v Augusta Twp*, 204 Mich App 33, 37; 514 NW2d 172 (1994).

B. Ripeness – Finality

Plaintiff argues that the trial court erred in ruling that the case was not ripe for presentation in the circuit court and failed to satisfy the rule of finality. Plaintiff asserts that there is no requirement that a party must establish that it cannot develop its property under any and all zoning classifications, or that it could develop the property with a use other than its proposed use. Plaintiff further argues that regulating agencies cannot burden property by imposition of repetitive or unfair land use procedures in order to avoid a final decision. In other words, according to plaintiff, a "regulating agency cannot play a game of 20 questions that requires the claimant to guess what the agency can and is willing to do regarding the development of the property." Plaintiff maintains that the trial court erred by ruling that the plaintiff needed to resubmit another rezoning request accompanied by a less alleged grandiose plan to ripen its claims. The trial court mistakenly believed that plaintiff was required to essentially keep trying with the township until no avenue was left to explore.

In *Paragon, supra*, our Supreme Court addressed the doctrine of finality, where the plaintiff property owner purchased a seventy-five acre parcel zoned for large-lot, single-family residential use and sought the city's approval to rezone the property to a mobile home district. The planning board recommended denial of the rezoning request, and the city subsequently denied the request. The plaintiff filed suit in the circuit court, and the court denied the city's motion for summary disposition, which motion was predicated on the plaintiff's failure to seek a use variance from the city's ZBA. On appeal, the Supreme Court held that the plaintiff's constitutional challenge to the zoning ordinance, as applied, was not ripe for review. *Id.* at 571.

The Michigan Supreme Court held:

> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality.
>
> "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . ." [*Id.* at 576-577 (citations omitted; alteration and omission in original).]

Citing favorably *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 85; 445 NW2d 61 (1989), the *Paragon* Court stated that until a municipalities' objections to a project are addressed and finally resolved, it is impossible to accurately determine the extent to which the plaintiff's land retained any reasonable beneficial use or the extent to which the plaintiff's expectation interest has been destroyed. *Paragon, supra* at 578. The Court noted that the finality requirement aids in determining whether a taking has occurred by addressing the actual economic effect of a regulation on the property owner's investment expectation, which cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular property. *Id.* at 578-579. The *Paragon* Court rejected the plaintiff's argument that the city's denial of the rezoning request was a final decision because the city council was the initial decisionmaker concerning rezoning requests. *Id.* at 579-580. The Court ruled:

> The City of Novi's denial of Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance. While, the city council's denial of rezoning is certainly a decision, it is not a final decision under *Electro-Tech* because had Paragon petitioned for a land use variance, Paragon might have been eligible for alternative relief from the provisions of the ordinance. [*Paragon, supra* at 580.][5]

A broad reading of *Paragon* suggests that here, plaintiff did not satisfy the rule of finality. True, a rezoning request was made and clearly rejected, and while a use variance was similarly rejected as opposed to the circumstances found in *Paragon*, there was no review by the township of other potential uses of the property because there were no further requests by plaintiff. The trial court stated that plaintiff failed to explore a PUD option and the development of a residential care facility,[6] along with failing to research the township's reasons for denial and reapply. With respect to the PUD option, plaintiff argues that there was no evidence that any such development option existed or that the development under a PUD would somehow negate the township's objection to an R-3 type development on the property. Article IX of the ordinance addresses PUDs, stating, in part:

> The intent of this section is to provide a degree of flexibility in regard to the use, area, height, bulk, and placement regulations for large scale developments which qualify as [PUDs]. These may include, but are not limited to, housing developments, shopping centers, industrial districts, office districts, and medical and educational campuses.

One of the factors that is required to be considered in a PUD application is whether "the proposal [is] compatible with objectives of the General Development Plan or specific elements thereof that have been officially adopted by the Planning Commission." Art IX, § 9.03. The ordinance, however, also refers to PUDs covering "incidental uses not normally permitted in the

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[5] In *MacDonald, Sommer & Frates v Yolo Co*, 477 US 340, 351; 106 S Ct 2561; 91 L Ed 2d 285 (1986), the United States Supreme Court stated that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." A final decision by the relevant agency informs the constitutional determination whether a regulation has deprived a landowner of all economically beneficial use of the property, or defeated the reasonable investment- backed expectations of the landowner to the extent a taking has occurred. *Palazzolo v Rhode Island*, 533 US 606, 618; 121 S Ct 2448; 150 L Ed 2d 592 (2001). These matters cannot be resolved in definitive terms until a court knows the extent of permitted development on the land at issue. *Id.*

[6] It appears that a residential care facility was not an option under the zoning ordinance. Plaintiff states on appeal that it was an offhanded, inaccurate remark by a witness that possibly a residential care facility could be operated under the RA classification. Defendant does not challenge this contention, and the zoning ordinance does not reflect the availability of such a use.

zone district."[7] Art IX, 9.01. Our review reveals no language that directly precludes plaintiff from seeking a PUD, but it is questionable whether a PUD was actually an option given some of the language in the ordinance.

We opine that *Paragon* creates a quagmire that we find unnecessary to extricate ourselves from in the case at bar. A broad reading of *Paragon* can literally lead to the necessity of endless requests on the part of a property owner to satisfy the rule of finality. Arguably, the case can be read to require plaintiff to keep resubmitting R-3 rezoning requests or ask for reconsideration with variations on the original proposal until every infinitesimal variation has been rejected.[8] Even then, it could be argued that plaintiff was not only required to apply for a PUD, but to also apply for rezoning to every other zoning classification available in the township, which might lead to use of the property such that it would not effectuate a taking. Plaintiff would have to make requests inconsistent with its desired use of the property. The quagmire is created because without such extensive exploration, it cannot truly be determined whether there was an actual concrete injury; speculation to some degree would be necessary. A more narrow or limited interpretation of *Paragon* would support the proposition that when a property owner seeks and is denied rezoning and denied a use variance through the ZBA to do what the owner sought to accomplish through rezoning, the rule of finality is satisfied. Under this interpretation, plaintiff's action in the circuit court was ripe. We are left with the question, does finality equate to a final decision on a specific request and necessarily related requests, e.g., a rezoning request to build an apartment complex and a use variance request to build the same apartment complex, or does it equate to a final decision on, additionally, any request that could possibly be made to the township that impacted the use of the property, e.g., a PUD. As noted above, we find it unnecessary to answer this question today because the trial court did not limit support for its decision to the rule of finality, and we conclude that the additional support for the court's grant of an involuntary dismissal was not in error.

C. Circuit Court Decisionmaking Standards

Aside from ruling that plaintiff's action was not ripe, the trial court found that the township's rejection of the rezoning application was supported by competent, material, and substantial evidence. We agree with plaintiff that this language correlates to an appellate review standard applied by the trial court in reviewing the township's decision, and it is not the

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[7] We acknowledge plaintiff's claim that the zoning ordinance was not admitted at trial and find it to be disingenuous. The record suggests that it may not have been formally admitted at trial; however, the trial court, defendant, *and plaintiff*, continually referenced and relied on the ordinance throughout the proceedings, and moreover, plaintiff stipulated to the ordinance being entered as an exhibit. Plaintiff's claim is predicated on the ordinance. For all intents and purposes, it was evidence, and we shall treat it as evidence.

[8] The same can be said for any use variance request. We recognize that variations of the rezoning request, e.g., a request to rezone to build only a 100 unit complex, as opposed to the same proposal in a variance request, would most likely be rejected because once the rezoning occurred, plaintiff could, according to trial witnesses, decide to build an 898 unit complex because it was consistent with the R-3 classification, and the township could do nothing.

appropriate standard because the court was sitting as a court of original jurisdiction where plaintiff challenged a rezoning denial.

MCL 125.293a(1) provides for judicial review by the circuit court of a ZBA decision for a determination whether the decision complied with the constitution and laws of the state, was based upon proper procedure, was supported by competent, material, and substantial evidence, and represented the reasonable exercise of discretion. The function of the circuit court when reviewing a ZBA variance decision is to determine whether it was supported by competent, material, and substantial evidence. *Schadewald v Brule*, 225 Mich App 26, 33; 570 NW2d 788 (1997). Here, the trial court was not reviewing a variance denial, or another administrative decision, because the issue was not raised in plaintiff's complaint, but rather the court was presented with a challenge to a rezoning denial.[9]

In *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650; 645 NW2d 50 (2002), the plaintiff petitioned to rezone property from a residential district to a zone that would permit construction of a convenience store and gas station. The rezoning request was denied, and the plaintiff pursued the matter by filing a complaint in the circuit court, alleging a violation of substantive due process and a confiscatory taking. The circuit court granted the county's motion for summary disposition, enunciating its belief that the action was essentially an appeal subject to an appellate standard of review and finding that the plaintiff failed to establish a genuine issue of material fact because the board's decision was aptly supported by competent, material, and substantial evidence.

The *Arthur Land* panel stated that it is well-settled law that the zoning and rezoning of property are legislative functions. *Id.* at 662. The Court held:

> Because in denying plaintiff's request to rezone, the county board of commissioners acted as a legislative, as opposed to administrative, body, the trial court's decision in this regard was error. Were this an appeal from an administrative body, the trial court would have been limited to a determination whether the decision was authorized by law and supported by competent, material, and substantial evidence on the record. However, " '[b]ecause rezoning is a legislative act, its validity and the validity of a refusal to rezone are governed by the tests which we ordinarily apply to legislation.'"
>
> Moreover, plaintiff's complaint was filed as an original action in the circuit court, wherein plaintiff challenged the constitutionality of the zoning

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[9] We note that, despite the fact that plaintiff sought review by the ZBA of the rezoning denial and that the ZBA actually reviewed the issue, the ZBA did not have the authority to entertain the matter in the first place. "The township board of appeals shall hear and decide questions that arise in the administration of the zoning ordinance . . . ." MCL 125.290. Plaintiff's claim did not arise out of the administration of a zoning ordinance but rather sought a legislative change in the zoning classification itself. See *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 664; 645 NW2d 50 (2002).

> ordinance as applied to plaintiff's property and requested declaratory and injunctive relief. These were matters within the trial court's original, rather than appellate, jurisdiction. Accordingly, plaintiff was entitled to a hearing de novo on the issues raised and the trial court therefore erred in limiting plaintiff's proofs to those presented before the township and county commissions and boards. [*Id.* at 664-665 (citations omitted; alteration in original).]

Here, because plaintiff also initiated an original action alleging constitutional violations arising out of the township's refusal to rezone the property, the trial court was sitting as a court of original, not appellate, jurisdiction. Accordingly, the trial court erred in utilizing an appellate standard of review that is reserved for review of administrative decisions. That being said, the trial court's statements from the bench in support of involuntary dismissal and its written opinion clearly indicate that the court also found that plaintiff failed to submit sufficient evidence at trial to show a taking, to show that it was treated differently than similarly situated property owners, and to show that the ordinance was not rationally related to a legitimate governmental interest. In other words, the trial court ruled that plaintiff failed to establish a taking, a due process violation, and an equal protection violation. Therefore, we next review these causes of action to determine if the trial court erred in its ruling, except as to equal protection which is not raised on appeal.

D. Substantive Due Process

Plaintiff argues that the trial court erred by dismissing its substantive due process claim. The state and federal constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. In order to afford a property owner substantive due process, an ordinance must be rationally related to a legitimate governmental interest. *Landon Holdings, Inc v Grattan Twp,* 257 Mich App 154, 173-174; 667 NW2d 93 (2003). A substantive due process violation occurs if the zoning ordinance and classification does not advance a legitimate governmental interest. *Hecht v Nile Twp,* 173 Mich App 453, 461; 434 NW2d 156 (1988). A zoning ordinance must be reasonable to comply with due process. *Landon, supra* at 173. The reasonable basis for an ordinance must be grounded in the police power and includes protection of the safety, health, morals, prosperity, comfort, convenience, and welfare of the public. *Hecht, supra* at 460. A zoning ordinance is presumed to be valid, and the party challenging the ordinance has the burden of showing that it has no real or substantial relation to public health, morals, safety, or general welfare. *Bevan v Brandon Twp,* 438 Mich 385, 398; 475 NW2d 37 (1991), amended on other grounds 439 Mich 1202 (1991). A zoning ordinance also violates due process where it constitutes an unreasonable means of advancing a legitimate governmental interest. *Hecht, supra* at 461. Thus, an ordinance may not unreasonably, arbitrarily, or capriciously exclude other types of legitimate land use from the area in question. *Kropf v City of Sterling Heights,* 391 Mich 139, 158; 215 NW2d 179 (1974). In order to establish a substantive due process violation, it must appear that the ordinance is an arbitrary fiat, a whimsical *ipse dixit,* and that there is no room for a legitimate difference of opinion concerning its reasonableness. *Id.* at 162. The argument that a property has a higher use if zoned differently does not rebut the showing of reasonableness of the existing zoning classification, nor does it satisfy the burden to show that the exclusion of other uses was arbitrary and capricious. *Id.* at 160. A court does not sit as a superzoning commission. *Id.* at 161.

We find that there was sufficient evidence presented to the trial court to support the conclusion that there was no substantive due process violation. The RA zoning classification under which plaintiff's property fell advanced the legitimate governmental interest of protecting the safety, convenience, and welfare of the public, most notably that of the elderly living in the adjacent Innisbrook retirement community. The evidence reflected that the only access to plaintiff's property was a two-lane county road without sidewalks, that R-3 zoning would have allowed up to 898 apartment units on plaintiff's property which by common sense would have the potential of greatly intensifying the traffic congestion through the retirement community, that Eastman Drive would have to handle an additional 4,500 to 4,600 vehicle trips per day, and that, on the other hand, RA zoning is completely compatible with, considering safety, convenience, and welfare purposes, the single road access, the R-3 zoned retirement community, and with the other zoning designations of surrounding property. Of course, our focus is on the constitutional validity of the RA zoning classification, not on the reasonableness of the R-3 request, because the substantive due process challenge attacks the validity of the existing ordinance. The evidence of the lone access, two-lane, sidewalk free roadway and the adjacent retirement community, along with a mix of other RA and R-3 zoned property nearby, when considered with the requirement that the ordinance be given a presumption of validity, leads us to conclusion that the RA zoning classification advances a legitimate governmental interest. The RA designation allowing low-density residential development and agricultural development is compatible with a lone access road, which was described as a glorified driveway, and a retirement community.

Moreover, we find that the placement of an RA classification on the property in question constituted a reasonable means to advance the legitimate interest of the township. The RA classification does not unreasonably, arbitrarily, or capriciously exclude other types of legitimate land use; it is indeed reasonable, practical, and wise to zone the property RA under the circumstances. Higher density usage, such as sought by plaintiff, is not arbitrarily excluded but instead not permitted because of incompatibility with the surrounding environment.

Plaintiff relies on MCL 125.273 which provides, in part, that "[t]he zoning ordinance shall be made with reasonable consideration, among other things, to the character of each district; its peculiar suitability for particular uses; the conservation of property values and natural resources; and the general and appropriate trend and character of land, building, and population development." We opine that this provision supports, rather than negates, the township's decision to leave intact the RA classification; the township clearly considered the peculiar suitability of R-3 and RA zoning designations on the basis of the particular property involved, and it did so in a reasonable fashion. Plaintiff's argument that the RA zoning classification is inconsistent with the surrounding classifications, which are allegedly more urban than rural, suggests that the township should urbanize every parcel regardless of its compatibility with surrounding urbanized developments and regardless of access points. This is illogical and contrary to the township's mandate to zone in a manner that protects the safety, health, and general welfare of the public. Moreover, there remain large tracts of RA zoned property in the general area of plaintiff's property.

Plaintiff asserts that MCL 125.273 requires a township to zone according to a basic plan. "The zoning ordinance shall be based upon a plan designated to promote the public health, safety, and general welfare[.]" MCL 125.273. This cannot be read to require that the numerous zoning classifications under the township ordinance and the application of those classifications to

the many tracts of township property are subject to a permanent set plan without change or consideration of new and evolving circumstances. A master plan is just that, a plan, a plan for the future. Even plaintiff's witnesses admitted that the master plan did not solely govern and conclusively determine how a particular parcel would be zoned. To read the statute as interpreted by plaintiff, a township would not have the discretion to make individual deviations from a plan based on ever changing circumstances to do just what it is bound to do, i.e., protect the general welfare. Plaintiff maintains that, because of the statutory language, the trial court should have presumed that the R-3 classification was reasonable absent evidence to the contrary. Even accepting this principle as valid, there was in fact evidence to the contrary as previously discussed.[10] Furthermore, this Court in *Troy Campus v City of Troy,* 132 Mich App 441, 457; 349 NW2d 177 (1984), stated that a "master plan is a factor in determining reasonableness. It is, however, only one factor; it does not replace the balancing of interests required under an assertion of the police power."

We reject plaintiff's argument that the township's purported concern with traffic congestion and safety merely masked its true concern, which was allegedly fear that plaintiff would allow subsidized housing despite assurances to the contrary. It cannot be ascertained from the record that this reflected the true concern of the township, nor was it argued, and regardless, traffic congestion and the safety and convenience of the Innisbrook residents were the concern presented, and this concern can be viewed as grounded in legitimacy considering the circumstances of the case.[11]

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[10] Plaintiff presents an additional argument that the township's past actions highlight that it acted arbitrarily and unfairly with respect to the RA zoning classification. This is because that, when the township approved the Innisbrook Subdivision in 1987, it allowed the project to go forth with a single means of ingress and egress set at a sixty-six foot width without requiring a more adequate road that could some day also serve a development on plaintiff's property. This argument, besides lacking merit, is illogical. It somehow assumes that in 1987, the township should have known that one day a developer wishing to build an enormous apartment complex would purchase adjacent land zoned RA and seek to rezone the land to R-3 such that, considering the higher density concentration of R-3, a more suitable means of ingress and egress to Innisbrook should have been required to allow the road to fully serve all residents and future residents of the area. At the time, and still today, the property was zoned RA which would not suggest the need for an expansive means of ingress and egress to serve Innisbrook. And the relevant master plan was not yet in place. To assert that this reflects arbitrariness on the part of the township is unfounded. The fact that a couple years after Innisbrook was approved, the township's master plan reflected a design to some day utilize plaintiff's property as high-density residential cannot in hindsight show arbitrariness. Plaintiff's reliance on *Troy Campus v City of Troy*, 132 Mich App 441; 349 NW2d 177 (1984), is misplaced and distinguishable because there this Court found arbitrariness where the city claimed worries of traffic congestion supported the continuing viability of a single-family zoning classification, but where the city also had plans to improve the pertinent roadway, a major thoroughfare, and two other office developments had just been approved without accompanying approval of the plaintiff's similar office development. *Id.* at 455-456.

[11] We respectfully reject the contention in *George v Harrison Twp,* 44 Mich App 357, 364-365;
(continued…)

E. Taking

Plaintiff argues that the trial court erred in dismissing its claim of a taking. Both the Fifth Amendment of the United States Constitution and art X, § 2 of the Michigan Constitution of 1963 prohibit the governmental taking of property without just compensation. A taking may occur where a governmental entity exercises its police power through regulation restricting the use of property. *Electro-Tech, supra* at 68. If zoning laws go too far in impairing a property owner's use of his or her land, the regulation may amount to a taking. *Bevan, supra* at 390. The diminution of property value by application of ordinance regulations, without more, does not amount to an unconstitutional taking. *Paragon, supra* at 579 n 13. The Taking Clause does not guarantee property owners an economic profit from the use of their land. *Id.* In *K&K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 576-577; 575 NW2d 531 (1998), our Supreme Court noted the parameters of a taking claim:

> [C]ourts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest,[12] or (2) where the regulation denies an owner economically viable use of his land.
>
> 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," or (b) a taking recognized on the basis of the application of the traditional "balancing test[.]"
>
> [A] person may recover for . . . [a categorical] 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 . . . in the name of the common good[.]" 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. [Citations omitted; emphasis in original.]

Here, we first find that there was no evidence of a "categorical" taking, which leaves us with the application of the balancing test to determine if the evidence showed that plaintiff was denied economically viable use of its land. The character of the township's action was simply the application of a zoning classification affecting plaintiff's property, which we find was reasonable and appropriate. The economic effect of the zoning classification is guided by the

(…continued)

205 NW2d 254 (1973), unsupported by any authority, suggesting that road and emergency responder access are irrelevant in determining the reasonableness of a challenged zoning ordinance. The case is not binding on this Court pursuant to MCR 7.215(J)(1).

[12] We again note that there is no merit in the claim that the zoning ordinance did not advance a legitimate state interest.

requirements and permitted uses of the ordinance regarding RA zoned property. Plaintiff did produce evidence showing that developing five-acre lots for sale would result in a financial loss and that continued leasing to a local farmer was not profitable after consideration of property taxes. We point out, however, that the evidence did not show that plaintiff could not sell the property for consideration or that plaintiff could not continue leasing to the farmer, only that no profit could be made, which *Paragon* indicates is insufficient.

Further, there was no exploration of other uses for development allowed under the RA designation, including various types of farming operations (livestock, poultry, dairying, etc.), and numerous potential uses, on special approval, including halls of worship, hospitals, roadside stands, horse stables, riding academies, private parks, gun clubs, golf courses, kennels, and other similar uses. But this Court's decision in *Troy, supra* at 451, states that the burden to show that a classification precludes use of the land for any use to which it is reasonably adapted does not impose a "burden on plaintiff to positively show that the land could not be reasonably adapted to each and every permitted use[.]" Though we find those statements somewhat inconsistent, we believe that the farming operation alternative here, as a definitive permitted use, should have minimally been recognized and addressed by plaintiff at trial. Regardless, our ruling hinges on the third factor of the balancing test. With respect to investment-backed expectations, we opine that this factor supports the conclusion that plaintiff had no viable taking claim given that plaintiff purchased and closed on the property with full knowledge of the RA classification and full knowledge of the rezoning request denial. It was not reasonable for plaintiff to expect, in the context of its investment, to make a profit developing an apartment complex when, at the time of the closing on the property, the rezoning request had been denied. Plaintiff took a chance or a risk that it might not be able to develop an apartment complex, and it cannot thereafter come running to the courthouse claiming that the township effectively took its property.

In *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 27; 614 NW2d 634 (2000), the Supreme Court, addressing and rejecting Adams' claim that East Lansing's sign code effectuated a taking with respect to rooftop signs, stated in partial support of its ruling:

> 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 had no reasonable expectation that it could maintain the signs at the rooftop locations after the date designated in the code. Under these circumstances, Adams' property interests in the leases clearly did not include a right to display signs on a rooftop after May 1, 1987.

We find additionally compelling and relevant Justice Kelly's concurring opinion, which is a consistent expansion on the preceding quote, wherein she stated:

> Here, plaintiff never had a legitimate expectation that its leaseholds or billboards would continue to produce income in perpetuity. The fact that plaintiff continued to invest in new leaseholds after defendant enacted its sign ordinance does not compel this Court to find a taking. Plaintiff was well aware that the

> enforcement of defendant's sign code could, at any time, render its leasehold interests worthless. [*Id.* at 38.]

Here, likewise, it was not reasonable for plaintiff to *expect* a return on its investment in the form of revenue generated by operating an apartment complex, where the township's zoning ordinance did not allow apartment complexes to be built on the property and a rezoning request had been denied.[13] While there was a *possibility* that the trial court would rule in its favor thus allowing development, it was just that a *possibility*, and considering the factual circumstances and law, an outside possibility at best. When that possibility did not occur and plaintiff's hopes did not come to fruition, plaintiff could not avail itself of the constitutional protections against takings without just compensation. The evidence supported the trial court's finding that plaintiff failed to establish a cause of action for a taking.[14]

III. CONCLUSION

The trial court erred by applying an appellate standard of review with regard to a portion of its ruling, instead of a de novo, independent standard, where plaintiff filed an original circuit court action challenging the denial of a rezoning request, which is legislative in nature as opposed to administrative. Regardless, the trial court also found that plaintiff failed to submit sufficient evidence at trial to support the claims of an unconstitutional taking and violations of substantive due process and equal protection. The evidentiary record supports the trial court's rulings as to the appealed claims. Finally, in light of our holding affirming the trial court on the substance of plaintiff's causes of action, we deem it unnecessary to determine whether the court erred in the application of the rule of finality or ripeness.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Janet T. Neff

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[13] We note that plaintiff fails to address this issue in its appellate brief despite the fact that the trial court used it as a basis for its opinion and specifically cited *Adams*. Plaintiff further fails to address the issue in its reply brief despite defendant's reliance on the principle in its appellee brief.

[14] Considering that plaintiff's due process claim is grounded in the alleged deprivation of a property interest, we see no reason not to similarly apply the principle in *Adams* to the substantive due process claim.