STATE OF MICHIGAN

COURT OF APPEALS

UNITED INVESTMENTS, INC, successor in interest to BROOMFIELD BLUFFS, LLC, Plaintiff-Appellant,	UNPUBLISHED October 21, 2010
v	No. 292279 Isabella Circuit Court
CITY OF MOUNT PLEASANT, Defendant-Appellee.	LC No. 06-005346-CK

Before: BANDSTRA, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's May 8, 2009 opinion and order, entered after a five-day bench trial, that plaintiff had no cause of action for either breach of contract or constitutional violations arising out plaintiff's effort to modify a May 25, 2000 Planned Residential Development (PRD) agreement that defendant entered into with plaintiff's predecessor in interest. In 2005, plaintiff requested the agreement, which permitted construction of M-1 apartments (no more than 2 unrelated persons per dwelling), be amended to allow instead for construction of M-2 apartments (more than 2 unrelated persons per dwelling). Plaintiff sought the modification because changes in the state building code made constructing M-1 buildings much more expensive and because of "significant modifications" in the market. Because we find no clear error in the trial court's findings of fact or in its legal conclusions that plaintiff failed to prove any of its claims at trial, and therefore had no cause of action against defendant, we affirm.

I. FACTUAL BACKGROUND

The trial court's findings of fact provide background for the issues on appeal:

> This case concerns a parcel of property located on the comer of Crawfield and Broomfield roads in the City of Mt. Pleasant, Michigan. This is the last large undeveloped parcel of land in the City. On May 25, 2000, a Planned Residential Development Agreement (PRD Agreement) was entered into between the City and Crawfield LLC. At the time, Crawfield LLC owned the entire parcel of property. Section 154.052 of the City Zoning Code governs the Planned Residential Development Districts. Paragraph 1 of the PRD Agreement states that:

> "The DEVELOPER is hereby granted approval to develop the Property as set forth in the PRD Plans and pursuant to the requirements of Sections 154.052 and 154.170 of the Code, subject to the remaining conditions set forth in this Agreement."

The parcel was also split into three separate pods and an area designated as open space. Specific plans were not set forth for each pod, but density and occupancy counts were assigned. Pod 1 was given a density count of 1,096 residents in 548 M-1 units. Pod 2 was assigned a density of 56 residents in 28 units. Pod 3 was assigned 950 occupants in 475 units. Development was not permitted on the area designated as open space.

In August of 2000, Plaintiff acquired Pod 1 and the open space area, approximately 97.6 acres. A site plan was approved for Pod 1 on April 10, 2003. Plaintiff obtained a permit to develop West Point Village on April 28, 2003. West Point Village was a residential development consisting of 548 M-1 units. In October of 2003, Plaintiff acquired an additional 5 acres making the combined acreage for Pod 1 and the open space area 102.6 acres. Plaintiff constructed 124 M-1units on Pod 1. A change in market conditions caused Plaintiff to stop construction on the remaining 424 units. The State changed the building code for M-1 units requiring developers to install fire suppression systems in all buildings and monitor the systems. Developers were also required to install an additional, separate water line to each building. An additional stairway and exit was required on the opposite side of the building. Mr. McGuirk[1] testified that these additional requirements made it more expensive to construct an M-1unit than an M-2.

On April 21, 2005, Plaintiff first approached Defendant with a proposal to add 164 M-2 units rather than constructing the remaining 424 M-1units. The M-2 units are typically used for student housing because it allows for more than two unrelated individuals to board together. Mr. McGuirk feels that M-2 units are more desirable in this location. Plaintiff first appeared in front of the Planning Commission on June 2, 2005. He was told to analyze the density and style of the units and create a parallel plan. An open space community overlay project is the only type of plan that would accommodate M-2 units.

On September 14, 2005, Plaintiff provided calculations to the City Attorney based on its interpretation of Section 154.052A of the City Zoning Code. This particular section applies to open space community overlay projects. A formula is set forth to determine how many units can be constructed in an open space community. Section 154.052A(D)(3)(c) states:

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[1] Rick McGuirk is plaintiff's principal officer and owner.

> "The total occupancy for an M-2 component shall not exceed 85% of two occupants multiplied by the number of dwelling units permitted. The M-2 node shall not exceed 25% of the total open space community."

There is no dispute over the interpretation of the 85% requirement. There is a dispute over the interpretation of the 25% requirement. Plaintiff interprets the 25% requirement to mean that the M-2 node shall not exceed 25% of the total land area of the total open space community. Defendant interprets the 25% to mean that the M-2 node shall not exceed 25% of the total dwelling units of the open space community.

Eric Williams, the City Attorney, drafted a legal opinion on January 25, 2006, addressing the various legal issues arising out of the PRD Agreement and request to modify Pod 1. Mr. Williams pointed out the need for Plaintiff to receive consent from all interested parties before the PRD Agreement could be modified. Mr. Williams also addressed the interpretation of the 25% density requirement. He stated that arguments can be made for both interpretations and that another phrase must be inserted for clarification. Mr. Williams stated that absent a strong basis for rejecting Mr. Kulick's, the Director of Planning and Community Development for the City of Mt. Pleasant, interpretation, the Planning Commission should follow and apply it. It was recommended that the ordinance be amended for the purposes of clarification as soon as possible. Mr. Williams concluded by stating that there is no definitive provision in the ordinance making either calculation correct or incorrect and that the Planning Commission will have to make its own determination based on the different calculations, the zoning ordinance, and the proposed amended PRD plans. Mr. Williams did not state that Plaintiff's interpretation was correct. He indicated that the ordinance was vague and needed to be amended.

On June 1, 2006, the Planning Commission held a public hearing and recommended an amendment to Section 154.052A of the City Zoning Code pertaining to the density requirement for an open space community overlay project. On June 22, 2006, Plaintiff requested that Defendant wait to amend the ordinance until after a decision was made on their parallel plan. On June 26, 2006, the City Commission held a public hearing on the proposed text changes. The language was ultimately approved on July 10, 2006. The language change is referred to as Ordinance 920. Ordinance 920 states: "[i]n an open space community of 30 or more acres, up to 25% of the total land area of the open space community can be developed as multiple family units or multiple non-family units." Ordinance 920 further stated that no more than 25% of the total dwelling units of the open space community could be developed as multiple family or multiple non-family type dwelling units. Defendant's interpretation was codified. Ordinance 920 became effective on November 1, 2006.

Before the effective date of Ordinance 920, plaintiff initiated this action asserting claims for (1) breach of contract, (2) declaratory or injunctive relief, (3) violation of substantive due process, (4) violation of equal protection, (5) inverse condemnation, and (6) a writ of mandamus.

The case was initially removed to federal court but remanded to state court on the basis of the party's agreement and plaintiff's filing an amended complaint asserting its constitutional claims were based only on Michigan's Constitution.

Contemporaneous with plaintiff's initiation of this litigation, defendant sought to accommodate plaintiff's desired modified development plans by amending its zoning ordinance to permit conditional zoning. The trial court describes this effort:

> In June of 2006, Plaintiff submitted a request for the Planning Commission to consider conditional zoning. On September 2, 2006, the Planning Commission considered a text amendment allowing for conditional zoning. On October 5, 2006, the Planning Commission held a public hearing to consider an amendment to allow conditional zoning. On October 23, 2006, all pod owners joined in the request for conditional zoning. Conditional zoning would allow the development of Broomfield Hills encompassing the entire 157 acre parcel of property. After various meetings, on May 14, 2007, the City Commission voted and accepted the Conditional Zoning Agreement. Ordinance 928 was also approved by City Commission allowing for conditional zoning of the 157 acre parcel and amending the zoning map.
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> The Conditional Zoning Agreement gave Plaintiff the ability to construct M-2 units in addition to the already present M-1units. 1,602 occupants would have resided in the M-2 units. The area designated as open space, 66.20 acres, could have been developed under an R-1 classification. Plaintiff would have constructed 26 duplexes and 72 single-family units on the open space area. A referendum vote was held and the Conditional Zoning Agreement was rejected by City voters on November 11, 2007.

As noted already, the trial court rejected all of plaintiff's claims. Plaintiff now appeals only the court's ruling regarding its breach of contract claim, and the trial court's rulings regarding plaintiff's constitutional substantive due process and takings claims. Plaintiff's theory regarding its contract claim is that the PRD agreement incorporated § 154.052A of the zoning ordinance governing open space community overlay projects—and that § 154.052A as written before Ordinance 920 permitted plaintiff's proposed modified development plan that includes M-2 dwelling units. It is undisputed that the plans originally approved by the PRD agreement did not include an open space community overlay or M-2 units. Plaintiff asserts defendant breached the PRD agreement by violating its implied covenant of good faith and fair dealing when it adopted Ordinance 920 so as to preclude plaintiff's proposed amendment to permit development of the number of M-2 units it desired in its proposed open space community overlay project.

The trial court found that both parties acknowledged that the PRD agreement was valid and that they each believed they were merely enforcing its terms. With respect to the M-2 density requirements of the zoning ordinance, the main impediment to approval of plaintiff's proposed amended PRD agreement, the trial court ruled in favor of defendant's interpretation:

> The court finds, as Mr. Williams stated, that the density requirement as written before Ordinance 920 is ambiguous. The court's goal now is to determine

> the drafters' intent when the ordinance was created. Mr. Kulick was the Director of Planning and Community Development for the City of Mt. Pleasant at the time that the dispute arose and was present when Ordinance 830 which created open space community overlay projects, was developed. Mr. Kulick testified that he and the Planning Commission had always interpreted the 25% requirement to mean 25% of dwelling units. The court finds Mr. Kulick's testimony to be credible and demonstrative of the legislative intent when the 25% requirement was created. Mr. Kulick had been active with the Planning Commission when Ordinance 830 was enacted creating open space community overlay projects. Mr. Kulick was aware of what the intent behind the amendment was from the beginning and always applied it in the same way. Plaintiff failed to demonstrate by a preponderance of the evidence that it met the density requirements set forth in Section 154.052A of the City Zoning Code. Plaintiff was not entitled to approval of an open space community until the Planning Commission approved the parallel plan with a valid number of dwelling units. Mr. Williams provided Plaintiff with a copy of his legal opinion and Plaintiff was aware of the Planning Commissions requirements for density. A revised parallel plan could have been submitted. [2]

The trial court went on to rule that the PRD agreement required plaintiff to obtain the consent of all owners in interest of property included within the original PRD agreement. In sum, the trial court ruled that plaintiff had not proved defendant breached the PRD agreement:

> The court finds that Plaintiff did not meet all of the requirements set forth in the PRD Agreement that would allow them to develop an open space community. The density requirements were not met by the terms of Plaintiffs parallel plan and Plaintiff failed to obtain approval from all of the owners in interest. Plaintiff did not have a vested right in the construction of the open space community. Defendant did not breach the terms of the PRD Agreement by not approving the parallel plan and enacting Ordinance 920. Ordinance 920 was enacted upon suggestion of the City Attorney to clarify the legislative intent behind the ordinance governing the development of open space community overlay projects. Ordinance 920 was not passed to unilaterally attack Plaintiff and deny them a more lucrative use of Pod 1. Plaintiff still has the opportunity to develop M-l units on Pod 1 according to the terms of the original approved PRD Plan. Plaintiff does not have a cause of action against Defendant for breach of contract based on the PRD Agreement because Plaintiff failed to show that a contract existed containing terms that granted the right to develop an open space community.

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[2] Ordinance 830 added § 154.052A effective January 19, 2000, apparently to accommodate plaintiff's predecessor desire to construct M-2 units. But the developer decided to include only M-1 units in the plans approved by the original May 25, 2000 PRD agreement.

II. STANDARD OF REVIEW

This Court recently stated the proper standard of review in another zoning case addressing a breach of contract claim involving a zoning planned unit development agreement. In *Chelsea Investment Group LLC v City of Chelsea*, ___ Mich App ___; ___ NW2d ___ (April 27, 2010, Docket No. 288920), this Court stated:

> . . . We review a trial court's finding of fact in a bench trial for clear error and its conclusions of law de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). The trial court's findings are given great deference, as it is in a better position to examine the facts. *Id.* Further, to the extent that this matter requires us to interpret the meaning of the PUD Agreement, our review is also de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). [*Chelsea Investment Group*, slip op at 6.]

This Court reviews de novo the interpretation and application of a statute, as well as constitutional issues. *Hess v Cannon Twp*, 265 Mich App 582, 589; 696 NW2d 742 (2005).

III. PLAINTIFF'S CONTRACT CLAIM

Granting the deference we must to the trial court's findings of fact, we can find no clear error. We also find no fault with the trial court's interpretation of defendant's zoning ordinance, or its application of constitutional principles to the facts of this case. Moreover, we find plaintiff's breach of contract theory problematic under Michigan law.

Nothing defendant did precluded plaintiff from developing the property at issue in accordance with the original PRD agreement. While the agreement contemplated that the developer might seek an amendment of the agreement in the future, it also provides that a request to make substantial changes in the agreement would return the parties to their positions before adopting agreement. The amended agreement would need approval as if was a new agreement. Paragraph 13 of the PRD agreement provides:

> If the DEVELOPER requests that the CITY modify the PRD Plans, the Additional Requirements or this Agreement, such request shall terminate approval of the PRD Plans until such changes or amendments have been reviewed and approved as in the first instance. In instances where modifications are necessary to the PRD Plans, the Building Official may request that the PRD Plans be again submitted for review if, in his or her judgment, a substantial change is being made in the PRD Plans.

Similarly, § 154.170(K) of defendant's zoning ordinance, which governs planned residential development agreements, provides:

> Any changes or amendments requested shall terminate approval of the overall plan until such changes or amendments have been reviewed and approved

> as in the first instance. In instances where modifications are necessary to the plan, the Building Official may bequest [sic] that the plan be again submitted for review if, in his/her judgment, a substantial change is being made in the plan.

It cannot be seriously argued that plaintiff's proposal to shift from building M-1 units to building M-2 units as part of an open space community overlay project was not a substantial change in the approved PRD plans. Consequently, plaintiff's request to amend the PRD agreement returned the parties to the negotiation stage of forming a new contract, and mutual assent would be required to form a new contract. The contract and ordinance provisions quoted above are consistent with general contract law.

"It is axiomatic that parties to a contract may contract to modify the contract by a later agreement." *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 11; 708 NW2d 78 (2005). "[M]utuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). When the parties mutually agree on a modified contract, it becomes the parties' new contract replacing the previous one. *Id*. at 372-373. Here, whether the parties could agree on a new contract was not controlled by the PRD agreement but by plaintiff's compliance or not with defendant's zoning ordinance, and in particular, the M-2 density requirements of § 154.052A. Indeed, plaintiff concedes no part of the PRD agreement controlled the interpretation of § 154.052A. "[T]he meaning and clarity of the density provisions are issues which must be evaluated through scrutiny of the allegedly ambiguous language of the Ordinance in question. The PRD Agreement incorporates § 154.052A as part of the contract, but sheds no light upon the meaning of its terms."[3]

In essence, defendant was enforcing its own ordinance in accordance with its understanding of the intent expressed in § 154.052A. When the pertinent density provisions in § 154.052A were discovered to be ambiguous, defendant adopted an ordinance to clarify the intent consistent with defendant's preexisting understanding. Nothing in the PRD agreement controlled the meaning defendant's ordinance, so clarifying ambiguous terms in the ordinance could not possibly breach the agreement. Further, what the parties were doing was not enforcing or performing the PRD agreement, they were negotiating a new contract.

Finally, plaintiff cannot create a breach of contract action out of an implied covenant of good faith and fair dealing. "*Every* contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Flynn v Korneffel*, 451 Mich 186, 213 n 8; 547 NW2d 249 (1996) (Levin, J., *dissenting*), quoting 2 Restatement Contracts, 2d, § 205, p 99 (emphasis in *Flynn*). But see Comment c of § 205, which states that section "does not deal with good faith in the formation of a contract." Here, by seeking modification of the PRD agreement, plaintiff was negotiating with defendant to form a new contract that would permit construction of M-2 dwelling units. Moreover, "Michigan does not recognize a claim for breach of an implied

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[3] See page 5 of plaintiff's reply brief. Although, plaintiff contends the PRD agreement incorporated § 154.052A, that section is not mentioned at all in the agreement.

covenant of good faith and fair dealing . . . ." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003); see also *Fodale v Waste Mgt of Michigan*, Inc, 271 Mich App 11, 35; 718 NW2d 827 (2006), and *In re Leix Estate*, ___ Mich App ___; ___ NW2d___ (Docket No. 291406; August 26, 2010), slip op 10.

In sum, we find no clear error in the trial court's factual findings and agree with the court's legal conclusion that plaintiff failed to prove its breach of contract claim. In addition, we find little support under Michigan law for plaintiff's breach of contract theory on the facts of this case. Consequently, we affirm the judgment of no cause of action.

IV. PLAINTIFF'S CONSTITUTIONAL CLAIMS

A. SUBSTANTIVE DUE PROCESS

Plaintiff argues that the "hurried" enactment of Ordinance 920 denied it substantive due process guaranteed by Const 1963, art 1, 17. This constitutional provision guarantees more than procedural fairness but has a substantive component that protects individual liberty and property interests from the arbitrary exercise of governmental power. *Cummins v Robinson Twp*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009). The general test to determine if a law or its enforcement violates substantive due process is whether the law is rationally related to a legitimate governmental purpose. *Id*. at 701. We conclude that the trial court correctly ruled that plaintiff failed to prove its claim of a substantive due process violation.

Plaintiff cites *Yankee Springs Twp v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004), quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992), for the burden it must meet to prove its constitutional claim:

> "(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 not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge." [*Id*.]

This Court has explained the foundation for the presumption of constitutional validity of an ordinance "is our recognition that elected officials generally act in a constitutional manner when regulating within their particular sphere of government." *Truckor v Erie Twp*, 283 Mich App 154, 162; 771 NW2d 1 (2009). To overcome the presumption and establish that the ordinance violates substantive due process, plaintiff must show "'(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question.'" *Dorman v Clinton Twp*, 269 Mich App 638, 650-651; 714 NW2d 350 (2006), quoting *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998).

In this case, the trial court accepted testimony that Ordinance 920 addressed social problems that result from high density M-2 developments and other public health, safety, and welfare concerns such as fire safety and drainage, and concluded that the ordinance furthered

these reasonable government interests. Furthermore, the trial court found that defendant did not act arbitrarily by adopting Ordinance 920 because it was consistent with defendant's interpretation of § 154.052A before its amendment and was adopted on advice of counsel after the ambiguity came to light. Consequently, the trial court found that defendant did not violate plaintiff's right to substantive due process rights by enacting Ordinance 920.

On appeal, in support of its substantive due process claim, plaintiff only argues the merits of its proposed development. Specifically, that the proposed development was a "desirable, beneficial, and economically viable use of the property," that it preserved more open space than the prior approved plan, and that, in sum, defendant should have approved its proposed amended development plan. This argument simply does not overcome the presumption the ordinance is valid, nor does it establish any clear error regarding the trial court's factual findings that underlie the trial court's ruling that plaintiff failed to prove its substantive due process claim.

B. PLAINTIFF'S TAKINGS CLAIM

Plaintiff bases its takings claim on the false premise that it held a "vested right" to have its proposed amended development plan "considered in good faith." As discussed already, the common-law implied covenant of good faith and fair dealing did not extend to plaintiff's effort to renegotiate the PRD agreement. Furthermore, a vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Detroit v Walker*, 445 Mich 682, 699; 520 NW2d 135 (1994). In particular, a vested right "'is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.'" *Cusick v Feldpausch*, 259 Mich 349, 352; 243 NW 226 (1932), quoting 2 Cooley, Constitutional Limitations (8th ed), p 7492. Here, plaintiff held no more than a mere expectation it might satisfy defendant's zoning ordinance and other requirements to permit amending its development plans to allow constructing M-2 units as part of an open space community overlay project. "One who asserts an uncompensated taking claim must first establish that a vested property right is affected." *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 787-788; 527 NW2d 468 (1994); see also *Attorney General v Michigan Public Serv Comm*, 249 Mich App 424, 436; 642 NW2d 691 (2002).

Plaintiff's remaining argument is that development of M-1 units as approved by the PRD agreement is much more costly than development of M-2 units it proposed. We adopt the trial court's reasoned response to this argument and this issue:

> A municipality is not obligated to zone any parcel of property for its most profitable use. *Dorman v Clinton Twp*, 269 Mich App 638, 647-648; 714 NW2d 350 (2006). The only requirement is that the property to be zoned has some economically viable use. *Id.* Plaintiff can still develop its property with M-1 units. The land is not unsuitable or unmarketable. The 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). The court finds that Plaintiff did not have a vested right to

develop an open space community overlay project on Pod 1 and the open space area. Defendant did not engage in an uncompensated taking by enacting Ordinance 920.

V. CONCLUSION

For the reasons discussed in this opinion, we find no clear error in the trial court's findings of fact and agree with the trial court's legal conclusions that plaintiff failed to prove both its contract claim and its constitutional claims. We affirm. Defendant may tax costs under MCR 7.219 as the prevailing party.

/s/ Richard A. Bandstra
/s/ Jane E. Markey
/s/ William C. Whitbeck