STATE OF MICHIGAN

COURT OF APPEALS

TIME OUT, L.L.C. and SQUIRT TRANSFER & STORAGE, INC.,	UNPUBLISHED January 8, 2009
Plaintiffs-Appellants/Cross-Appellees,	
v	No. 278916 LC No. 05-002978-CH
NEW BUFFALO TOWNSHIP,	Berrien Circuit Court
Defendant-Appellee/Cross-Appellant.	

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

In this zoning dispute, plaintiffs Time Out, L.L.C. and Squirt Transfer & Storage, Inc. appeal by right the lower court's November 14, 2006 pretrial order granting partial summary disposition to defendant New Buffalo Township, dismissing plaintiffs' de facto taking and inverse condemnation claims. The township cross appeals the lower court's post-trial entry of declaratory judgment for plaintiffs, determining that the back portion of plaintiffs' property was not changed from "Industrial" to "C-1 Commercial" when on October 31, 2000, the township adopted a revised zoning ordinance. We affirm in part and reverse in part.

I. Summary of Facts and Proceedings

Time Out owns a 14.5-acre parcel of property fronting on US-12 in New Buffalo Township. Squirt Transfer is a business that operates at the same property. Ross Bradley and Debbie Bradley own the businesses. The parties do not dispute that the first 500 feet of plaintiffs' property fronting on US-12 has always been zoned "C-1 Commercial." The township maintains that when it adopted a completely revised zoning ordinance on October 31, 2000, plaintiffs' entire parcel was zoned "C-1 Commercial." Plaintiffs dispute this, contending that the back portion of the property was never rezoned, so it remains zoned "Industrial." This claim was the sole factual dispute the trial court resolved in plaintiffs' favor after a December 2006 bench trial. Defendant cross appeals the trial court's entry of judgment for plaintiffs.

The parties' dispute surfaced in 2002. Plaintiffs' principals wanted to operate an outdoor business selling lawn and garden supplies, concrete statuary, and local produce on their property fronting US-12. Although zoned commercial, "open air business" outside an enclosed building

was not permitted. Plaintiffs applied to the township planning commission for a special land use permit (SLU) to operate an outdoors business. At a June 4, 2002 meeting, the planning commission voted to recommend to the township board that a SLU be granted for the first 500 feet of plaintiffs' property fronting US-12 that was zoned "C-1" but that the granting of the permit be conditioned on plaintiffs clearing "junk" from the entire parcel within 90 days of the township board's approval of the SLU permit. The township board never acted on plaintiffs' SLU application. The minutes of the township board meeting of July 15, 2002 state: "Bradley SLU – Withdrawn by applicant." Plaintiffs' first amended complaint states that plaintiffs rejected the tie-in to "cleaning up" the back of the property.

Instead of pursuing the SLU, plaintiffs applied in April 2002 for a building permit to construct a building within which to operate their proposed statuary business; the township granted the permit six months later. The delay in granting the permit apparently resulted from plaintiffs' failing to submit necessary documentation, including site plans and zoning permit, and paying necessary fees. After plaintiffs received the building permit they commenced construction but because of financial problems were unable to finish before the permit expired on April 4, 2003 because of lack of construction progress within 180 days of its issuance.

Plaintiffs applied for a new building permit to construct an accessory building to house their statuary business on August 10, 2004. Defendant eventually issued plaintiffs a building permit on November 22, 2004. Plaintiffs allege that the four-month delay in granting a permit was deliberate and unlawful. However, there was evidence the permit application was incomplete when filed because it lacked both building work plans drawn to scale and a site plan.

Plaintiffs filed this lawsuit on May 23, 2005, alleging their property had not been rezoned (count I), that proper procedure had not been followed to amend the zoning of plaintiffs' property (count II), and even if the property had been rezoned from industrial to commercial, plaintiffs use was a valid, "grandfathered" nonconforming use (count III). Plaintiffs' complaint was assigned to Judge Paul Maloney, who had presided over a prior proceeding the township had brought under its litter and debris ordinance against Ross Bradley. Judge Maloney had ruled that plaintiffs' property was zoned commercial, not industrial. Plaintiffs moved to disqualify Judge Maloney, who entered a recusal order. This case was then assigned to Judge Lynda Tolen. On March 20, 2006, the trial court granted plaintiffs' oral motion for leave to amend their complaint to add claims for just compensation for a de facto taking and inverse condemnation.

On September 11, 2006, defendant moved for summary disposition on all plaintiffs' claims. The trial court conducted a hearing on the motion on October 23, 2006. Regarding plaintiffs' claim that its property was never rezoned (count I), the trial court denied summary disposition, ruling that material questions of fact remained for trial. The trial court granted defendant's motion for summary disposition regarding plaintiffs' count II (alleging procedural error) but denied summary disposition on plaintiffs' claim to a valid nonconforming use (count III), viewing it as an alternative pleading to count I. However, the trial court ruled it would only conduct a trial on count III if defendant prevailed on count I. Plaintiffs subsequently dismissed count III during trial.

Regarding plaintiffs' counts IV and V alleging respectively a de facto taking and inverse condemnation, the trial court reasoned as follows:

> Plaintiff argues that the four-and-a-half-month delay in issuing the building permit amounted to a de facto taking and inverse condemnation. First of all, they're the same thing. They're not two separate causes of action. De facto taking is inverse condemnation. But be that as it may, the Court-whatever the Court rules will apply to both counts. . . . Michigan law does recognize a cause of action for inverse condemnation, and under Michigan law it accrues when the property has been taken for public use either physically or by regulation with[out] commencement of formal condemnation proceedings. [Citing *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989) and *Hart v Detroit*, 416 Mich 488; 331 NW2d 438 (1982).] Inverse condemnation has also been found to lie where property "has been damaged by a public improvement undertaking or other public activity." That's *In Re: Acquisition of Land, Virqinia Park* (1982) 121 Mich App 153, 158, where the Plaintiff claimed that the city's actions caused a substantial decline in property values. Plaintiffs in inverse condemnation actions have the burden of proving that governmental actions were a substantial cause of the deprivation or decline in value.
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> The Court finds that there is no material question of fact that Defendant's actions deprived Plaintiffs of all economically viable use of the land or were a substantial cause in bringing about a decline in the value of the property. First, there's no claim that Plaintiffs were ever denied possession of their property. Second, they have not set forth any documentary evidence to establish that they were denied all economically viable use the property for any period of time. And even if Defendant effectively rezoned the property, the Plaintiffs have always been able to use the property for commercial purposes, if not industrial. Plaintiffs have not produced any evidence to show that the Defendant caused a substantial decline in the value of the property or that its utility was largely destroyed. And as counsel for the Plaintiff has stated, the case law is replete with cases going up to this-the United States Supreme Court that a temporary diminution in use or value of a property is not enough to amount to an inverse condemnation. Therefore, the Court finds with regard to questions four-counts four and five that there are no genuine issues of material fact and the motion for summary disposition is granted. [Tr, 10/23/06, pp 57-59.]

The trial court entered its order implementing its summary disposition rulings on November 14, 2006. Subsequently, the issue whether plaintiffs' back lot property had been rezoned from "Industrial" to "Commercial" when the township adopted its revised zoning ordinance proceeded to a bench trial on December 20-21, 2006.

At the conclusion of the trial, the court accepted plaintiffs' argument that even though the adopted zoning maps clearly showed plaintiffs' entire parcel was zoned commercial, the township had not done so knowingly and intentionally. The trial court determined:

> [M]y belief and fact finding is that this was not a knowing and intentional change of the plaintiff's property. However, defendant is correct when he says it did get changed.
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> * * *

> . . . I think it's been established that what actually got approved, what got recommended by the planning commission apparently, because the board wholesale approved it, had the plaintiff's property marked out as commercial. The problem is, I don't think that was done knowingly or intentionally. And the question is, what do you do about it? Can I do anything about it? [Tr, 592.]

Because the trial court was unsure it could grant the relief plaintiffs were requesting, it requested briefs on whether it could order reformation of the township's zoning map.

On February 12, 2007, the trial court issued its opinion and order for declaratory relief in favor of plaintiffs. In it, the trial court noted that after bench trial, it found "as a matter of fact, that the rear portion of Plaintiff's property was never knowingly and purposefully rezoned from industrial to commercial." Further, relying on *Prestige Community Developments v Sumpter Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 1997 (Docket Nos. 193390; 193772), the trial court opined "it is not necessary that the Court reform the ordinance, but merely to find and rule that Plaintiffs property was never rezoned." Therefore, the trial court found and declared "that [plaintiffs'] property along the front of the highway is zoned commercial to a depth of 500 feet and the balance of the property is and remains zoned industrial." The opinion and order further directed the parties to submit a declaratory judgment in accordance with the court's opinion. Finally, the opinion and order stated, "Defendant Township shall issue a corrected Zoning Map and adopt it by Ordinance."

A hearing was held June 11, 2007 on defendant's motion to amend the trial court's findings of fact and conclusions of law, which the trial court considered an untimely motion for reconsideration. The court declined to do so, noting it had previously concluded, "plaintiff's property was never in fact or in law rezoned." And the court repeated its reliance on *Prestige*, *supra*, in finding that because plaintiffs' property had not been rezoned, it was unnecessary to reform the ordinance. Nevertheless, the court acknowledged that it ordered the township to correct its zoning map and to do so by adopting an ordinance. The court denied defendant's motion to amend the court's findings of fact and conclusions of law. Consequently, the trial court entered a declaratory judgment that reiterated the court's finding that defendant "never knowingly and intentionally rezoned" plaintiffs' property and ordered that plaintiffs' property "is determined to be zoned C-1 (Commercial) on the front along the highway of U.S. 12 to a depth of 500 feet and the balance of the property is and remains zoned Industrial." The judgment also ordered defendant to "issue a corrected Zoning Map and adopt it by Ordinance" and denied defendant's motion for stay pending appeal.

Plaintiffs appeal by right the trial court's order granting summary disposition to defendant regarding dismissing plaintiffs' de facto taking and inverse condemnation claims. The township cross appeals the trial court's granting declaratory judgment in favor of plaintiffs.

II. Plaintiffs' Appeal

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Dorman v Clinton Twp*, 269 Mich App 638, 644; 714 NW2d 350 (2006). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id*. In reviewing such a motion, we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a

genuine issue of material fact exists. *Conlin v Scio Twp*, 262 Mich App 379, 382; 686 NW2d 16 (2004). If there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law, summary disposition is appropriate. *Dorman, supra* at 644. We also review constitutional questions de novo. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 541; 688 NW2d 550 (2004).

Both the Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation.[1] *Dorman, supra* at 645. The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v Los Angeles County*, 482 US 304, 315; 107 S Ct 2378; 96 L Ed 2d 250 (1987). Thus, the government is not constitutionally prohibited from taking private property for public use but is only required to pay property owners just compensation when it does so. The government normally "takes" private property through the power of eminent domain and formal condemnation proceedings. See *Dorman, supra* at 645; *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004). But the government may also effectively "take" private property without formal condemnation proceedings when it overburdens the property with regulations. *Dorman, supra* at 645, citing *K & K Const, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998). "'[T]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *K & K Const, supra* at 576, quoting *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922).

On appeal, plaintiffs argue that the township's actions improperly conditioning issuance of a special use permit on cleaning up an unrelated portion of its property and delaying issuance of a building permit for 3½ months while attempting to impose the same condition, amounted to a governmental taking. Plaintiffs further argue that the trial court erred by granting summary disposition in favor of defendant on their de facto taking and inverse condemnation claims because material questions of fact remained with respect to applying the three-part balancing test for determining whether governmental action has effected a regulatory taking requiring just compensation. See *K & K Const, supra* at 577, citing *Penn Central Transportation Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Under the *Penn Central* balancing test, a court must consider "(1) the character of the government 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." *K & K Const, supra* at 577. Although the trial court did not specifically address the *Penn Central* balancing test, we nevertheless conclude that the trial reached the correct result when it ruled defendant was entitled the judgment as a matter of law on plaintiffs' taking claims. This Court will not reverse the trial

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[1] The pertinent clause in the Fifth Amendment "provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.'" *First English Evangelical Lutheran Church v Los Angeles County*, 482 US 304, 314; 107 S Ct 2378; 96 L Ed 2d 250 (1987). Michigan's Constitution provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." Const 1963, art 10, § 2.

court when it reaches the right result, even if the court does so for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

Defendant persuasively argues that there are several reasons why plaintiffs cannot base a regulatory taking claim on the township planning commission's decision to recommend conditioning approval of a special use permit to operate an outdoor business selling lawn and garden supplies and concrete statuary on plaintiffs' clearing "all junk" from plaintiffs' entire property. First, the undisputed facts establish plaintiffs abandoned any claim regarding their application for a special use permit by withdrawing it before the township board either approved or rejected the application. In other words, the township never acted on the recommended condition, so it cannot form the factual basis for a regulatory taking claim. Second, because the township board never rendered a final decision on the plaintiffs' SLU application, it was not ripe for adjudication. *Frenchtown Charter Twp v City of Monroe*, 275 Mich App 1, 6; 737 NW2d 328 (2007). The rule of finality applies to all constitutional challenges to zoning as applied to a particular parcel of property and ensures that a plaintiff has suffered an "actual, concrete injury." *Braun v Ann Arbor Twp*, 262 Mich App 154, 160-161; 683 NW2d 755 (2004). Thus, until the government has rendered a final decision regarding the application of a regulation to a particular property, it is impossible to apply the *Penn Central* balancing test. *Id*. at 158-159.

> [A]mong the factors of particular significance in [applying the *Penn Central* balancing test] are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply 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 land in question. [*Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 190-191; 105 S Ct 3108; 87 L Ed 2d 126 (1985).

Moreover, plaintiffs advance no meaningful argument why the proposed condition at issue was unlawful. The government may attach lawful conditions to land-use permits. See *Electro-Tech, Inc v H F Campbell Co.*, 433 Mich 57, 75, 77-79 n 22; 445 NW2d 61 (1989). Plaintiffs' claim that the proposed condition did not advance a legitimate state interest because it pertained to unrelated property, i.e., that portion of plaintiffs' property that plaintiffs believed to be zoned "Industrial," is without merit. The front and back portions of plaintiffs' property are one contiguous parcel of property. It is well settled that when considering a claim that a regulatory taking has occurred as to one parcel of property, all of the plaintiff's contiguous property must be considered as a whole. *K & K Const*, *supra* at 578-579. Further, although it is appropriate to consider whether a regulation "substantially advances a legitimate state interest" when reviewing a substantive due process challenge to an ordinance, it "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Lingle v Chevron USA, Inc.*, 544 US 528, 541; 125 S Ct 2074; 161 L Ed 2d 876 (2005). Finally, the proposed condition did not involve a physical taking or the ouster from private property for public use but rather involved an effort to enforce the township's litter and debris ordinance. A clear nexus exists between permitting plaintiffs' proposed outdoor sales use and compliance with the township's litter and debris ordinance.

The undisputed facts also fail to establish a regulatory taking on the basis of the time period between plaintiffs' application for a building permit in August 2004 and the township's

issuing one in November 2004. Although, plaintiffs argue the delay was the result of the township's seeking to impose conditions, the evidence does not support these claims. Rather, the unrebutted testimony of the township's building official was that the building permit was not issued sooner because plaintiffs did not comply with the state construction code requirements that an applicant for a building permit must provide written building and site plans, MCL 125.1510(1). Defendant's building official also testified that plaintiffs did not submit a necessary zoning permit application or pay a required fee. Plaintiffs did not contend they had fulfilled these requirements; they only asserted in their affidavits that they were not told that their building permit application was deficient. Further, plaintiffs argue that the permit was issued even though they did not provide the missing required items after their initial application for the permit. Plaintiffs' argument, however, does not contradict the township official's testimony that plaintiffs never provided the documents required for issuance of a building permit. Likewise, that the township, in fact, issued the building permit without full compliance with state and local requirements does not alter the conclusion that because plaintiffs did not provide the necessary items they were not legally entitled to the issuance of a building permit under MCL 125.1511(1). Because the undisputed facts established plaintiffs were not entitled to the issuance of a building permit under state law, plaintiffs cannot base a claim for a regulatory taking on delay in its issuance. See *Frenchtown Charter Twp*, *supra* at 5-6 (a balancing-test regulatory taking cannot be established against a local government that is merely enforcing state-law requirements).

Moreover, plaintiffs claim for a temporary regulatory taking fails as a matter of law for the additional reasons that (1) such claims do not apply to normal delay attendant to issuance of building permits, zoning changes, or other similar administrative action regarding land use, (2) plaintiffs sole underlying basis for damages consists of speculative claims for lost profits, and (3) analysis under the three-part *Penn Central* balancing test confirms no regulatory taking requiring just compensation occurred under the facts and circumstances of this case.

The Supreme Court in *First English*, *supra* first recognized that if government regulation is so onerous that it amounts to a taking, just compensation is constitutionally required even if the taking is only temporary. *Id*. at 316, 321. But the Court specifically noted that its analysis did not address "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id*. at 321. The Supreme Court subsequently reasoned that "requiring a governmental agency to compensate a property owner for the loss of value while considering applications for permits and variances under a land-use regulatory scheme would either become cost-prohibitive or lead to governmental agencies making hasty, presumably haphazard, decisions." *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 536 n 17; 705 NW2d 365 (2005), citing *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 334-335; 122 S Ct 1465; 152 L Ed.2d 517 (2002). The regulation in *Tahoe-Sierra* involved two moratoria lasting 32 months and banning virtually any residential development, but the Court held the petitioners could not recover for a regulatory taking under a *Penn Central* analysis "because petitioners expressly disavowed that theory, and because they did not appeal from the District Court's conclusion that the evidence would not support it." *Tahoe-Sierra*, *supra* at 334. Here, a 3½-month time period can hardly be considered abnormal and of constitutional significance when plaintiffs failed to comply with the statutory requirements for the issuance of a building permit and also failed to pursue an administrative or judicial appeal that would be available if plaintiffs believed they had fulfilled all necessary

requirements for its issuance. See MCL 125.1511(1): "Failure by an enforcing agency to grant, in whole or in part, or deny an application within [10 or 15 business days] shall be deemed a denial of the application for purposes of authorizing the institution of an appeal to the appropriate board of appeals." See also MCL 125.1514 – MCL 125.1518.

Plaintiffs also failed to raise a material issue of fact that it suffered any concrete injury requiring just compensation. In this regard, "it is well established that a municipality is not required to zone property for its most profitable use, and that '[mere] diminution in value does not amount to [a] taking.'" *Dorman*, *supra* at 647 (citations omitted). Moreover, "a plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages." *Hinojosa*, *supra* at 548; see also *Frenchtown Charter Twp*, *supra* at 5-6. Here, plaintiffs' sole basis for damages is a claim for lost profits. But the Takings Clauses in the Fifth Amendment and Const 1963, art 10, § 2 do "not guarantee property owners an economic profit from the use of their land." *Paragon Properties Co v City of Nov*i, 452 Mich 568, 579 n 13; 550 NW2d 772 (1996); see also *Sun Oil Co v City of Madison Heights*, 41 Mich App 47, 56; 199 NW2d 525 (1972). Although when not speculative, evidence of lost profits may be proper indirect evidence regarding the diminution in the value of property taken for public use, *Merkur Steel*, *supra* at 135-136, claims for lost expected profits are generally too speculative to require just compensation. See *Dorman*, *supra* at 644 ("an owner may not base his or her claim for just compensation on uncertain and speculative expected profits"); *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 545; 481 NW2d 762 (1992) (affirming the trial court's determination of just compensation that rejected the plaintiff's claim for lost profits on the ground that it was speculative); *City of Detroit v Larned Assoc*, 199 Mich App 36, 42; 501 NW2d 189 (1993) (in a condemnation case holding that "because of their speculative nature, damages for lost profits are not recoverable in a business-interruption case").

In the present case, plaintiffs did not have an on-going profitable business selling statuary and other items at the subject property; they wanted to start the business. Plaintiffs claim that delay in granting a building permit resulted in lost profits is belied by the fact that when granted a building permit in 2002, plaintiffs did not follow through by erecting a building to house the proposed business. Similarly, it is pure speculation to posit that the three-month period from application to issuance of a building permit resulted in lost profits. Plaintiffs cannot establish a causal connection between the township's actions and their alleged damages, lost profits. *Dorman*, *supra* at 644; *Hinojosa*, *supra* at 548.

Finally, defendant was entitled to judgment as a matter of law because on the undisputed material facts plaintiffs cannot establish a regulatory taking under the *Penn Central* balancing test. That test exams (1) the character of the government action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, *supra* at 124; *K & K Const*, *supra* at 577.

First, the character of the government action here consists of two types: (a) traditional zoning where the government exercises its police powers and adopts laws that regulate in which zones certain uses are permitted or prohibited, and (b) the issuance of building permits, which involves a combination of ensuring compliance with state construction code standards and local zoning compliance, including use location, set backs, and other similar requirements. When considering this first factor, the "relevant inquiries are whether the governmental regulation singles plaintiffs out to bear the burden for the public good and whether the regulatory act being

challenged . . . is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally." *K & K Const, supra,* 267 Mich App at 559. Because the ordinance here is one imposing traditional zoning as part of a comprehensive plan and plaintiffs are both benefited and burdened like other similarly situated property owners, "this factor weighs heavily against finding that a compensable regulatory taking has occurred here." *Id*. at 563. Similarly, state building code requirements apply equally to all citizens who equally share the burdens and benefits of enforcement. In sum, the character of the regulatory actions in this case weighs heavily in favor of finding that a regulatory taking did not occur.

The economic effect of either the zoning ordinance or the application of the state building code on the property also does not support the conclusion there was a taking. Plaintiffs only claim is that they were unable to profit as much as they had hoped. But as noted above, the "Taking Clause does not guarantee property owners an economic profit from the use of their land." *Paragon Properties*, *supra* at 579 n 13. Moreover, the township is not required to zone property for its most profitable use, and the mere fact that a zoning classification might diminish the value of a parcel of property does not amount to a taking. *Dorman*, *supra* at 647. As the trial court correctly observed, plaintiffs were never ousted from their property; none of their property was required to be dedicated to public use, and plaintiffs were not denied all economically viable use of their land. To establish a taking, "a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned." *Bevan v Brandon Twp*, 438 Mich 385, 403; 475 NW2d 37 (1991), amended 439 Mich 1202 (1991). Here, the effect of the regulations was not "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, *supra* at 539. The mere fact that a regulation reduces the value of the regulated property is insufficient to establish a compensable regulatory taking. *K & K Const*, *supra,* 267 Mich App at 553, citing *Penn Central*, *supra* at 131. So, this factor does not support finding defendant effected a regulatory taking of plaintiffs' property requiring just compensation.

The last *Penn Central* factor, the extent to which the regulation has interfered with plaintiffs' distinct investment-backed expectations, also favors finding that no regulatory taking occurred in this case. Plaintiffs concede that at all times the portion of the property on which they desired to operate a lawn and garden supplies, concrete statuary, and local produce sales business was zoned "Commercial." Plaintiffs were also aware that to operate the proposed business outdoors according to their own original plan required their obtaining a special land use permit. The record reflects that the township was willing to grant a special land use permit in 2002. But plaintiffs voluntarily chose to withdraw their SLU application because they were unwilling to accept a condition, which plaintiffs have not established was unlawful. Thereafter, in 2002, the township granted plaintiffs' application for a building permit that would have allowed plaintiffs to erect a structure to house their statuary business. This plan fell through not because of defendant's regulatory action but because of plaintiffs' financial difficulties. The building permit then lapsed. Then, in 2004, 3½ months after plaintiffs' application, the township issued plaintiffs another building permit. As noted above, the Takings Clause does not require just compensation for "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *First English*, *supra* at 321; see also *Tahoe-Sierra*, *supra* at 332-335. Based on the record evidence, reasonable minds could only conclude that any abnormal delay plaintiffs experienced implementing their business plan was not substantially caused by government regulators but by plaintiffs' own choices, financial difficulties, and failure

to provide necessary documents to support their second building permit application. Finally, plaintiffs claim for just compensation is based solely on their allegation of lost profits. For the reasons already noted, plaintiffs' claim for lost profits is too speculative to support a claim for just compensation. *Dorman, supra* at 644.

After examining all the *Penn Central* factors, we conclude that a regulatory taking requiring just compensation did not occur in this case. The trial court correctly ruled that plaintiffs failed to create a material fact dispute that defendant's zoning ordinance or the application of the building code amounted to a regulatory taking of plaintiffs' property.

III. Defendant's Cross-Appeal

Following a bench trial, we review for clear error the court's factual findings and we review de novo its conclusions of law. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A trial court's finding of fact is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 265; 673 NW2d 815 (2003). When reviewing a trial court's findings of fact, we will give due regard to the trial court's opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). The interpretation of a township zoning ordinance, as occurred here, presents a question of law we review de novo. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421; 616 NW2d 243 (2000).

"The power to zone and rezone property is a legislative function." *Essexville, supra* at 265; see also *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000) ("[I]t is settled law in Michigan that the zoning and rezoning of property are legislative functions."). Further, the board of a local unit of government legislates when it adopts or amends a zoning ordinance that incorporates a zoning map or maps.[2] *Id*. at 669-700, citing Crawford, Michigan Zoning and Planning (3d ed), § 1.11, p 53; see also *City of Hillsdale v Hillsdale Iron & Metal Works, Inc*, 358 Mich 377, 384-385; 100 NW2d 467 (1960).

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[2] Defendant enacted its zoning ordinance under the authority of the Township Zoning Act (TZA), MCL 125.271 *et seq*., repealed by 2006 PA 110. The current local government zoning enabling legislation is the Michigan Zoning Enabling Act (MZEA), MCL 125.3101, *et seq*. The MZEA preserves "any pending litigation, administrative proceeding . . . or any ordinance, order, permit, or decision that was based on" the TZA before its repeal. MCL 125.3702(2).

The former MCL 125.277(c) provided that the "township zoning board" submit its recommendations to the township board regarding the "text of a zoning ordinance with the necessary maps and zoning regulations to be adopted for a zoning district or the township as a whole." MCL 125.279 required that notices before required public hearings regarding the adoption of an ordinance specify where the tentative text and maps could be examined. MCL 125.290 vested the township zoning board of appeals with authority to "decide questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps." Similar provisions are found in the MZEA. See MCL 125.3305, .3306, .3308, & .3603.

The rules of statutory construction apply with equal force to local legislative acts, including zoning ordinances. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998); *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). The primary goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the legislative body. *Green Oak Twp v Munzel*, 255 Mich App 235, 239; 661 NW2d 243 (2003). The first and foremost source in determining legislative intent is the specific language of the statute. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2000). If the language of an ordinance is clear and unambiguous, the judiciary must apply it as written. *Id*.; *Brandon Charter Twp, supra* at 422. Courts may not speculate about the probable intent of a legislative body beyond the language expressed in the statute or ordinance. *Green Oak Twp, supra* at 240; *Kalinoff, supra* at 10. Stated otherwise, when a statute or ordinance is clear and unambiguous, the judiciary may not employ other rules of statutory construction to reach a contrary result. *Green Oak Twp, supra* at 240. Pertinent here, "resort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute. Legislative history cannot be used to create an ambiguity where one does not otherwise exist." *In re Certified Question (Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v Continental Biomass Industries, Inc)*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003).

In the present case, the undisputed evidence at trial established that the township, through its planning commission and board of trustees, worked for over two years on a total revision of its existing zoning ordinance, conducting numerous workshops and holding necessary public hearings. On June 29, 2000, the planning commission approved for recommendation to the township board a totally revised zoning ordinance, which incorporated 27 sectional maps of the township displaying the proposed zoning of lands over which the townships zoning authority extended. According to the minutes of the township board meeting of October 31, 2000, as well as the testimony several witnesses, the township board unanimously approved the new revised zoning ordinance. The new ordinance unambiguously incorporates the 27 sectional zoning maps that were unequivocally identified at trial as defendant's exhibit 15, and also unambiguously repeals the township's prior zoning ordinance and its incorporated zoning maps. New Buffalo Township Zoning Ordinance, October 2000, § 2.2(A); § 18.6. The trial court recognized that this evidence established that the township's new zoning ordinance, through its zoning map, classified plaintiffs' entire parcel commercial. Nevertheless, the court in its written opinion and order concluded "as a matter of fact, that the rear portion of Plaintiff's property was never knowingly and purposefully rezoned from industrial to commercial." The trial court's determination, whether it is a finding of fact or a conclusion law, is clearly erroneous.

The trial court did not elaborate on how it arrived at its conclusion, but the record suggests it was based on the fact that none of the participants in the rezoning process who testified at trial could specifically recall any details regarding the rezoning of plaintiffs' property. The trial court also focused on the lack of any written record documenting discussion of the proposed change in zoning for plaintiffs' property during the review process, other than the sectional zoning map the planning commission approved and the township board adopted. But, the new zoning map, which the new ordinance incorporated, unambiguously depicted plaintiffs' property as rezoned commercial. The township board minutes and the undisputed testimony of numerous witnesses established the township board unanimously adopted the new ordinance and its incorporated zoning map. Imposing a scienter requirement on the members of the township board as a requisite to the validity of all or part of its corporate legislative acts is contrary to

Michigan law. "[T]he motivation of legislators who actually approve or reject zoning proposals is irrelevant to a determination of the validity of those actions." *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525, 528; 656 NW2d 212 (2002). A local government "board speaks only through its official minutes and resolutions and their import may not be altered or supplemented by parol evidence regarding the intention of the individual members." *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 161; 702 NW2d 588 (2005), rev'd on other grounds 476 Mich 131 (2006). Justice Campbell explained in *Stevenson v Bay City*, 26 Mich 44, 46-47 (1872):

> When the law requires municipal bodies to keep records of their official action in the legislative business conducted at their meetings, the whole policy of the law would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting memories. No authority was found, and we think none ought to be, which would permit official records to be received as either partial or uncertain memorials. That which is not established by the written records, fairly construed, cannot be shown to vary them. They are intended to serve as perpetual evidence, and no unwritten proofs can have this permanence.

The trial court's apparent reliance on the lack of documentation in the legislative history was also erroneous. As noted above, resort to legislative history for the purpose of construing a statute is proper only where legislation is ambiguous, *In re Certified Question*, *supra* at 115 n 5. That is not the case here. Legislative history or lack of legislative history may not be used to create an ambiguity where none exists. *Id*. When the "'plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted.'" *Green Oak Twp, supra* at 240, quoting *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 277; 621 NW2d 233 (2000).

The only legal authority on which the trial court relied to support its ruling was *Prestige Community Developments v Sumpter Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 1997 (Docket Nos. 193390; 193772). But that case does not support the trial court's ruling. In *Prestige*, the plaintiff sought rezoning for its property to permit a mobile home park, which a citizen group opposed. The defendant township board approved the rezoning, but the citizen group led a successful referendum that returned the property to its former classification. Litigation ensued. The plaintiff discovered that two months before the defendant township approving the change in zoning, the township's zoning map had been altered in anticipation of the board's approval. The trial court agreed with the plaintiff that the referendum did not affect the earlier change in the zoning map, so it entered an order declaring the plaintiff's property was zoned in accordance with the map change. *Id*. at 2. Much of this Court's opinion addressed the issue of the citizen group's intervention in the litigation. *Id*. at 2-4. As to the trial court's ruling regarding the map change, this Court ruled the change to the zoning map relating to the plaintiff's property was unauthorized by the township board, did not comply with the zoning procedures, and was therefore insufficient to rezone the plaintiff's property. *Id*. at 5-6.

In contrast to *Prestige*, the trial court here ruled that the township had followed proper procedures before it adopted by unanimous vote its revised zoning ordinance that incorporated new zoning maps, including one changing the zoning of the back portion of plaintiff's property

from industrial to commercial. Nothing in this Court's decision in *Prestige* provides a basis for invalidating the clear and unambiguous provisions of the township's zoning ordinance and its incorporated zoning maps.

Finally, although we have determined that the trial court cleared erred as a matter of fact and law by invalidating the rezoning of plaintiffs' property, we also note that the trial court's order requiring the township to adopt an ordinance rezoning plaintiffs' property exceeded its authority under the separation of powers doctrine. *Schwartz v City of Flint*, 426 Mich 295, 307-308; 395 NW2d 678 (1986). While reaffirming the traditional role of the judiciary in reviewing the constitutionality of zoning ordinances in general, and when necessary, granting appropriate relief, the *Schwartz* Court also approved the statement of Justice T. G. Kavanagh dissenting in *Daraban v Redford Twp*, 383 Mich 497, 503; 176 NW2d 598 (1970): "'Zoning is a legislative function that cannot constitutionally be performed by a court, either directly or indirectly -- in law or in equity.'" *Schwartz*, *supra* at 307. So, even if the trial court had properly determined that the township had unlawfully zoned plaintiffs' property, "the trial court went too far when it ordered defendant to change the zoning classification of plaintiffs' property." *English v Augusta Twp*, 204 Mich App 33, 40; 514 NW2d 172 (1994).

IV. Conclusion

The trial court correctly ruled that plaintiffs failed to create a genuine issue of a material fact that defendant's zoning ordinance or the application of the building code amounted to a regulatory taking of plaintiffs' property. Accordingly, the trial court correctly granted defendant summary disposition regarding plaintiffs' constitutional claims. We affirm that ruling.

The trial court, however, clearly erred as a matter of fact and law in concluding that defendant did not rezone plaintiffs' property from industrial to commercial. We reverse, vacate entirely the trial court's opinion and order dated February 12, 2007, and its declaratory judgment dated June 11, 2007, and remand for entry of an order consistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder