STATE OF MICHIGAN

COURT OF APPEALS

ORCO INVESTMENTS, INC., Plaintiff-Appellant,	UNPUBLISHED June 26, 2012
v	No. 303744 Wayne Circuit Court
CITY OF ROMULUS, ROMULUS PLANNING COMMISSION, and ROMULUS CITY COUNCIL, Defendants-Appellees.	LC No. 09-018235-CK

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Orco investments, Inc., appeals as of right from an order granting summary disposition in favor of defendants, the City of Romulus, the Romulus Planning Commission, and the Romulus City Council,[1] in this regulatory taking claim. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE OVERLAY DISTRICT

This case arises from Orco's intent to develop 18 single-family condominiums on a vacant, 7.35-acre piece of property located on Superior Road in Romulus. In September of 2003, Orco submitted a preliminary site plan for its project to the planning commission. The property was zoned RI-B, for single family residences, so Orco's plans were proper under the applicable zoning ordinances. Orco did not yet own the property, but intended to buy it.

At a city council meeting on December 8, 2003, many individuals living near the property, including the mayor of Romulus, voiced their concern and dissatisfaction with Orco's development plan. These residents were worried that development would affect the rural character of the neighborhood. The city council then passed a six-month moratorium on issuing building permits for the area, which included the property that Orco planned to develop.

[1] In a prior order, summary disposition was granted as to the Planning Commission and the City Council, but they continue to be named parties.

At a planning commission meeting on December 15, 2003, the commission tabled approval of Orco's site plans and asked Orco to work with the city and make changes to address some of the concerns raised by citizens at the city council meeting. Orco met with the city's engineers and adapted its plans. The plan was brought up again at the planning commission's February 2004 meeting, when four members voted to approve Orco's preliminary site plan and four members voted to deny it (the ninth member of the commission was not present). This was interpreted as a denial of the plan.

On March 26, 2004, Orco filed an action in Wayne Circuit Court and asked the court to order the city to approve Orco's preliminary site plan.[2] The trial court ordered the city to include the issue on the Board of Zoning Appeals' (BZA) agenda. On July 7, 2004, the BZA reversed the decision of the planning commission and approved Orco's preliminary site plan. Orco finalized its purchase of the property on July 16, 2004. However, on June 15, 2004, before this approval and purchase, the city adopted the "Rural Characters Overlay District," which included the property that Orco sought to develop. The Overlay District increased the lot size requirement for the property, reduced the number of condominium units that Orco could develop, and required Orco to completely revise its development plans. Orco requested that the court relieve it from the requirements of the Overlay District. The court ordered Orco to appeal to the BZA for a use variance, but the BZA denied Orco's request.

Orco then moved for summary disposition under MCR 2.116(C)(10) and argued that the Overlay District should not apply to its site plan because the city acted in bad faith and with unreasonable delay when it initially denied Orco's preliminary site plan in February of 2004. At a motion hearing held on November 19, 2004, the circuit court agreed and granted Orco a writ of mandamus. The court concluded that Orco's preliminary site plan should have been approved originally, so the subsequently adopted Overlay District did not apply. The court then explained that the City attempted "to block this preliminary site plan with every possible obstacle," and that the "adoption of the Overlay District on June 15, 2004 was for the sole purpose of stopping Plaintiff's development and manufacturing a defense to this suit." Orco proceeded with development of the property, but alleged that the city continued to purposefully delay approval of various permits required and Orco's final site plan by creating problems with: 1) the storm water drainage system; 2) the Soil Erosion and Sedimentation Control (SESC) permit; and, 3) the long-term maintenance agreement for the storm water drainage system.

B. STORM WATER DRAINAGE SYSTEM

In October of 2003, the city's engineer expressed his concern to Orco that the storm water drainage ditch parallel to Superior Road could not accommodate the additional storm water drainage from Orco's proposed condominium development. The city engineer suggested that Orco use adjacent property belonging to the Romulus School District because it could better accommodate the development's storm water drainage. The school district's superintendent, Joel Carr, and the school district's facilities director, Donald Morris, initially agreed to grant

[2] See *Orco Investments, Inc v City of Romulus and City of Romulus Planning Comm*, Wayne Circuit Court Case No. 04-409170-CH.

Orco an easement for storm water drainage and the parties began negotiations. Randall C. Orley, the president of Orco, claims that in early 2005 he had a telephone conversation with Carr and Eric Garber, another Orco employee. During this conversation, Carr indicated that the mayor of Romulus and other city officials were pressuring Carr to deny the storm water drainage easement to Orco because areas of the city were "best kept separate by their existing racial makeup." These officials were concerned about African Americans moving into the planned condominium development. However, Carr testified that city officials never told him to deny Orco's easement. According to Carr, negotiations over the easement halted because of Orco's failure to respond.

Orley claimed that Orco's time negotiating with the school district and developing engineering plans to use the district's property for storm water drainage were thus rendered useless. Orco returned to its original plan to use the Superior Street ditch, which it had abandoned at the city's suggestion and request.

C. SESC PERMIT

Before beginning construction, a SESC permit was required. On May 23, 2005, the city voted to relinquish jurisdiction of SESC permits to the Wayne County Soil Erosion Department (WCSED). The city did so after the Michigan Department of Environmental Quality (MDEQ) told the city that it needed more staff and additional training to maintain its SESC program. The soil erosion program did not take in enough revenue to justify paying for these changes, so the city turned jurisdiction of the program over to the WCSED. The WCSED's jurisdiction over the city's SESC permits began on June 1, 2005. When the city relinquished jurisdiction of soil erosion permits, it also lost control of approving engineering plans for storm water drainage and management. Orley claims that the city did not inform Orco that it no longer had authority to award SESC permits or approve engineering plans for storm water drainage systems.

On November 16, 2005, while attending a meeting at the WCSED, Orco's engineer was informed that the city no longer had control over SESC permits and Orco thus had to apply for approval of its plan with the WCSED. Orco also had to apply to the Wayne County Department of Public Service (WCDPS) to find out if the WCDPS would have jurisdiction over all of the storm drainage issues related to Orco's development. This required the preparation of new engineering plans to be submitted to the city, the city's engineers, the WCSED, and the WCDPS. On May 11, 2006, Orco's plans were approved, as long as the city accepted jurisdiction and responsibility for long term maintenance of the storm water drainage system.

D. LONG TERM MAINTENANCE AGREEMENT FOR STORM WATER DRAINAGE SYSTEM

Orco then sent the city a proposed agreement, under which the city would assume jurisdiction and responsibility for the long term maintenance of the development's storm water drainage system, as required by the WCSED. The city responded on May 2, 2006, and said that Orco's proposed agreement lacked certain essential information, like a description of the project and who prepared the project's plans. The city also requested separate documents providing for

an access easement. In addition, it appears that the city told Orco it would not sign a maintenance agreement unless Orco agreed to dismiss the 2004 case.[3] Over the next several months, Orco and the city negotiated the terms of the agreement. In March of 2007, the parties executed a final agreement.

E. PROCEDURAL HISTORY

On August 30, 2006, Orco held a public auction for the property. The minimum bid price was $375,000. No one attended or bid at the auction. Orley claimed that if the city had approved its preliminary site plan in 2003, the property would have been developed and ready for sale in March of 2005. If the plan had been approved in 2003, Orco's soil erosion and storm water drainage plans would have been approved by the city before it relinquished jurisdiction. As a result, Orco would not have needed to develop new engineering plans to submit to the WCSED and the WCDPS, which pushed back development even further. Orley contended that "[w]hat should have been a nine month to one year project became a five and one-half year fiasco. . . ."

On July 24, 2009, Orco filed a complaint in a new suit against defendants. In Count I, Orco alleged that the planning commission's denial of its site plan violated Orco's equal protection and substantive due process rights under the Michigan Constitution. Orco claimed that defendants "purposefully and willfully rezoned Orco's Property by an 'Overlay District' in furtherance of its bad faith efforts to prevent development." In Count II, Orco contended that defendants' actions, including the denial of Orco's site plan and its attempt to rezone the property, resulted in an unlawful regulatory taking without just compensation under the Michigan Constitution, 1963 Art 10, § 2.

On March 1, 2010, defendants filed their first motion for summary disposition. Defendants alleged that all of Orco's claims are barred by a three-year statute of limitations. Defendants also argued that the claims against the planning commission and city council should be dismissed because those entities did not have a separate legal existence; they were part of the city itself.

On March 26, 2010, the trial court held a hearing on defendants' first motion for summary disposition and made an oral ruling granting the motion in part and denying it in part. The court concluded that Orco's equal protection and due process claims were time-barred if they rested on events that occurred before July 24, 2006. Based on the record, it appeared that the only remaining event was the city's alleged refusal to sign an agreement accepting jurisdiction over the long term maintenance of the storm water drain, which occurred sometime between July 19, 2006, and August 23, 2006. The court specifically rejected Orco's argument that these claims accrued on August 30, 2006, when no one bid on the property at auction. The trial court denied defendants' motion on Orco's regulatory taking claim because the statute of

[3] At this point the previous litigation had been dismissed for lack of progress pursuant to MCR 2.502, although it seems that the parties were not aware of this fact.

limitations is six years. The court stated that the planning commission and city council were not separate legal entities which could be held liable in tort, so they were entitled to summary disposition under MCR 2.116(C)(8). An order reflecting this oral decision was issued on June 7, 2010.

On February 11, 2011, defendants filed a second motion for summary disposition. First, defendants argued that the city's "temporary refusal to assume long term maintenance responsibilities of Plaintiff's storm water system" was the only alleged wrong giving rise to a timely substantive due process claim. This alleged wrong did not shock the conscience, and it did not deprive Orco of any property interest. Orco was not entitled to an agreement where the city assumed long term maintenance responsibility for the storm drainage system of its private development. Furthermore, the city did not refuse to enter into such an agreement. Although negotiating the agreement took time, the city ultimately agreed to assume responsibility of long term maintenance of the development's storm water drainage system.

Defendants also argued that Orco failed to establish a regulatory taking claim because the property did not lose all economic value. An appraiser hired by Orco valued the property at $70,000 and, although this was less than what Orco paid for the property, the decrease in value is comparable to the general decrease in property values associated with the recession. During the six months when the Overlay District was in effect, Orco could not have proceeded with development because of other issues, like storm water drainage. Orco also could not establish a takings claim based on the city's relinquishment of jurisdiction over SESC permits; this action affected SESC permit applicants uniformly and was the result of pressure from the MDEQ. Furthermore, Orco did not have reasonable investment-backed expectations because it knew about the Overlay District when it purchased the property.

At a hearing held on March 4, 2011, the trial court granted defendants' motion for summary disposition on the remaining claims and denied Orco's counter-motion for partial summary disposition. The court first addressed Orco's regulatory taking claim. The court concluded that defendants acted in bad faith by adopting a zoning ordinance that singled out Orco's property. However, the court reasoned that the economic effect of the ordinance on Orco's property was minimal. Even if the Overlay District was not in effect in 2004, Orco could not have continued development because it took Orco longer than that to address the development's storm water drainage issues. In addition, Orco had not yet purchased the property when the Overlay District was adopted, so any effect of the rezoning should have been accounted for in the purchase price. The court found significant the fact that Orco knew of the Overlay District when it purchased the property.

In addition, the trial court held that the other alleged actions by defendants did not constitute takings under the Fifth Amendment. Orco presented no evidence, other than inadmissible hearsay evidence, that the city council interfered with its negotiations with the school district for a storm drainage easement. Rather, Carr testified that council members and the mayor did not contact him regarding the easement. Regarding issuing SESC permits, the court concluded that the city did not act in bad faith; it rescinded jurisdiction because the MDEQ required additional staff and training, and compliance was not economically-efficient for the city. The court also concluded that the city's relinquishment of jurisdiction had no economic effect on the property and did not interfere with distinct investment-backed expectations. Orco knew it

needed a SESC permit. It had not yet applied for one with the city. There did not seem to be any delay in approval of Orco's application, and if there was, this delay was not the fault of the city. The delay in approving the long term maintenance agreement was due in large part to Orco's failure to include certain information or make discussed changes to the proposed agreement. Thus, any economic impact that resulted from the alleged delay is attributable to Orco. Finally, the court dismissed Orco's substantive due process and equal protection claims because those that were not barred by the statute of limitations were meritless for reasons already discussed.

Orco now appeals as of right.

II. ANALYSIS

A. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Cedroni Assoc v Tomblinson, Harburn Assoc*, 290 Mich App 577, 584; 802 NW2d 682 (2010). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) applies to the factual support for a party's cause of action. *Id*. When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmovant. *Id*. A motion for summary disposition should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

In reviewing a trial court's decision to grant summary disposition on the basis of statute of limitations under MCR 2.116(C)(7), we consider the pleadings and any other documentary evidence in the light most favorable to the nonmoving party. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). If there is a factual dispute, summary disposition is not appropriate. *Id*. If there is no factual dispute, whether a claim is barred by the statute of limitations is a question of law for the court. *Id*.

We review constitutional issues de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010).

We review a trial court's decision on a motion to reinstate an action for an abuse of discretion. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 138; 624 NW2d 197 (2000).

B. REGULATORY TAKING

Orco argues that the trial court erred in granting defendants summary disposition on its regulatory taking claim. We disagree.

Both the United States and Michigan Constitutions prohibit the taking of private property for public use without just compensation. See US Const, Am V; Const 1963, art 10, § 2. "[G]overnmental regulations that overburden a property may also constitute a compensable taking." *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010).

To determine if a compensable regulatory taking has occurred, three factors are considered: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Id.*, quoting *Penn Central Transp Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). For the first factor, the question is whether the government's action singles out the property owner or is actually a "comprehensive, broadly based regulatory scheme that burdens and benefits all citizens equally." *Chelsea*, 288 Mich App at 262, quoting *Cummins v Robinson Twp*, 283 Mich App 677, 720; 770 NW2d 421 (2009). To determine the economic effect of the regulation on the property, it is necessary to compare the value of the property that was removed by the government regulation with the value of the property that remains. *Chelsea*, 288 Mich App at 262. By itself, a "mere reduction in the value of regulated property" is not enough to demonstrate a compensable taking. *Id.*

The first factor to consider in a regulatory taking claim, the character of the government action, weighs in favor of Orco. The evidence shows that the city adopted the Overlay District in an attempt to prevent Orco from developing the property in question. Based on the zoning ordinances in place when Orco submitted its preliminary site plan, Orco was entitled to approval. However, many residents living near the property, including the mayor of Romulus, complained about the development. The city council then passed a moratorium on building permits and ultimately adopted the Overlay District, which reduced the number of lots that Orco could develop on the property. It appears that these actions were aimed solely at Orco and its plans to develop the property. In fact, in the previous litigation, the trial court ordered the city to approve Orco's preliminary site plan after determining that the city acted in bad faith and with unreasonable delay by attempting "to block this preliminary plan with every possible obstacle." The court concluded that the city singled Orco out and adopted the Overlay District "for the sole purpose of stopping Plaintiff's development and manufacturing a defense to this suit."

However, neither the second factor (the economic effect of the government regulation on the property) nor the third factor (interference with Orco's distinct investment-backed expectations) weigh in Orco's favor. Orco had not yet purchased the property when the Overlay District was adopted. The United States Supreme Court has concluded that the purchase of property with knowledge that it is burdened by a regulation does not automatically defeat a regulatory taking. See *Palazzolo v Rhode Island*, 533 US 606, 626-627; 121 S Ct 2448; 150 L Ed 2d 592 (2001). The Court in *Palazzolo* stated that the takings clause, "in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation." *Id.* at 627. However, in *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523; 705 NW2d 365 (2005), this Court also acknowledged that notice of such regulations should nevertheless be taken into account. As we explained, a purchaser's notice of the regulation helps shape the analysis of whether the purchaser's investment-backed expectations were reasonable. *Id* at 557. We examined the three *Penn Central* factors and stated:

> 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*. [*Id.* at 529.]

Orco knew of the Overlay District at the time it closed on the property. Thus, as the trial court pointed out, Orco had the ability to renegotiate the purchase price to take into account the Overlay District. In addition, Orco presented no evidence that the city's adoption of the Overlay District (which was in effect for all of six months) significantly decreased the property's value. Quite simply, Orco could not have developed the property while the Overlay District was in effect because it had yet to negotiate an easement for the storm water and had yet to perform soil testing.

We are not persuaded by Orco's claims that the city officials thwarted development efforts by making it impossible for Orco to obtain an easement for storm water drainage and in failing to notify Orco that it had relinquished jurisdiction of soil erosion control to Wayne County. Orco negotiated with the school district for nearly two years to obtain an easement on the district's property for the development's storm water drainage. No agreement came from these negotiations, and Orco then had to receive approval from the city to use the Superior Road ditch. Orco came forward with no admissible evidence to support its contention that the city interfered with negotiations. Additionally, there was no dispute that Orco had not applied for an SESC permit at the time the ordinance was rescinded. It does not appear that transfer of the permitting process to Wayne County was done to thwart Orco's development efforts; rather, the city relinquished control for economic reasons and the inability to support such a department.

In any event, requiring Orco to obtain the necessary permits could not itself constitute a taking of property. *Cummins v Robinson Twp*, 283 Mich App 677, 719; 770 NW2d 421 (2009). The storm drainage and SESC permit requirements were consistent with *Cummins* and were merely a normal administrative step of property development.

Orco claims that the city caused it to "miss the market" and that "by the time Orco jumped through all the city's hoops, there was nobody interested in buying what Orco was selling." Orco admits that "the real estate market had so dramatically changed by mid-2005 that plaintiff could not market the property at all." It claims that it would have avoided the market downturn if defendants had not denied approval of its preliminary site plan in 2003. It is impossible to know if Orco would have actually completed its development, gotten approval of its final site plan, and sold the property before mid-2005. Orco was able to make valuable use of the property despite the regulation. It developed the property as it originally intended and placed it on the market. Because Orco purchased the property with knowledge of the regulatory scheme and because Orco made (and can make) valuable use of the property, compensation is not required under *Penn Central*.

C. STATUTE OF LIMITATIONS

Orco argues that the trial court erred in concluding that most of its equal protection and substantive due process claims were barred by the statute of limitations. We disagree.

If no statute of limitations is specified for a particular cause of action, the statute of limitations is three years after the injury occurred, or the claim accrued. See MCL 600.5805(10). A claim accrues when "the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. In addition, the Michigan Supreme Court has rejected the assertion that "a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 389; 738 NW2d 664 (2007). Nor does Michigan recognize the continuing violations doctrine. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 266, 696 NW2d 646 (2005), amended by 473 Mich 1205, 699 NW2d 697 (2005).

Orco filed its complaint on July 24, 2009. Michigan law does not specify a statute of limitations for equal protection or due process claims brought under its Constitution. Therefore, the statute of limitations is three years. See MCL 600.5805(10). Consequently, any claims based on wrongs that occurred before July 24, 2006, are time-barred. Orco claims that it was not harmed, and thus no wrong occurred, until August 30, 2006, when it tried to sell the property at auction and had no bidders. We disagree. Taking the facts in a light most favorable to Orco, it is clear that Orco argues that it sustained harm when: (1) the city allegedly persuaded the school district not to grant Orco a storm water easement; (2) the city allegedly did not inform Orco that it no longer had the authority to issue soil erosion permits; and (3) the city allegedly stalled negotiations on the long term maintenance agreement for the storm water drainage system. All of these alleged acts occurred outside of the statute of limitations. Even if Orco was not aware that the property was decreasing in value, the discovery rule does not toll the statute of limitations. See *Trentadue*, 479 Mich at 389. Moreover, it is unlikely that given the widespread news of the recession and housing crisis, Orco, a property development company, was unaware that property values were in decline. Accordingly, the trial court did not err in granting summary disposition on the basis of statute of limitations.

D. EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS

Orco argues that the trial court erred in granting summary disposition in favor of defendants on its remaining equal protection and substantive due process claims. We disagree.

Both the United States and Michigan Constitutions provide that all people are entitled to equal protection of the laws. See US Const, Am XIV; Const 1963, art 1, § 2. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). The Michigan Supreme Court has held that Michigan's equal protection clause is coextensive with the United States Constitution's Equal Protection Clause. *Shepherd Montessori*, 486 Mich at 318. Unless legislation treats groups differently on the basis of a suspect or quasi-suspect class, or the legislation interferes with a fundamental right, the party asserting that the legislation is unconstitutional has the burden of proof. *Id.* at 319. That party must show that the legislation's classification is not rationally related to a legitimate government interest. *Id.*

The Michigan Constitution also provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. When evaluating

individual governmental actions, "the governmental conduct must be so arbitrary and capricious as to shock the conscience," in order to constitute a violation of substantive due process. *Cummins*, 283 Mich App at 701. "[O]nly the most egregious official conduct can be considered arbitrary in the constitutional sense." *Id*. The Michigan Constitution's substantive due process clause is coextensive with the United States Constitution's substantive due process clause. See *id*. The United States Supreme Court has held, "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Sacramento Co v Lewis*, 523 US 833, 842; 118 S Ct 1708; 140 L Ed 2d 103 (1998). This concept has been applied to regulatory taking claims, which fall under the Fifth Amendment. See US Const, Am V; *Cummins*, 283 Mich App at 704.

In its complaint, Orco alleged that its equal protection and substantive due process rights were violated by: (1) the acts of government officials to prevent or delay the approval of its preliminary site plan and further development, (2) the planning commission's denial of its preliminary site plan, and (3) the city council's adoption of the Overlay District. All of these acts occurred before July 24, 2006, so they are barred by the statute of limitations. In its response to defendants' first motion for summary disposition, plaintiff argues that these "continual tortious acts" occurred after July 24, 2006: (1) "July 24, 2006: the City's engineer deferred final approval pending submission of separate easement documents," (2) "August 23, 2006: the City would not agree to language in a Long Term Maintenance Agreement," and (3) "November 10, 2006: the City's engineer notes six items 'needed before formal engineering approval can be granted.'" These actions do not constitute a violation of Orco's equal protection or due process rights.

To defeat summary disposition on its equal protection claim, Orco needed to present evidence that defendants' actions were not rationally related to a legitimate government interest. See *Shepherd Montessori*, 486 Mich at 318. It has not. Our Supreme Court has recognized that zoning is "a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development." See *Kyser v Kasson Twp*, 486 Mich 514, 520; 786 NW2d 543 (2010). Defendants have a legitimate government interest in regulating development and requiring building permits. See *Cummins*, 283 Mich App at 701. This Court in *Cummins* explained that "[i]n disputes over municipal actions, including the issuance of building permits, only the most egregious official conduct can be considered arbitrary in the constitutional sense." *Id*. Defendants' conduct of requiring appropriate documents, including separate easement documents, was not egregious. It was within their police power to ensure compliance with applicable ordinances and statutes. Defendants' dispute with the language of the long term maintenance agreement was also not egregious; it was reasonable for defendants to negotiate with Orco before assuming long-term maintenance responsibility for the proposed development's storm water drainage system.

Orco's substantive due process claims are based on the same governmental action that gives rise to its taking claim. The takings clause provides "an explicit textual source of constitutional protection" against the government's regulatory taking of property, so plaintiff's due process claims are more properly analyzed under the takings clause. See US Const, Am V; *Sacramento*, 523 US at 842; see also *Cummins*, 283 Mich App at 704. Furthermore, to establish its substantive due process claim, plaintiff must show that defendants' conduct was "so arbitrary

and capricious so as to shock the conscience." Viewing the evidence in the light most favorable to plaintiff, there is still no evidence that any conduct by defendants after July 24, 2006, was "so arbitrary and capricious so as to shock the conscience." As discussed above, defendants were within their authority to require appropriate documentation before issuing engineering approval and building permits. In addition, it was reasonable for defendants to take time to negotiate before agreeing to assume responsibility for the development's storm water drainage system. These actions were not so egregious "so as to shock the conscience." Accordingly, the trial court did not err in granting summary disposition on Orco's equal protection and substantive due process claims.

E. PLAINTIFF'S MOTION TO REINSTATE LITIGATION

Finally, Orco argues that the trial court should have reinstated its prior case. We disagree.

MCR 2.502(C) provides that, "[o]n motion for good cause, the court may reinstate an action dismissed for lack of progress on terms the court deems just." MCR 2.502 does not prescribe a time limit for filing a motion to reinstate. However, this Court has considered how much time passed after the case was dismissed in determining if good cause exists to reinstate it. See *Wickings*, 244 Mich at 139; *Bolster v Monroe Co Bd of Rd Comm'rs*, 192 Mich App 394, 400; 482 NW2d 184 (1991). This Court has also taken into account these factors in determining whether there is good cause to reinstate: "(1) procedural or technical error in dismissing the case for lack of progress, (2) the movant's actual diligence before dismissal, (3) justification for the movant's failure to make progress before dismissal, (4) the movant's diligence in attempting to settle the case or a prompt motion to reinstate it following dismissal, and (5) potential prejudice to the nonmovant if the action is reinstated." *Wickings*, 244 Mich App at 142.

Orco moved to reinstate the previous litigation (by filing a motion to reinstate in that case, No. 04-409170) because the issue of damages remained unresolved. The last substantive action in the previous litigation was the trial court's grant of summary disposition in favor of Orco nearly five years before. In its motion to reinstate, Orco explained that it waited so long because it was trying to mitigate its damages by selling the property. Orco's motion was denied.

Orco asks this Court to reinstate the previous litigation by reversing the trial court's order that denied its motion to reinstate. However, this order was not entered in the case associated with this appeal. Rather, it was entered in the previous litigation. Orco's request that this Court reverse that order is untimely, as it was not filed within 21 days of the order's entry. See MCR 7.204(A)(1). In its response to defendants' first order for summary disposition in this case, Orco asked the trial court to reevaluate its denial of its motion for reinstatement. The trial court refused, explaining that Orco's request was basically a motion to reconsider his previous ruling. Because Orco did not move for reconsideration within 21 days of the court's order, Orco's request was untimely.

We agree that Orco's request for reinstatement in the instant case is essentially an untimely and improper motion to reconsider the trial court's order denying Orco's original motion to reinstate. This request to reconsider was made approximately nine months after the trial court first denied Orco's motion to reinstate. In addition, Orco's original motion to reinstate

was not made in this case, but rather, in the previous litigation. Hence, the trial court correctly denied the request. Even if Orco's request was timely, the trial court did not abuse its discretion in denying Orco's initial motion for reinstatement. Approximately four and a half years had passed since any action was taken in the previous litigation, and how much time has passed is a relevant consideration in determining if there is good cause to reinstate. See *Wickings*, 244 Mich at 139-142; *Bolster*, 192 Mich App at 400. In addition, the denial of Orco's motion to reinstate did not affect its opportunity to assert a claim for damages based on a regulatory taking. The previous litigation was dismissed for lack of progress, which does not constitute a final judgment. Consequently, Orco's taking claim in the instant case was not barred by res judicata.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer