

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BEDFORD PARTNERS, LLC,

Plaintiff-Appellee/Crossappellant,

v

BEDFORD TOWNSHIP,

Defendant-Appellant/Crossappellee.

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UNPUBLISHED  
September 8, 2009

No. 278208  
Monroe Circuit Court  
LC No. 05-020841-CH

Before: Servitto, P.J. and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant, Bedford Township, appeals as of right from the trial court's judgment in favor of plaintiff Bedford Partners, LLC. Plaintiff cross-appeals from the trial court's dismissal of its taking claim. We affirm.

Plaintiff's cause of action arises from its purchase of farmland. Plaintiff purchased the property with the intention of constructing a residential development. However, to build the project in accordance with plaintiff's planned density, it was necessary for defendant to agree to rezone the property. Defendant denied the rezoning request, and plaintiff filed suit alleging a violation of substantive due process and a taking claim. Following a bench trial, the trial court concluded that a substantive due process violation occurred, but the taking claim was dismissed.

**I. Defendant's Claim of Appeal**

A trial court's ruling on a constitutional challenge to zoning is reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004). The trial court's factual findings in a bench trial are reviewed under the clearly erroneous standard. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2004). Great deference should be given to the trial court's findings in a zoning case. *Norman Corp v City of East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004).

Three rules are applied when reviewing a challenge to an ordinance on substantive due process grounds:

- (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical

ipse dixit; and that there is no room for a legitimate different of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Yankee Springs, supra.*]

Thus, in order to establish that a zoning ordinance violates substantive due process protections, a party must demonstrate (1) a reasonable governmental interest that is advanced by the zoning classification, or (2) that the ordinance is unreasonable because it contains, arbitrary, capricious, and unfounded exclusions of legitimate land use. *Id.* at 609.

A review of the trial court's factual findings reveals that it considered all of the testimony and the composition of the area in question. The trial court addressed that the parcel at issue bordered a residential development. With regard to infrastructure, it was held that there would be additional costs for schools and students; state money for an increase in the student body would follow. Additionally, with regard to sewers, water, police service, and fire service, it was noted that the services were not free of charge. Rather, residents were charged for sewer and water use, and millages would generate the extra revenue to offset any problems with the police and fire service. The trial court further discounted defendant's proofs regarding the increase of traffic. Rather, the trial court held that not all traffic would be directed onto Erie Road and noted that plaintiff agreed to make contributions for a road upgrade.

The trial court also acknowledged the master plan. However, it was noted that the development of the residential area known as Village Meadows changed the composition of the master plan. The trial court held, in relevant part:

Defendant refers to the master plan as one of the main concerns for denial, not the only concern, but one of the main concerns, and Defendants argue that to grant this request means that they can never go against the master plan without being subjected to a new rezoning request, and that's in reference to Village Meadows being ... a big issue here and having impact on the Plaintiff's property. Now I disagree with the Defendants [sic] because this is a unique situation partially brought on by the rezoning of Village Meadows, and even other parcels in this section, and I'm referring to other agricultural parcels in this section, do not have the same status as the Defendant's property, and while the Defendants [sic] had a good reason to rezone Village Meadows, and I'm not being critical of that, it's clear that the master plan is just a guide, but they still have to consider the ramifications on any other property by ... going against the master plan, as they did with Village Meadows.

After addressing the appropriate standard of review, the presumption of constitutionality, and the burden of proof, the trial court ruled in favor of plaintiff, stating in relevant part:

[T]he Court has to determine whether this is arbitrary, capricious and an unfounded exclusion of other types of legitimate land use from the area in question, and I find that it is. I find that there is not room for a legitimate difference ... of opinion. Just looking at the map, without considering anything else, would make one wonder how could they not rezone this property? But that isn't the only reason of course for this ruling. For all these reasons, ... I'm ruling

for the Plaintiff in this matter, and find that the proposed ... rezoning with the conditions that are being indicated by the Plaintiff should be allowed[.]

Therefore, although defendant identified a reasonable governmental interest advanced by the zoning classification, the trial court found that the ordinance contained arbitrary, capricious, and unfounded exclusions of legitimate land use. *Yankee Springs, supra* at 609.

We note that defendant cites to the master plan, the deference afforded a local ordinance and the community's wishes, the rejection of the rezoning to a prior developer, and the repeated rejection of the rezoning at the local and county level. However, this case was not decided at the summary disposition stage. Rather, the trial court rendered its decision following a bench trial when it was in the best position to resolve conflicts in the evidence and determine issues of credibility. See *Norman Corp, supra*. Consequently, the trial court's factual findings are reviewed for clear error, *Harbor Park Market, supra*, and we defer to the trial court's factual findings, *Norman Corp, supra*. In light of the trial court's factual findings, we cannot conclude that the trial court's conclusion that the zoning violated plaintiff's substantive due process rights was erroneous.<sup>1</sup>

## II. Plaintiff's Cross-Appeal

On cross-appeal, plaintiff alleges that the trial court clearly erred in dismissing the taking claim. We disagree.

Although this motion was characterized as a directed verdict request, when an action is tried before the bench, it should be labeled an involuntary dismissal motion. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 235-236 n 2; 615 NW2d 241 (2000). MCR 2.504(B)(2) provides:

In an action tried without a jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make factual findings as provided in MCR 2.517.

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<sup>1</sup> We note that plaintiff admitted that the case presented a challenge to the zoning ordinance "as applied" not a facial challenge. A challenge to the validity of a zoning ordinance as applied is subject to the rule of finality, and therefore, a party must seek some other form of relief, such as a variance, to final conclusion before mounting a court challenge. See *Paragon Properties Co v Novi*, 452 Mich 568, 577; 550 NW2d 772 (1996); *Conlin v Scio Twp*, 262 Mich App 379, 382-384; 686 NW2d 16 (2004). The parties did not address whether other avenues were pursued before filing suit.

Following a bench trial, the trial court's factual findings are reviewed under the clearly erroneous standard, MCR 2.613(C). *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 329-330.

Property need not be zoned for its most lucrative use. *Equitable Building Co v Royal Oak*, 67 Mich App 223, 227; 240 NW2d 489 (1976). "A zoning ordinance is not unconstitutional merely because the land would be worth more if rezoned." *Albert v Kalamazoo Twp*, 37 Mich App 215, 217; 194 NW2d 425 (1971). A constitutional challenge fails when the plaintiff is not prevented from making reasonable use of their property or when the property is not rendered worthless. *Id.* To successfully challenge a zoning ordinance, the ordinance is presumed to be valid, and it is the burden of the party attacking it to affirmatively prove that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property. *Kropf v Sterling Heights*, 391 Mich 139, 162; 215 NW2d 179 (1974). Each zoning case is evaluated on its own facts and circumstances. *Selective Group, Inc v Farmington Hills*, 180 Mich App 595, 600; 447 NW2d 817 (1989). This Court does not review questions of fact other than to determine the presence of evidence that supports the verdict. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 137; 680 NW2d 485 (2004). A verdict will not be disturbed when it is within the fair range of the testimony. *Id.* at 137-138. The trier of fact is entitled to believe all, part, or none of the testimony from a witness. See *Brown v Pointer*, 41 Mich App 539, 552; 200 NW2d 756 (1972), rev'd on other grounds 390 Mich 346; 212 NW2d 201 (1973).

Property may be regulated to some extent, but when the regulation goes too far, it constitutes a taking. *Lingle v Chevron USA, Inc*, 544 US 528, 537; 125 S Ct 2074; 161 L Ed 2d 876 (2005). Regulatory action will be deemed per se taking where (1) the owner suffers permanent physical invasion of the property as a result of government requirements or (2) where regulations completely deprive an owner of all economically beneficial use of the property. *Id.* at 538. To determine whether compensation is required for land use regulation that negatively impacts a private citizen's property rights, one must determine:

[1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is [3] the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [*Penn Central Transportation Co v New York*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978) (citations omitted).]

In Michigan, the following factors are utilized to determine whether a regulatory taking claim is compensable:

- (1) what is the average reciprocity of advantage, in other words, is the aggrieved property owner singled out to pay for the public good, or is the land-use regulation so universal and ubiquitous that the benefits and burdens of the land-use regulation fall relatively equally among all, including the complaining party;
- (2) what use could the landowner reasonably expect to make of the land given the

state of the land-use regulations at the time of acquisition (as part of this inquiry, it is necessary to take into account whether the landowner knew, or should have known of the land-use regulation at the time of purchase); and (3) did the specific, challenged application of the land-use regulation leave the property owner valuable land use rights or did it instead render the land virtually worthless?

Stated another way, if the land-use regulation, like traditional zoning and wetland regulations: (1) is comprehensive and universal so that the private property owner is relatively equally benefited and burdened by the challenged regulation as other similarly situated property owners, and (2) if the owner purchased with knowledge of the regulatory scheme so that it is fair to conclude that the cost to the owner factored in the effect of the regulations on the return on investment, and (3) if, despite the regulation, the owner can make valuable use of his or her land, then compensation is not required under *Penn Central*. [*K & K Construction, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 528-529; 705 NW2d 365 (2005).]

In the present case, plaintiff alleges that the trial court clearly erred by holding: (a) that plaintiff did not have distinct investment backed expectations because it bought the property with notice of the restrictions; (b) that the land was adaptable because it was physically possible to farm; (c) that the aggregation of the property with an adjacent parcel was appropriate to determine if a taking occurred; and (d) that the property was valuable and marketable as zoned. We disagree.

As previously stated, factual findings are reviewed for clear error, and we do not resolve factual issues anew, but rather determine if there is evidence to support the verdict. Although plaintiff asserted that the land was not adaptable to farming, crops were planted at that time and would continue to be planted for five years after the property's sale. While the soil type may have been described as "poor," specific crops were planted in certain locations to account for any deficiency. Albring did not testify regarding whether the soil condition could be cured by fertilizer or some other process. Although he testified that farming was incompatible with the nearby residential use because of trespass, theft, and destruction of property, on cross-examination, Albring acknowledged only five to six incidents with some pre-dating the residential construction. Despite the fact that the agricultural land was valued at approximately \$3,000 per acre, plaintiff paid \$18,000 per acre at a time when the property was not marketed for sale. Thus, the contention that the trial court clearly erred in its determination regarding the viability of maintaining the land for farming is without merit.

We also reject plaintiff's contention that it was inappropriate for the trial court to aggregate the sixty-acre parcel at issue with an eighty-acre parcel. When analyzing a taking claim, the court must determine what constitutes the "denominator parcel" because it impacts the determination regarding economically viable uses that remain for a person's property after regulation is imposed. *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 578; 575 NW2d 531 (1998). Property should not be viewed without regard to the affected parcel, but rather the impact of the regulation on the entire parcel, the "nonsegmentation" principle. *Id.* at 578-579. The size of the denominator parcel is inherently a factual issue. *Id.* at 580. The identification of the denominator parcel should involve examining the parcel as realistically and fairly as possible in light of the entire factual and regulatory environment. *Id.*

Factors to consider include the degree of contiguity, the acquisition dates, the treatment of the parcel as a single unit, and the enhancement of value on remaining land among other considerations. *Id.*

Even though plaintiff submitted a separate proposal for the other parcel, the testimony at trial revealed that it was plaintiff's intention to develop the entire tract. Because the identification of the denominator parcel is inherently a factual issue and there was record evidence to support the trial court's conclusion, clear error was not established.

Finally, plaintiff contends that the trial court clearly erred in considering the investment-backed expectation because of the purchase with notice of the restrictions and the determination that the property nonetheless had value. We disagree. In Michigan, the determination of whether negative land use regulation results in compensation requires consideration of: (1) equal benefits and burdens on similarly situated property owners; (2) a purchase with knowledge of the regulation such that it is fair to conclude that it was factored into the return on the investment; and (3) valuable use of the land irrespective of the regulation. *K & K Construction, Inc v Dep't of Environmental Quality, supra* at 529. Plaintiff asserted that the property held a negative value unless rezoned. However, the opinion evidence was belied by actual events that transpired. It was established that plaintiff was comprised of experienced businessmen who participated in rezoning decisions and were aware of the risks of purchasing the property without receiving the rezoning requested. Indeed, a prior request to rezone by another entity was denied. Moreover, the zoning of the parcel did not preclude construction, but altered the density. In light of the proofs presented at trial, we cannot conclude that the trial court's dismissal of the claim was clearly erroneous in light of the factual findings that were supported by the evidence presented at trial.

Affirmed.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood