STATE OF MICHIGAN

COURT OF APPEALS

SUNDRY DEVELOPMENT, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED November 27, 2007
v	No. 270458 Kent Circuit Court
CITY OF LOWELL, Defendant-Appellant/Cross-Appellee.	LC No. 03-009803-CH

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Defendant appeals as of right an order granting judgment in favor of plaintiff and awarding plaintiff $134,100.30, plus pre-judgment interest, on the ground that plaintiff's property was taken by defendant's actions. Defendant also appeals the trial court's decision to enjoin a referendum election. We reverse. Because of our resolution of the issues raised in defendant's appeal, we need not address plaintif's cross-appeal of the trial court's partial denial of the full amount of damages he had requested.

Plaintiff is in the business of developing residential property, generally by working with some other entity that will perform actual house construction. In 2000, plaintiff purchased a parcel of property in the City of Lowell with the goal of developing it, but its distance from water and sewer services precluded doing so. In January 2002, plaintiff entered into a land contract purchase agreement for adjacent property, known as the "Highland Hill property," which was at the time zoned SR, or "suburban residential." Plaintiff planned to arrange for the property to be rezoned to R-2, which would permit smaller minimum lot sizes and therefore denser development, and then sell the property to a developer who would perform any actual construction. On November 18, 2002, defendant's city council rejected R-2 zoning. However, the city council agreed to rezone the property to R-1 "PUD,"[1] subject to plaintiff submitting an application. Plaintiff's owner, Kevin Rude, and defendant's city manager, David Pasquale, had numerous meetings with each other to arrange for development. Pasquale testified that the PUD

[1] The difference between R-1 and R-2 is density. "PUD" means "planned unit development" and in the City of Lowell, it is an independent zoning classification.

zoning idea was an alternative plan that he and Rude developed after R-2 zoning was rejected. However, defendant had never undertaken a PUD rezoning before, and Rude testified that the "process was not quite clear to [plaintiff] all along."

The same day the city council rejected R-2 zoning, the following motion took place:

> IT WAS MOVED BY BRUBAKER and seconded by BLOUGH to rezone the Highland Hill property to PUD/R1 with the understanding that a PUD application will be submitted to the Planning Commission who will account for all the provisions within the Zoning Ordinance under PUDs and site plans. Further a recommendation would then be made to the City Council concerning the actual PUD proposal from Sundry Corporation. [. . .] MOTION CARRIED.

Pursuant to the passage of the motion, and pursuant to the rezoning process, the rezoning was published as Ordinance Number 02-6 in Chapter 23 of the Lowell Zoning Ordinance, pertaining to zoning map amendments, and it provided as follows:

> The "Official Zoning Map" as referenced in section 3.02 of Article III of the Zoning Ordinance of the Code of Ordinances of the City of Lowell is amended to change the zone district classification of real property located in part at 1115 East Main Street legally described from SR Suburban Residential District to Planned Unit Development (PUD)/Residential (R-1) District: [metes and bounds description omitted].

This ordinance was simply a recognition that plaintiff sought PUD status for the property, and pursuant to that plan, plaintiff submitted a PUD rezoning application on February 17, 2003. The parties' representatives continued to meet with each other, and plaintiff began discussing cooperative development of the property with Lee Kitson, a highly respected builder. Over the course of several more meetings, defendant's city council eventually approved plaintiff's proposed site plan for the property.

Defendant's city council gave its approval of plaintiff's site plan on April 21, 2003, subject to some technical details. Rude believed the project itself had received all necessary approvals by that date, although the parties' representatives continued to discuss the details. Pasquale concluded, on the basis of discussions with defendant's attorney, that the project would require passage of "a second ordinance that would basically incorporate all the details of this planned unit development," and he testified that he passed on all communications regarding the rezoning process to plaintiff. A meeting was held on June 18, 2003, between Pasquale, city attorney Richard Wendt, the city engineer, the public works director, and Sundry representatives, where they finished the details of an application for a final PUD ordinance, which Pasquale asked Wendt to prepare. On July 2, 2003, Wendt sent to both Pasquale and plaintiff's attorney a letter containing the draft PUD ordinance. Plaintiff's attorney forwarded it to Rude, who testified that it was the first time he became aware that the additional step of a second PUD ordinance would be required. By that time, plaintiff was already in the process of removing trees from the Highland Hills property.

The day before the letter, plaintiff and Kitson had entered into a development agreement entailing joint financial obligations and a provision stating that Kitson had the right to terminate

the agreement if the necessary approvals were not obtained "within 60 days after the date of this agreement," and Kitson's right to do so would be waived if not exercised within 30 days thereafter. Therefore, plaintiff was required to obtain the necessary approvals by August 30, 2003, and if Kitson desired to terminate the agreement as a result, he needed to do so by September 29, 2003.

At the July 21, 2003, city council meeting, the city council defeated the second rezoning ordinance. Pasquale had been on vacation at the time and was surprised at the rejection; he and plaintiff's attorney requested that the city council reconsider. At the city council's August 4, 2003, meeting, the council reconsidered and approved the PUD ordinance. Again pursuant to defendant's rezoning process, the PUD rezoning for plaintiff's property was published as Ordinance Number 03-4 as follows:

> The "Official Zoning Map" as referenced in section 3.02 of Article III of the Zoning Ordinance of the Code of Ordinances of the City of Lowell is amended to change the zone district of the following legally described property to Planned Unit Development Single Family Residential District, R-1: [metes and bounds description omitted].

This ordinance was authorized after submission to, and approval by, the city council of the complete details of the PUD development. Shortly after its passage, the parties became aware that members of the community were planning to petition for a referendum to overturn Ordinance Number 03-4 and have the Highland Hills project terminated. Pasquale testified that he had never been involved in a referendum before, and as far as he knew there had never been a special election before, but pursuant to the City Charter, all ordinances are potentially subject to a referendum.

Plaintiff repeatedly protested to defendant that the referendum petitions should be rejected as illegal. Defendant's city clerk reviewed the petitions and, on September 9, 2003, certified them as valid and sufficient. The city council declined to take immediate action on them at its next meeting, and instead tabled the issue and asked the city clerk to review them again. On September 26, 2003, Kitson exercised his right to terminate the development agreement because he needed to build something to continue his business, and the possible referendum made the Highland Hills project too uncertain. On October 3, 2003, the city clerk reaffirmed the validity and sufficiency of the petitions; at the next city council meeting three days later, the city council decided to hold a referendum election regarding Ordinance 03-4, rather than either reject the petitions or repeal the ordinance outright. The election was scheduled to take place on December 9, 2003, and Ordinance Number 03-4 was automatically suspended in the interim. On October 16, 2003, Sundry then commenced the instant lawsuit and immediately sought to enjoin the referendum election.

At a hearing on November 21, 2003, the trial court concluded that all of the substantive legal steps necessary for final approval of the Highland Hill project had been completed by, at the latest, April 21, 2003, when the revised site plan received final approval, and the remainder of the procedural steps were merely administrative details. Defendant's referendum process contained a 40-day window in which to petition for a referendum election. Therefore, the trial court concluded that by August 4, 2003, any petitions would have been facially untimely or, in the alternative, functionally untimely because they pertained to administrative acts rather than

legislative acts. The trial court enjoined the referendum election, declared Ordinance Number 03-4 "final and binding upon all interested parties," and authorized Sundry to proceed with the development of the Highland Hill project in compliance with the same ordinance. Defendant sought leave to appeal, which this Court denied in Docket No. 252466.

Rude testified that the "project was a dream" and he went forward with the development to the extent he could, even during the uncertainty before the trial court enjoined the referendum. Plaintiff negotiated loans for the project and a new development agreement with a different builder, Gregory Holwerda. The subsequent construction took place in weather and financial conditions that were significantly less optimal than they would have been under the Kitson development agreement. In the end, only three houses built on the property – out of 52 lots – had actually sold by the time of trial. All three developers, Rude, Kitson, and Holwerda, testified that they had had faith in the Highland Hills project, but they all conceded that land development was inherently speculative to some extent.

Rude estimated that if the Kitson development agreement had gone forward, plaintiff would ultimately have realized approximately $630,897 in profit, but the lost profits, incurred debts, and expenses caused by the delay and in fighting the referendum had caused plaintiff to suffer $1,439,182.65 in damages. Defendant's expert forensic accountant testified that approximately 91 percent of plaintiff's expenditures on the Highland Hill development project were spent after Kitson withdrew from participation, and plaintiff's projected profits for the Highland Hills development were inconsistent with, and approximately ten times higher than, Sundry's historical profitability. The trial court granted plaintiff part of its claimed damages, explaining that it found defendant's acts wrongful and that the delay caused by the referendum had caused plaintiff to suffer a taking. Defendant now appeals.

We first address the propriety of the injunction. We find that the trial court abused its discretion in enjoining the referendum election.

Questions of statutory interpretation are reviewed de novo with the goal of effectuating the Legislature's intent as it is expressed in the language of the statute. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). Ordinances are treated as statutes for the purposes of interpretation and review. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003). This Court reviews a trial court's decision whether to grant injunctive relief for an abuse of discretion. *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 105-106; 662 NW2d 387 (2003). However, an injunction is an "extraordinary remedy;" it must be required by justice, and there must be a real and imminent danger of irreparable harm with no adequate remedy at law if the injunction does not issue. *Charter Twp of Bloomfield v Oakland Co Clerk*, 253 Mich App 1, 15; 654 NW2d 610 (2002). Enjoining an election is an even more drastic act that affects a fundamental right of all citizens in a community, so much so that elections generally may not be enjoined, even if they are illegal. *Id*., 16. Instead, the proper remedy is at law, in the form of a quo warranto action brought under MCL 600.4545 to determine the validity of the election. *Id*., 15-17. "Irreparable harm" must be legally noncompensible or impossible to calculate; economic injuries are not irreparable. *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998).

First, it is clear from defendant's charter and ordinances that Ordinance Number 03-4 was, as defendant properly determined, subject to a referendum. The procedure for holding a

referendum is set forth in Chapter 6 of the Lowell City Charter, which governs city administration, as follows:

Section 6.6. Initiative and Referendum.

An ordinance may be initiated by the electors of the City and a referendum on an ordinance may be had by them by the submission of a petition therefor as provided in this chapter.

Section 6.7. Initiative and Referendary Petitions.

An initiatory or a referendary petition shall be signed by not less than fifteen per cent of the registered electors of the City. Such petition may be the aggregate of two or more petition papers. Each signer of a petition shall sign his name, and shall place thereon, after his signature, the date and his place of residence by street and number. To each petition paper there shall be attached a sworn affidavit by the circulator thereof, stating that each signature thereon is the genuine signature of the person whose name it purports to be, and that it was signed in the presence of the affiant. Such petitions shall be filed with the Clerk who shall, within fifteen days, canvass the signatures thereon to determine the sufficiency thereof. Any signatures obtained more than ninety days before the filing of such petition with the Clerk shall not be counted. If found to contain an insufficient number of signatures of registered voters of the City, or be improper as to form or compliance with the requirements of this section, the Clerk shall notify forthwith the person filing such petition, and ten days from such notification shall be allowed for the filing of supplemental petition papers. When found sufficient and proper, the Clerk shall present the petition to the Council at its next regular meeting.

Section 6.8. Council Procedure on Initiative or Referendary Petitions.

Upon receiving an initiatory or referendary petition from the Clerk, the Council shall, either:

(1) If it be an initiatory petition, adopt the ordinance as submitted in the petition within thirty days after the receipt thereof, or determine to submit the proposal to the electors; or

(2) If it be a referendary petition, repeal the ordinance to which the petition refers within thirty days after receipt thereof or determine to submit the proposal to the electors.

Section 6.9. Same--Submission to Electors.

Should the Council decide to submit the proposal to the electors, it shall be submitted at the next election held in the City for any purpose, or, in the discretion of the Council, at a special election. The result shall be determined by a majority vote of electors voting thereon, except in cases where otherwise required by law.

* * *

Section 6.11. Same--Ordinance Suspended.

> The certification by the Clerk of the sufficiency of a referendary petition within forty days after passage of the ordinance to which such petition refers shall automatically suspend the operation of the ordinance in question, pending repeal by the Council or the final determination of the electors thereon.

This procedure does not differentiate between kinds of ordinances: "*an*" ordinance in this context unambiguously indicates that *any* ordinance is subject to the referendum procedure. The city clerk's certification of the referendum petitions on September 9, 2003, was within 40 days of the August 4, 2003, passage of Ordinance Number 03-4. The certification was therefore timely under § 6.11. As a result, the plain language of § 6.8 *required* the city council to take one of only two possible actions: repeal the ordinance outright, or hold an election. The city council here tabled doing either and ordered the clerk to re-check the petitions, then chose to hold an election instead of repealing the ordinance. The city council's acts appear to be as accommodating to plaintiff as the city council was *permitted* to be – if not more so.

Plaintiff argues that Ordinance Number 03-4 was only labeled an ordinance, and it was really an administrative detail not subject to a referendum. Plaintiff relies on Justice Levin's opinion in *West v City of Portage*, 392 Mich 458, 460-463; 221 NW2d 303 (1974), in which he wrote that labeling a municipal act as an "ordinance" does not necessarily confer upon that act the status of "legislation." Rather, if the act is truly more administrative or executive in nature, it will be treated as such, and it will therefore not be subject to a referendum. *Id*. Plaintiff further relies on Justice Levin's conclusion that "an amendment to a city zoning ordinance changing the zoning of particular property . . . although in form (amendment of a zoning ordinance) and in traditional analysis thought to be legislative action, is in substance an administrative, not legislative, act." *Id*., 460-461.

However, Justice Levin's opinion, although designated the lead opinion in that case, was in fact joined by only two other Justices. The concurring opinion, also signed by a total of three Justices, explicitly held that "there is a right to referendum [sic] a zoning ordinance but that the instant petition is fatally defective because it attempts to combine a zoning referendum and an initiative." *Id*., 472. Justice Coleman "concurred in the result." *Id*. Moreover, Justice Levin's view that zoning ordinances are merely administrative was contrary to existing case law at the time. See, *e.g.*, *Robinson v City of Bloomfield Hills*, 350 Mich 425, 430-433; 86 NW2d 166 (1957) (observing that zoning decisions are legislative functions, the wisdom of which can only be challenged in "the ballot box, not the courts"). More recently, our Supreme Court explicitly reaffirmed that zoning ordinances are legislative in nature. *Schwartz v City of Flint*, 426 Mich 295, 307-309; 395 NW2d 678 (1986). This Court has explicitly recognized that zoning decisions are legislative, even when an ordinance amends a general zoning ordinance as to a specific parcel of property. *Albright v City of Portage*, 188 Mich App 342, 346-349; 470 NW2d 657 (1991). Even if such an ordinance only specifies an individual parcel of property, it nevertheless applies to and affects the entire community. *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, 389-390; 389 n 12; 733 NW2d 734 (2007). Thus, "an amendatory zoning ordinance is subject to referendum by the local electors." *Albright*, *supra* at 346.

Furthermore, plaintiff's argument – that Ordinance Number 03-4 is a mere administrative detail – is contrary to the plain language of defendant's Zoning Ordinance. Section 15.03 thereof sets forth the "application procedures" for planned unit development as follows:

> A. An application for a planned unit development shall be submitted and acted upon as a rezoning in accordance with the requirements of this ordinance, and as noted in this chapter.
>
> B. An application for planned unit development shall be accompanied by a statement with regard to compliance with the criteria required for approval in section 15.04, and other criteria imposed by this ordinance affecting the planned unit development under consideration.
>
> C. Review and approval. The planning commission shall review the application for a planned unit development, comments received at the public hearing, the site plan, and other materials submitted in relation to the application, and recommend to the city council denial, approval, or approval with conditions, the planned unit development application in accordance with the purpose of this chapter and the criteria for approval stated in section 15.04, and such standards contained in this ordinance which relate to the planned unit development under consideration, including those for site plan review. The planning commission shall prepare a report stating its conclusions on the request for a planned unit development, the basis for this recommendation, and any conditions relating to an affirmative recommendation.
>
> D. Upon the approval, or approval with conditions by the city council, the applicant may apply for preliminary plat approval, if applicable.

This procedure unambiguously requires PUD rezoning to be treated as an independent zoning request and accompanied by specific additional documentation. Furthermore, § 3.01 of the Lowell Zoning Ordinance explicitly provides that PUD is a zoning district *separate and distinct* from any others, including SR, R 1, or R 1. It is not disputed that plaintiff submitted an application for PUD zoning *after* defendant passed Ordinance Number 02-6. Therefore, only Ordinance Number 03-4 could have granted the final rezoning necessary for planned urban development on the property. To the extent either ordinance could be considered merely administrative, it would be Ordinance Number 02-6.

The trial court therefore erred in finding Ordinance Number 03-4 not subject to defendant's referendum process, either because the petitions were untimely or because Ordinance Number 03-4 was not legislative in nature. The trial court therefore erred in finding that defendant engaged in any wrongdoing by accepting the referendum petitions, suspending Ordinance Number 03-4, and scheduling a referendum election on Ordinance Number 03-4. Moreover, because the only harm plaintiff alleges is economic, the trial court erred in issuing an injunction in any event.

The trial court also erred in finding that plaintiff's property had been taken by any of defendant's acts. A "taking" of a person's property occurs when a government "goes too far" in regulating that property. *K&K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998), cert den 525 US 819; 119 S Ct 60; 142 L Ed 2d 47 (1998). There are various analyses the courts use to determine whether there has been a taking, but they all have in common one feature: "each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle v Chevron USA Inc*, 544 US 528, 539; 125 S Ct 2074; 161 L Ed 2d 876 (2005). At a minimum, "the question whether a regulation

denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains." *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991), cert den 502 US 1060; 112 S Ct 941; 117 L Ed 2d 111 (1992).

The gravamen of plaintiff's argument is that because the property was not conclusively rezoned PUD by a particular date specified in a contract between plaintiff and a third party, plaintiff lost that contract and was unable to obtain a similarly advantageous replacement contract. Plaintiff does not contend that its *property rights* were affected in any meaningful way. Plaintiff only contends that it *lost a contract*, and, when it chose to pursue the project anyway, it was unable to negotiate a new contract that was as profitable. In fact, the evidence suggests that any diminution in value to the *land* was due to the overall economy changing and due to notoriety that had attached to the land due to the dispute between the parties. In any event, an inability to obtain an expected profit is irrelevant to the constitutionality of a zoning ordinance under a takings analysis. *Sun Oil Co v City of Madison Heights*, 41 Mich App 47, 56; 199 NW2d 525 (1972).

Moreover, no municipality is constitutionally obligated to zone any parcel of property for its *most* profitable use; the only requirement is that the property must be zoned to have *some* economically viable use. *Dorman v Twp of Clinton*, 269 Mich App 638, 647-648; 714 NW2d 350 (2006). Commercial property will generally be more valuable than residential property, but short of depriving an owner of all viable use of the land or encumbering the property with inherently unreasonable restrictions, a municipality must have leeway to manage individual property parcels pursuant to an overall plan. *Brae Burn, Inc, v City of Bloomfield Hills*, 350 Mich 425, 432-434; 86 NW2d 166 (1957). The evidence showed that the Highland Hills property could be developed even without PUD zoning. The fact that plaintiff lost a particular contract for a specific development plan is insufficient to constitute a "taking" by defendant, particularly where defendant's acts were nothing more than following its rezoning procedure, which in turn carried with it the possibility of a referendum.

Finally, plaintiff would not have any compensable losses even if the property had been taken. Consequential damages arising from a taking are sometimes compensable, including damages due to interruption of an ongoing business, but they may not include the loss of *projected future* profits. *In re Slum Clearance, in City of Detroit*, 332 Mich 485, 492-493, 495-497; 52 NW2d 195 (1952). Lost profits may be compensable when an ongoing business concern is taken, but if the allegation is that *future* profits have been lost due to a business interruption, those projected lost future profits are inherently too speculative to be compensable. *Detroit v Larned Associates*, 199 Mich App 36, 41-42, 42 n 1; 501 NW2d 189 (1993). Future profits are inherently uncertain, and here, all of the developers additionally conceded that land development was speculative. All of plaintiff's claimed losses are based on a predicted amount of profit that the Highland Hills development had been expected to generate. Any computation of losses based on a comparison to those future profits must also be too speculative to be compensable.

The trial court erred in enjoining the referendum election and in finding that there had been a taking of plaintiff's property. We reverse the trial court's judgment in plaintiff's favor.[2]

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis

[2] Defendant has not asked this Court for any specific additional relief pertaining to the referendum election.