O S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

WILLIAM J. SOPSICH, ROBERT D. SOPSICH, WILLIAM SLAVENS, ALBERT ROBINSON, DALE FEIGLEY, KEITH HEADLEY, DONALD WAINIO, DANIEL PARGOFF, DONALD GREEN, MARK BEKKALA, HARLEY MAXWELL, DAVID MAMO, EDWARD SUIDAN, ANDREW SUIDAN, BILL COLLIER, ROLAND RADO, WILLIAM SOPSICH, KENNETH D. MILLER, WILLIAM DE JOSEPH, DAVID DERBY, LAWRENCE SERAFIN, HAL STUERER, KENNETH CONRAD, KENNETH AGELOSANTO, DONALD LAWRENCE, VIRGIL BIDLACK, and RONALD CAIN,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF MILFORD,

Defendant-Appellee.

UNPUBLISHED
July 23, 1996

No. 177033
LC No. 91-423420

Before: Murphy, P.J., and Reilly and C.W. Simon, Jr.,* JJ.

PER CURIAM.

Plaintiffs appeal as of right a trial court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) [no genuine issue as to any material fact]. We affirm.

On August 16, 1989, defendant Charter Township of Milford determined that "the safety and well-being of persons or property in the entire Township are endangered by hunters or discharge of firearms or bow and arrows" and requested that the Hunting Area Control Committee (HACC) "recommend such area closure as may be required to relieve the problem." In February of 1990, the HACC held a public hearing to discuss the hunting issue. Following the public hearing, the HACC

* Circuit judge, sitting on the Court of Appeals by assignment.

conducted an investigation to determine whether the health, safety, and welfare of the residents of Milford necessitated the closure of certain areas to hunting. As a result of its investigation, the HACC made specific findings and recommendations.

Defendant's Board of Trustees adopted the HACC's recommendations as Charter Township of Milford Ordinance Number 151. Ordinance 151 contains the following prohibitions: (1) hunting with a firearm is prohibited in certain portions of the township, (2) hunting with a firearm or bow and arrow and discharging a firearm or bow is prohibited in Kensington Metropolitan Park, (3) discharging a firearm within 150 yards of certain buildings without the written permission of the owner, renter, or occupant of the property is prohibited, and (4) all hunting with centerfire rifles or rimfire rifles is prohibited within the entire Township.

Plaintiffs, real property owners in the Charter Township of Milford, filed a complaint alleging that Ordinance 151 was enacted in violation of the Controlled Hunting Areas Act, MCL 317.331 et seq.; MSA 13.1397(101) et seq., that it constituted an unconstitutional taking of their land without just compensation in violation of US Const, Am V, US Const, Am XIV, and Const 1963, art 10, § 2, and that defendant's enactment of the ordinance violated plaintiffs' due process rights and/or denied them equal protection of the laws in violation of US Const, Am XIV and Const 1963, art 1, § 2.

The trial court conducted a three-day bench trial to determine the constitutionality of the ordinance. Following the trial, the trial court issued a written opinion finding that defendant did not violate the Controlled Hunting Areas Act in enacting Ordinance 151. The trial court also found that plaintiffs were not denied equal protection or deprived of substantive due process. Regarding the taking issue, the trial court stated that it could not decide whether the enactment of Ordinance 151 resulted in a taking of plaintiffs' property independent of the issue of damages. Relying on what it called dicta from *Lucas v South Carolina Coastal Council*, 505 US 1003; 112 S Ct 2886; 120 L Ed 2d 798 (1992), the trial court determined that plaintiffs would prevail in their taking claim if they could show that they had experienced a diminution in property values relative to similarly situated but unregulated property.

On February 9, 1994, defendant moved for summary disposition of plaintiffs' taking claim pursuant to MCR 2.116(C)(10). The trial court granted the motion. In granting the motion, the trial court stated that "defendant has presented undisputed evidence that shows that residential property values have appreciated throughout Milford Township over recent years" and "residential property values in hunting regulated areas have appreciated more rapidly that [sic] those that are non-regulated." The trial court found that plaintiffs presented no evidence to create a disputed issue of fact regarding a diminution in their property values. As for plaintiff William Sopsich Sr., the trial court found that he had presented evidence of a loss of trees in the amount of $130,000 and an interference with an investment backed expectation, but that:

> there has been no evidence to show that the loss of the trees on the William Sopsich, Sr. property were significant relative to the value of the property. This court finds that the loss is only tangentially related to the hunting regulations, but more directly from the migration of wildlife from public and private property on to plaintiff Sopsich's property.

Plaintiffs appeal as of right.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 650; 513 NW2d 441 (1994). The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Smith v General Motors Corp*, 192 Mich App 652, 654; 481 NW2d 819 (1992). Then, giving the benefit of any reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed which would leave open an issue upon which reasonable minds might differ. *Id*.

Plaintiffs argue that the trial court erred in granting summary disposition because plaintiffs created a genuine issue of material fact regarding whether there is a taking requiring payment of just compensation because their property values decreased as a result of defendant's enactment of Ordinance 151. US Const, Am V; US Const, Am XIV; Const 1963, art 10, § 2. A land use regulation effects a taking and violates the Fifth Amendment if the regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land. *Dolan v City of Tigard*, 512 US ___; 114 S Ct 2309; 129 L Ed 2d 304, 316 (1994); *Lucas*, 120 L Ed 2d at 813; *K & K Construction, Inc v Dep't of Natural Resources*., ___ Mich App ___; ___ NW2d ___ (Docket No. 168393, decided June 4, 1996). In land regulation cases, it has been recognized that while property may be regulated to a certain extent, if the regulation goes "too far" it will be recognized as a taking. *Lucas*, 120 L Ed 2d at 812. The Supreme Court has not established a specific formula regarding what constitutes going "too far," but has engaged in ad hoc, factual inquiries in making such determinations. *Id*.

There are two distinct categories of regulatory action that require compensation without case-specific inquiry into the public interest advanced in support of the restraint. *Id*.; *K & K Construction*, *supra*. The first category encompasses regulations that compel the property owner to suffer a physical invasion of the property. *Lucas*, 120 L Ed 2d at 812; *K & K Construction*, *supra*. The second category is where the regulation denies the owner all economically beneficial or productive use of the land. *Lucas*, 120 L Ed 2d at 813; *K & K Construction*, *supra*.

Here, plaintiffs did not suffer a physical invasion of their property as a result of Ordinance 151. Furthermore, we conclude that Ordinance 151 did not deny plaintiffs all economically beneficial or productive use of their land. Typically, regulations which leave the landowner without economically beneficial or productive options for the use of the land require land to be left substantially in its natural state. *Lucas*, 120 L Ed 2d at 814. Ordinance 151 contains no such requirement; rather, it merely restricts and prohibits certain forms of one activity: hunting. Aside from the hunting restrictions, Ordinance 151 does not otherwise prevent plaintiffs from making economically viable use of their land. We therefore conclude that Ordinance 151 did not deny plaintiffs all economically beneficial or productive use of their land.

Because plaintiffs did not suffer a physical invasion of their property and were not left without economically beneficial or productive uses for their land, plaintiffs are not entitled to automatic

compensation for a taking. This does not end the inquiry regarding whether a taking occurred, however. As we noted above, a land use regulation effects a taking if the regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land. We have already determined that Ordinance 151 does not deny plaintiffs economically viable use of their land. However, we still must conduct a case specific inquiry into the public interest advanced in support of the ordinance and determine whether the ordinance went "too far." *Lucas*, 120 L Ed 2d at 812. We conclude that it did not.

In granting defendant's motion for summary disposition, the trial court divided the plaintiffs into two groups: William Sopsich, Sr. and all the remaining plaintiffs. Plaintiffs presented the deposition of Robert Knoop. Knoop stated that plaintiffs suffered the following damages as a result of Ordinance 151: (1) the loss of use and enjoyment of their property for hunting purposes, (2) the economic loss caused by their inability to lease the property to third parties for hunting purposes, and (3) the economic loss caused by plaintiffs being required to lease property from third parties for hunting purposes because they could not hunt on their own property. In addition, plaintiff William Sopsich Sr. presented evidence that he had a tree farm on his property and that he suffered damage to his trees in the amount of approximately $130,000. According to Sopich's expert, the tree damage was caused by deer and would not have occurred without Ordinance 151. While an injury to property may result in a taking, it is not enough for the owner to prove injury to his property by the defendant with resultant damages. *Hart v Detroit*, 416 Mich 488, 500-501; 331 NW2d 438 (1982). Rather, the owner must prove that the defendant's actions were of such a degree that a taking occurred. *Id*., 501.

We do not believe that Ordinance 151 went "too far" or that it effectuated a taking of plaintiff Sopsich's property or the remaining plaintiffs' property. As for plaintiff William Sopsich Sr., even accepting as true that the tree damage was caused by Ordinance 151 and the resulting increase in the deer population, Sopsich still is not entitled to damages unless the ordinance does not substantially advance a legitimate state interest or denies him economically viable use of the land. As we have already stated, Ordinance 151 does not deny any of the plaintiffs economically viable use of their land. Moreover, for reasons stated in plaintiffs' second issue, we conclude that Ordinance 151 advances a legitimate state interest.

Plaintiffs argue that the ordinance diminished the value of their land. However, in *Volkema v Dep't of Natural Resources*, 214 Mich App 66, 70; 542 NW2d 282 (1995), this Court stated:

> When a land-use regulation merely results in diminution in a property's value, the property owner is not entitled to compensation. [*Lucas*, 120 L Ed 2d at 814.] The justification for this rule is often stated as being that
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> > [g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . . [citing *Lucas, 120 L Ed 2d at 814.]*

In any event, as the trial court noted, defendant presented undisputed evidence that Ordinance 151 did not cause any diminution in value to residential real estate values in the Township.

In sum, we conclude that Ordinance 151 does not go "too far" in relation to plaintiff William Sopsich Sr. or the remaining plaintiffs. In investigating the danger to the public, the HACC sought and received public input. Moreover, in making its recommendations, the HACC considered population densities, obstructions such as trees which might stop a projectile, the topography of the land, and accessibility to pedestrians. The HACC also read complaints filed with the police department relating to hunting in the Township and thoroughly surveyed the area by van and helicopter. The HACC's recommendations were based on its careful and specific research. The result is an ordinance which does not contain blanket prohibitions of all hunting in Milford Township, but carefully and specifically restricts and prohibits certain types of hunting only where the danger to the public is the greatest. As we indicated above, defendant had a legitimate interest in enacting Ordinance 151 and the restrictions and prohibitions in Ordinance 151 do not deny plaintiffs economically viable use of their land. We therefore conclude that Ordinance 151 does not effect a taking of plaintiffs' property.

Plaintiffs next argue that summary disposition was inappropriate because Ordinance 151 resulted in a taking without just compensation because it was not roughly proportional to the public good which it sought to protect. A land use restriction is not a taking if there is an "essential nexus" between the ordinance and a legitimate state interest and there is a "rough proportionality" between the manner of the taking and actual state interest involved. *Dolan*, 129 L Ed 2d at 317, 320; *Peterman v Dep't of Natural Resources*, 446 Mich 177, 201; 521 NW2d 499 (1994). An ordinance is presumed to be valid. *Bevan v Brandon Twp*, 438 Mich 385, 398; 475 NW2d 37 (1991). The party challenging an ordinance generally has the burden of showing that the ordinance constitutes an arbitrary regulation of property rights. *Dolan, 129 L Ed 2d at 320 n 8; Bevan*, *supra*, 398.

As the Supreme Court stated in *Bevan*, there are a broad range of governmental purposes that satisfy the legitimate state interest requirement. *Id*. Certainly, defendant's concern with protecting the safety and well-being of individuals within the Township constitutes a legitimate state interest. It seems equally obvious that a nexus exists between restricting and prohibiting certain types of hunting in certain portions of the Township and the safety and well-being of the Township's residents. Finally, we conclude that there is a "rough proportionality" between the manner of the regulation and the actual state interest involved. The potential danger to individuals located in certain areas of the Township is constitutionally sufficient to justify the prohibitions in Ordinance 151. The restrictions and prohibitions contained in Ordinance 151 will lessen the danger that individuals in Milford Township will be injured in hunting accidents. Thus, we reject plaintiffs' argument that Ordinance 151 was not roughly proportional to the public good which it sought to protect.

Plaintiffs finally argue that Ordinance 151 ordinance violates their equal protection and due process rights. The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective. *Shavers v Attorney General*, 402 Mich 554, 612; 267 NW2d 72 (1978). The test is essentially the same for an equal protection challenge to such legislation. *Id*., 612-613. The challenged

legislation is presumed to be constitutional. *Id.*, 613. For the same reasons we articulated above, we conclude that Ordinance 151 passes constitutional muster under

the reasonable relation standard. Accordingly, we conclude that Ordinance 151 did not deprive plaintiffs of due process or deny them equal protection under the laws.

Affirmed.

/s/ William B. Murphy
/s/ Maureen Pulte Reilly
/s/ Charles W. Simon, Jr.