STATE OF MICHIGAN

COURT OF APPEALS

CHANDLER KALKMAN,

Plaintiff/Counter-Defendant-
Appellee/Cross-Appellant,

v

CITY OF THE VILLAGE OF DOUGLAS,

Defendant/Counter-Plaintiff-
Appellant/Cross-Appellee.

and

DAVID KOWAL,

Defendant.

UNPUBLISHED
September 20, 2012

No. 306051
Allegan Circuit Court
LC No. 08-043342-CH

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In this dispute over the regulation of real property, defendant/counter-plaintiff City of the Village of Douglas (the City) appeals by right the trial court's judgment in favor of plaintiff/counter-defendant Chandler Kalkman, who cross-appeals the same judgment. On appeal, we conclude that the trial court did not err when it determined that the undisputed evidence showed that the City temporarily took Kalkman's property, but clearly erred in calculating the damages after a bench trial. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

In July 2007, the City ordered Kalkman to stop the construction of a residential home on his property because he purportedly violated the City's zoning ordinances governing front yard setbacks. See Douglas Zoning Ordinance §§ 6.05 and 16.09,. Before beginning construction, Kalkman obtained zoning approval for the proposed setback from the zoning administrator. By the time the City ordered him to cease building, he had spent $65,000 on the construction. Although Kalkman did not request a variance from the City's Zoning Board of Appeals, the zoning board held a hearing in August 2007 and determined that Kalkman required a variance under §§ 6.05 and 16.09 and then denied the variance.

In June 2008, Kalkman sued the City for improperly ordering him to cease construction. Specifically, he alleged that he had a vested right to build under the permit issued before the stop work order and that the City's order amounted to a regulatory taking.[1] The parties cross-moved for summary disposition and the trial court determined that, under the undisputed facts, Kalkman was entitled to judgment in his favor. The trial court concluded that the zoning administrator had properly approved Kalkman's building permit and that, after Kalkman spent considerable amounts in reliance on that permit, he obtained a vested right to build under the permit. As such, the City's subsequent decision to order him to stop construction amounted to a temporary taking. Although the trial court entered an order enjoining any further enforcement of the stop work order, it determined that there was a question of fact on the amount of compensation due to Kalkman for the temporary taking. The trial court held a bench trial on damages and ultimately found that the City owed Kalkman $178,903.91 in compensation.

The City first argues that the trial court erred when it determined that Kalkman's claims were not barred by his failure to exhaust his administrative remedies because he did not seek a variance and did not appeal the stop work order.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). This Court also reviews de novo whether the trial court had jurisdiction to hear Kalkman's claims. *Papas v Mich Gaming Control Bd*, 257 Mich App 647, 656-657; 669 NW2d 326 (2003). This Court likewise reviews de novo the proper interpretation of zoning ordinances, *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003), and the application of equitable doctrines, such as laches and equitable estoppel, *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

Generally a party must exhaust administrative remedies before the local zoning board before challenging the zoning ordinance in circuit court. See *Paragon Properties Co v City of Novi*, 452 Mich 568, 576-583; 550 NW2d 772 (1996). However, a property owner does not have to resort to the board where it is clear that further administrative proceedings would be futile and nothing more than a formality. *L & L Wine & Liquor Corp v Liquor Control Comm'n*, 274 Mich App 354, 358; 733 NW2d 107 (2007). "Futility will not be presumed," and a mere expectation that a body will decide or act in a certain way is insufficient to satisfy the futility exception. *Id.* at 358-359.

Under the facts of this case, we conclude that the trial court did not err when it determined that Kalkman was not required to seek a variance in order to finalize his claim.

"The general principles of statutory construction apply to the interpretation of zoning ordinances." *Macenas v Village of Michiana*, 433 Mich 380, 397 n 25; 446 NW2d 102 (1989). Thus, the City's Zoning Ordinance must be read as a whole and its provisions harmonized. *Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009). A provision is ambiguous if it irreconcilably conflicts with another provision or if it is equally susceptible to more than one

[1] Kalkman also asserted claims against defendant David Kowal in his individual capacity. However, the trial court dismissed those claims and they are not at issue on appeal.

meaning. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39-40; 761 NW2d 269 (2008). When the language of the ordinance is ambiguous, the court may not substitute its judgment "by imposing what it considers to be the wisest version of the ordinance, but is confined to an analysis of the text of the ordinance and, in the face of ambiguity, a determination of what the legislative body that enacted the ordinance intended by the language in question." *Macenas*, 433 Mich at 396-397.

Section 6.05 of the City's zoning ordinance establishes a front setback of 25 feet for "all uses and structures in the [zoning district], unless . . . specifically modified by the provisions of Article XVI: General Provisions . . . or as varied pursuant to Article XXIX, Board of Appeals." Section 16.09 of Article XVI provides that "[a]ny front setback area in any residential district may be reduced below the minimum requirements when the average front setback of existing principal buildings within two hundred (200) feet of a proposed principal building location are less than the minimum required, in which case the required minimum front setback shall be that which has been established by the existing buildings in order to bring the proposed building in line." Thus, by its own terms, the setback provided under § 6.05 applies except as provided under § 16.09 *or* "as varied pursuant to Article XXIX, Board of Appeals," which sets forth the Zoning Board's authority to grant variances. "The disjunctive term 'or' refers to a choice or alternative between two or more things." *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004). As such, although Kalkman could have asked for a variance, he did not need a variance if the exception to § 6.05 provided under § 16.09 applied to his property, which it did.

The City argues that § 16.09 is not self-executing because it provides that the "setback area in any residential district *may* be reduced below the minimum requirements", which must be understood to give the Board the discretion to permit a variance under § 16.09. The verb "may" is permissive rather than mandatory. See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). But it does not necessarily follow that the Zoning Board alone has the discretion to determine when § 16.09 applies. As the trial court correctly noted, § 16.09 does not refer to the Zoning Board or even to variances; indeed, it is silent as to whom any discretion lies. It simply provides that the front setback "may be reduced" when certain circumstances apply and then provides what the setback will be under those circumstances. At its August 2007 meeting, the Zoning Board determined that it alone had the discretion to apply § 16.09—not the zoning administrator. Section 29.05(1) of the City's ordinances does provide the Zoning Board with the "power to authorize specific variances from site development requirements," and § 6.05 is titled "SITE DEVELOPMENT REQUIREMENTS," thus, perhaps suggesting that one must obtain a variance to the front yard setback from the Zoning Board. However, such an interpretation would ignore the language in § 6.05, which treats the exception stated under § 16.09 as an alternate to that provided by variance. At the very least, the Zoning Ordinance is ambiguous because it is equally susceptible to the reading urged by Kalkman. *Alvan Motor Freight*, 281 Mich App at 39-40.

When construing an ambiguous zoning ordinance, courts are to "accord[] great weight in determining the meaning," to the "construction [] applied over an extended period by the officer or agency charged with its administration." *Macenas*, 433 Mich at 398; see also *Sinelli v Birmingham Bd of Zoning Appeals*, 160 Mich App 649, 652; 408 NW2d 412 (1987). Kalkman offered the only evidence of the City's past practice with regard to § 16.09; in an affidavit, the

former zoning administrator averred that he approved Kalkman's application in good faith, consistent with his past experience and interpretation of the City's ordinances, and that he had the authority to grant the approval. Thus, the undisputed evidence showed that the City did not treat § 16.09 as requiring a variance from the Zoning Board. Therefore, considering the zoning ordinance in light of the City's past practice, we conclude that Kalkman did not need a variance.

Even if we were to conclude that Kalkman was required to seek a variance in order to exhaust his administrative remedies, we would nevertheless conclude that he was excused from doing so here because any such attempt would have been futile given the Zoning Board's actions. See *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 52-54; 620 NW2d 546 (2000). Likewise, we conclude that Kalkman's failure to timely appeal the stop work order to the Zoning Board is excused on this same basis. *Id*.

We also agree with the trial court that the City is equitably estopped from interfering with Kalkman's construction. Equitable estoppel arises when: (1) a party, by representation, admission, or silence, intentionally or negligently induces another party to believe alleged facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of those alleged facts. *AFSCME Int'l Union v Bank One, NA*, 267 Mich App 281, 293; 705 NW2d 355 (2005) (quotation marks and citation omitted). Equitable estoppel may be an appropriate remedy where one party has changed its position in reasonable reliance on a governmental mistake. See, e.g., *Pittsfield Twp v Malcolm*, 375 Mich 135, 147-148; 134 NW2d 166 (1965) (estopping a municipality from enforcing its zoning regulations against a kennel owner who was erroneously issued a building permit after he had relied on the permit and built a kennel).

The City issued a facially valid building permit to Kalkman and, relying on its validity, he invested approximately $65,000 in construction costs. As our Supreme Court explained in *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89, 98; 223 NW2d 689 (1974), by definition, a permit is an official document authorizing its holder to proceed with the proposed project and thus, "[o]nce a city or township issues a valid permit to an applicant, that applicant has every reason and right to rely thereon in his business dealings." See also *Expert Steel Treating Co v City of Clawson*, 368 Mich 619, 621-622; 118 NW2d 815 (1962). By issuing Kalkman a building permit, the City induced Kalkman to believe that he was permitted to construct the proposed residence, and Kalkman changed his position in reliance on that permit to the extent that he would be prejudiced if the City were now permitted to revoke it. *Dingeman*, 393 Mich at 98; *Pittsfield Twp*, 375 Mich at 147-148.

The City is correct that "everyone dealing with a municipality and its agents is charged with knowledge of the restrictive provisions of lawfully adopted ordinances." *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009). However, the City did not offer any evidence that Kalkman knew, or had reason to know that the zoning administrator lacked the authority to approve his application so as to render Kalkman's reliance unreasonable or unjustified. Instead, the only evidence placed before the trial court established that Kalkman submitted his application to the zoning administrator; that, after consulting with the City's attorney, the zoning administrator approved Kalkman's application with the reduced setback and without any indication that any additional approvals were required; and that Kalkman then submitted his application for a building permit and plan to the authority responsible for issuing

the City's building permits, which application was likewise approved. On the basis of the evidence presented, the trial court did not err by concluding that there was no genuine issue of material fact that Kalkman reasonably relied on the building permit issued to him by the City, particularly considering the ambiguity in the ordinance and the actions of the City's agents in issuing the unconditional approvals and permits.

Additionally, "receiving a permit and making significant expenditures in reliance on it," constitutes the type of "exceptional circumstances" courts have determined to warrant application of equitable estoppel to prevent later enforcement of a zoning ordinance against a property owner, even where that enforcement would otherwise be proper. *Hughes*, 284 Mich App at 28. There is no dispute that, after he received the building permit, Kalkman expended approximately $65,000 on the construction of the approved residence. Therefore, the trial court correctly determined that the City was estopped from enforcing the ordinance. *Pittsfield Twp*, 375 Mich at 147-148.

We further agree that there was no genuine issue of material fact that the City's actions in issuing the stop work order and preventing Kalkman from completing construction of the residence constituted a temporary taking under the balancing test set forth in *Penn Central Transp Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). A governmental action may result in a "temporary" regulatory taking. *Poirier v Grand Blanc Twp*, 167 Mich App 770, 776-777; 423 NW2d 351 (1988) (*Poirier I*). To determine whether such a taking has occurred, courts engage in an "ad hoc, factual inquiry," centering on three factors: (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. *K & K Const, Inc v Dep't of Natural Resources*, 456 Mich 570, 577; 575 NW2d 531 (1998), citing *Penn Central*, 438 US at 124. There is no genuine issue of material fact that the City's action singled out Kalkman. See *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 262; 792 NW2d 781 (2010). Although the City's zoning ordinances are part of a broad-based regulatory scheme that burdens and benefits all citizens equally, the evidence submitted to the trial court showed that the stop work order was directed solely at Kalkman's property and that the City issued the order after first determining that the setback complied with the regulatory scheme.

Next, 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. *Id.* at 262. The trial court correctly observed that there was no genuine issue of material fact that the principal use of the property was for single family residential use, and that, considering the unique dimensions of the property, the City's actions rendered the property wholly unsuitable for that use. The trial court also aptly noted that the City had not identified any economically beneficial use of the property other than as a residential site and that the City had not shown where a dwelling could have been placed without a change to the setback.

Finally, the trial court correctly determined that the there is no genuine issue of material fact that the stop work order interfered with Kalkman's distinct, investment backed expectations. Kalkman purchased the property for the purpose of constructing a residential dwelling, and then, having received zoning approval and a building permit to construct such a residence, Kalkman

invested approximately $65,000 in making improvements to the property. The City does not dispute that this is the case. Indeed, the City does not argue about the application of the *Penn Central* factors. Rather, relying on *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302; 122 S Ct 1465; 152 L Ed 2d 517 (2002), it argues that the stop work order constitutes a "normal delay in the land use process," which does not constitute a taking.

In that case, the United States Supreme Court instructed that ordinary delays attendant to the process of governmental land-use decision making do not constitute takings. *Id.* at 335-336; see also *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 536 n 17; 705 NW2d 365 (2005) (observing that "requiring a governmental agency to compensate a property owner for a loss of value while considering applications for permits and variances under a land-use regulatory scheme" would be inappropriate). However, this is not a case in which Kalkman's claim arises from the City's delay in issuing a permit or in ruling on a variance request. Rather, here, the governmental decision had been made and construction had begun. Only thereafter did the City issue a stop work order premised on its new understanding of the zoning ordinances and which completely eliminated any economic viability for the property as a residential property. Under these circumstances, the trial court properly applied the *Penn Central* factors to the undisputed facts.

The City next asserts that the trial court clearly erred in its finding on damages. A property owner is entitled to compensation for the period within which the taking was effective. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 548; 481 NW2d 762 (1992) (*Poirier II*). The period that the taking is in effect and the compensation for the taking are questions of fact. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 137; 680 NW2d 485 (2004). This Court reviews a trial court's findings for clear error. *Florence Cement Co v Vettraino*, 292 Mich App 461, 468; 807 NW2d 917 (2011). A finding of fact is clearly erroneous if, after a review of the entire record, this Court "is left with a definite and firm conviction that a mistake has been committed." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

The trial court found that the City's temporary taking began when it issued the stop work order on July 7, 2007 and ended 21 days after it entered its final judgment. The trial court's findings with regard to the end date was, however, clearly erroneous. On May 19, 2009, prior to its final judgment, the trial court granted Kalkman partial summary disposition. In its order, the trial court "estopped and enjoined [the City] from employing its zoning ordinance to enforce its stop work order on [the property]" and permitted Kalkman to restart construction as soon as practical. The parties to actions are obligated to obey the court's orders, even if they believe those orders are erroneous, until and unless the orders are reversed. *Rose v Aaron*, 345 Mich 613, 615; 76 NW2d 829 (1956). Therefore, the City was obligated to follow the trial court's May 19, 2009 order, and, consequently, it was not permitted to enforce the stop work order on the basis of its zoning ordinance at any time after that order became effective. And, by permitting him to continue construction, that order returned Kalkman to the position he was in before the stop work order was issued. Accordingly, the taking ended on May 19, 2009. See *Poirier II*, 192 Mich App at 548-549 (stating that the temporary taking ended on the date the trial court entered an order directing that property be rezoned, even though the property was not actually rezoned until sometime later).

The order enjoining the City from enforcing its stop work order was further not subject to an automatic stay. The automatic stay applies to efforts by a party to execute on a judgment or enforce a judgment through judicial proceedings. See MCR 2.614(A)(1). Here, Kalkman would not have to take any special steps to enforce the trial court's order and the City was immediately required to comply with it unless it obtained a stay pending an interlocutory appeal. Further, to the extent that MCR 2.614(A)(1) might apply, the injunction against enforcement amounted to a form of preliminary injunctive relief. As such, it was not subject to the 21-day stay. MCR 2.614(A)(2)(b). Similarly, the injunctive relief found in the trial court's final judgment was also not subject to a 21-day automatic stay. MCR 2.614(A)(2)(c).

Finally, both parties take issue with the trial court's damages award. The City argues that the trial court erred in its calculation of compensation for property taxes and by awarding damages based on loss of market value during the pendency of the stop work order. Kalkman argues on cross-appeal that the trial court erred by declining to award him lost income and his interest and property tax expense for the entire development. "Just compensation" for a government taking of private property is mandated by both the state constitution and statute. *Wayne Co v William G Britton & Virginia M Britton Trust*, 454 Mich 608, 621; 563 NW2d 674 (1997). Just compensation is compensation that places the property owner in as good a condition as he would have been had the injury not occurred. *Id.* at 622. Accordingly, it "'should neither enrich the individual at the expense of the public nor the public at the expense of the individual.'" *Id.*, quoting *In re State Hwy Comm'r*, 249 Mich 530, 535; 229 NW 500 (1930). "There is no formula or artificial measure of damages applicable to all condemnation cases." *Detroit v Michael's Prescriptions*, 143 Mich App 808, 811; 373 NW2d 219 (1985). Rather, the amount to be recovered by the property owner is generally left to determination by the trier of fact. *Id*. Nevertheless, the damages may not be speculative:

> It is our intent to compensate a person for the losses he has actually suffered by virtue of the taking. Either the parties may agree to an appropriate damage measure or each may present evidence as to the actual damages in the case and its correct method of determination. The damages awarded and the way to measure those damages thus may be adapted to compensate the party whose land has been taken for his actual losses.
>
> We emphasize, however, that no matter what measure of damages is appropriate in a given case, the award must only be for *actual damages.* Such actual damages must be provable to a reasonable certainty similar to common law tort damages. This approach will compensate for losses actually suffered while avoiding the threat of windfalls to plaintiffs at the expense of substantial government liability. [*Poirier II*, 192 Mich App at 544-545, quoting *Corrigan v Scottsdale*, 149 Ariz 538, 543-544; 720 P2d 513 (1986) (citations omitted, emphasis in original).]

The trial court did not clearly err by determining that an award of Kalkman's property tax and interest expenses for the property taken, the costs to restore the construction to its state as of the date of the issuance of the stop work order, and Kalkman's expert witness fees, was appropriate. Regarding the trial court's award of property taxes for the entire single tax parcel including the property subject to the stop work order, the City did not present the trial court with any argument or evidence for apportioning the property taxes between the property and another lot included within that single tax parcel. Thus, considering the evidence presented to it, we find that the trial court did not err by awarding Kalkman the property taxes incurred on the entire parcel. *Beason*, 435 Mich at 805.

The trial court also did not err by awarding Kalkman damages for the diminution in the value of the property during the period in which the stop work order was in effect. In support of this contention, the City cites several authorities. See, e.g., *Dorman v Clinton Twp*, 269 Mich App 638, 647; 714 NW2d 350 (2006) (noting that "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"); *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App, 523, 553-554; 705 NW2d 365 (2005) (stating that "[a] reduction in the value of the regulated property is insufficient, standing alone, to establish a compensable regulatory taking"); *Volkema v Dep't of Natural Resources*, 214 Mich App 66, 70; 542 NW2d 282 (1995). However, those cases each address a situation in which a property owner asserted that a taking had occurred *solely because* the zoning of the property rendered it less valuable; they do not address the determination of what constitutes just compensation after a determination that a taking had occurred. The City offers no authority prohibiting a damage award based on a loss in value resulting from a taking. The trial court was presented with evidence from both Kalkman's appraisal expert and the City's appraisal expert that the residence would have been worth more had it been completed in 2007 rather than 2010. Keeping in mind the principles enunciated in *Poirier II*, 192 Mich App at 544-545, that courts should be flexible and compensate a person for the losses he has actually suffered by the taking, we conclude that this evidence was sufficient to support a conclusion that the City's actions caused Kalkman to suffer a compensable loss for the decline in market value. *Beason*, 435 Mich at 805.

Kalkman argues that the trial court erred by declining to award him lost income and profits for his projects, which he anticipated making after the sale of the residence. As this Court explained in *Poirier II*, 192 Mich App at 543, "just compensation is that compensation that places the property owner in as good a position as he would have been had the injury not occurred." Equally clear, however, is the notion that the property owner is only entitled to recover actual damages provable to a reasonable certainty; speculative claims for lost profits are not permissible. *Id*. at 545. The goal is to compensate for the losses actually suffered while avoiding the threat of windfalls for property owners. *Id*. at 545.

In *Dorman*, 269 Mich App at 648, this Court declined to countenance the property owner's "high personal expectations" for the value of a mini-storage facility, noting that despite these expectations, "this business could, potentially, have operated at a loss" and finding the property owner's claim of damages to be "too speculative." Likewise, in *Poirier II*, 192 Mich App at 549, this Court recognized that a claim for lost profits must be "proved with a reasonable degree of certainty as opposed to being based on mere conjecture or speculation." Kalkman testified as to the profits he hoped to earn on the building and sale of projects other than the

residence, during the compensable period. However, as noted by the trial court, this testimony was based on Kalkman's "optimistic expectations" as to "what he might have done had everything gone according to plan." Considering the entirety of the evidence, including that Kalkman's income had declined over the three years preceding 2007, and that the real estate market declined significantly thereafter, the trial court did not clearly err by concluding that Kalkman's claim to future income was speculative, and thus, not compensable.

Finally, Kalkman argues that the trial court erred by not awarding him his interest and tax expenses for the entire development, rather than merely for the property subject to the stop work order. As aptly noted by the trial court, the City did not prohibit Kalkman from taking any action with regard to the remainder of the development. That Kalkman's inability to complete construction on the residence may have prevented him from obtaining financing to undertake additional development does not mean that he was prevented by the City's order. The City took no action to prevent Kalkman from developing any other property. Thus, the interest and tax expenses on the remainder of the development were not actual damages caused by the stop work order. *Poirier II*, 192 Mich App at 544-545. Consequently, the trial court did not clearly err by concluding that Kalkman was not entitled to recover these expenses. *Beason*, 435 Mich at 805.

In sum, the trial court did not clearly err in determining the proper elements of just compensation due to Kalkman as a result of the City's actions. However, it did clearly err in determining the point at which the taking ended. Accordingly, we remand for a recalculation of the amount of those damages on the basis of the revised takings period.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, neither may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens