STATE OF MICHIGAN

COURT OF APPEALS

PHILLIP D. FORNER, F & B DEVELOPMENT, L.L.C., and ALLENDALE HEATING CO., INC., a Michigan corporation,

Plaintiffs-Appellants,

v

ALLENDALE CHARTER TOWNSHIP, a subdivision of the State of Michigan,

Defendant-Appellee.

UNPUBLISHED
May 26, 2000

No. 212531
Ottawa Circuit Court
LC No. 95-23665 CZ

PHILLIP D. FORNER, F & B DEVELOPMENT, L.L.C., and ALLENDALE HEATING CO., INC., a Michigan corporation,

Plaintiffs-Appellants,

v

ALLENDALE CHARTER TOWNSHIP, a subdivision of the State of Michigan,

Defendant-Appellee.

Nos. 219743, 219744
Ottawa Circuit Court
LC No. 95-23665 CZ

Before: White, P.J., and Wilder and Meter, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs challenge as unconstitutional the zoning of part of their property as agricultural, and allege that defendant effected regulatory takings without just compensation, and that the determination by defendant's zoning board of appeals to grant them variances subject to

certain conditions was unsupported by competent, material and substantial evidence, deprived them of procedural due process, and constituted an unreasonable exercise of discretion. We affirm.

I

Plaintiffs collectively own approximately 38 acres of contiguous property in defendant Allendale Charter Township (ACT), located in three separately zoned districts established under the township zoning ordinance (agricultural, residential and commercial). The property is near the intersection of M-45 and 60th Avenue in Ottawa County.

In May 1989, plaintiff Phillip D. Forner paid $128,000 to acquire the first parcel, approximately twenty-eight acres zoned agricultural (AG), on which a farm operated (Knoper farm). To date, asparagus is still grown and harvested on that land by a producer who pays Forner annual compensation. Allendale Heating, a commercial entity of which Forner is president, owns a contiguous 2.62-acre parcel that is zoned commercial (C-3). In 1992, Forner donated a parcel of the farm land to a non-profit organization. The remainder of the farm is approximately twenty-five acres. A quarter section line runs along the south border of Forner's farm property. In 1994, plaintiff F & B Development, of which Forner is a principal, purchased a parcel of R-1-zoned property (low density, one-family residential district) south of the quarter section line, which was an existing subdivision project.

The property east of plaintiffs' farm property is also zoned AG, and is the site of a turkey farm, owned by Harley Sietsema. Defendant's zoning ordinance regarding AG-zoned property allows dwellings on lot areas of an acre or more, having lot widths at the front building line of 150 feet. All the property surrounding Forner's farm on the north, east, and west sides, north of the quarter section line, is zoned AG.

South of plaintiffs' land are two residential developments, a seventy-six lot development (Dewpointe) and fifty-five lot development (Parkside). Both developments are served by public water and sewer.

In October 1994, plaintiffs filed an application to rezone their combined 38-acre property into a seventy-lot, single family, residential planned unit development (PUD), to be known as Brookland Estates. In January 1995, defendant's Planning Commission approved plaintiffs' request for rezoning. The Zoning Board of Appeals (ZBA) adopted an ordinance on April 10, 1995 approving the PUD site plan and amending the zoning ordinance to rezone the land as a PUD. The PUD imposed two conditions relating to the adjacent agricultural property housing the turkey farm - - the construction of a fifty-foot-wide berm on the east side of the subdivision, and the notification of purchasers of the subdivision lots that the lots are adjacent to an intensive agricultural operation.

In May 1995, Sietsema and other property owners successfully petitioned for a referendum on the PUD zoning ordinance amendment, and in August 1995 the rezoning was defeated by a large margin in a special election. The land thus reverted to its pre-amendment zoning classifications.

In September 1995, plaintiffs filed a two-count complaint in circuit court challenging the constitutionality of the original zoning classification and claiming a taking of property without just compensation.

In December 1996, plaintiffs filed an application with the ZBA for variances from the area, frontage and density requirements in the AG zoned district (25.25 acres). Plaintiffs sought to reduce the minimum lot area from one acre to 10,000 square feet (corner lots to 12,500 square feet); reduce the frontage lot width from 150 to eighty feet (corner lots to one hundred feet); and increase the maximum number of dwellings from twenty to twenty-eight. If these variances were granted, the twenty eight lots on the AG property and the lots on the R-1 property would total seventy lots.

The ZBA held a public hearing in January 1997 and, after a public meeting the next month, granted plaintiffs' variance application in part, with the following conditions: 1) maintenance of defined open space on the property's east side to separate the residential development from the intensive agricultural turkey farm operation; 2) construction and maintenance of an earthen berm, also to separate the two; 3) inclusion of a disclosure statement in the deeds conveying lots regarding the adjacent turkey farm operation; and 4) these conditions would be eliminated when the farming operation east of plaintiffs' property ceased to be used as a confined animal feeding operation or for intensive animal raising for a period of one year.

In February 1997, the trial court granted plaintiffs leave to amend their complaint to add a third count, an appeal of the ZBA's decision granting the variances in part and with conditions, alleging that the decision was contrary to the Township Zoning Act (TZA), MCL 125.271 *et seq.*; MSA 5.2963 (1) *et seq.*, imposed an illegal and unconstitutional regulatory taking of plaintiffs' land, and that the ZBA had lacked subject-matter jurisdiction to hear plaintiffs' appeal. Plaintiffs further alleged that they were denied procedural due process, that the ZBA's decision was unsupported by competent, material and substantial evidence, and was not a reasonable exercise of its discretion under the TZA or defendant's zoning ordinance.

A bench trial on counts I and II began in February 1997. The trial court ruled in defendant's favor in an opinion entered on June 27, 1997, rejecting plaintiffs' constitutional challenge to the original AG zoning classification and rejecting plaintiffs' taking claim. The trial court's opinion stated that it would address count III in a separate opinion. After issuing an opinion and order on count III in January 1998, the trial court held the opinion in abeyance pending additional briefing and rehearing. On May 14, 1998, the court issued an opinion and order on count III affirming the ZBA's decision. Plaintiffs filed their first application for leave to appeal on count III on June 4, 1998, seeking review of the trial court's May 14, 1998 affirmance of the ZBA's decision.[1] The trial court entered a final judgment disposing of all counts on June 5, 1998. Plaintiffs filed a second application for leave to appeal with this Court on June 19, 1998, seeking review of the trial court's final judgment.[2] On that day plaintiffs also filed an appeal of right from the June 5, 1998 judgment on counts I and II.[3] This Court consolidated the two applications for leave to appeal on count III and denied both applications for absence of merit. Plaintiffs appealed to the Supreme Court which, in lieu of granting leave to appeal, remanded the appeals on count III to this Court for consideration with plaintiffs' appeal of right on counts I and II in docket number 212531.

II

Plaintiffs raise three issues in this appeal, two of which are interrelated and are considered together. Plaintiffs assert that 1) the Supreme Court's decision in *Paragon Properties Co* v *Novi*, 452 Mich 568, 571; 550 NW2d 772 (1996), which requires an appeal to the ZBA before a judicial claim ripens,[4] is inapplicable here because the ZBA lacks subject-matter jurisdiction over appeals from PUDs and from referenda; and that 2) because the ZBA lacked subject-matter jurisdiction over plaintiffs' PUD appeal, but nevertheless heard it and granted a variance, the ZBA's variance is void and inapplicable to this appeal.

Plaintiffs reason as follows: They sought and obtained approval for a PUD, but a referendum vote rejected the PUD rezoning. They filed their appeal with the ZBA knowing that the ZBA lacked subject-matter jurisdiction over appeals involving PUDs or referenda, but mindful of *Paragon*'s instruction that futility is no excuse. *Paragon* instructs a trial court to consider a variance when evaluating the extent of a plaintiff's injury under a zoning ordinance, but that instruction assumes that the variance was granted by a ZBA with subject-matter jurisdiction, a circumstance that did not exist in the instant case. The only administrative decision plaintiffs could take to the ZBA was the decision granting them PUD zoning and plaintiffs knew, and presumably the ZBA knew as well, that the ZBA lacked jurisdiction over such an appeal. The trial court should have recognized that the variances were a nullity and therefore should not have considered the variances in its takings analysis. *Paragon*'s rule of finality does not control this case because plaintiffs could not exhaust administrative remedies if the only administrative agency available to review the case lacked subject-matter jurisdiction.

A challenge to subject-matter jurisdiction may be raised at any time and presents a question of law this Court reviews de novo. *Bass v Combs*, 238 Mich App 16, 23; 604 NW2d 727 (1999).

Plaintiffs are correct that § 28.02[5] of defendant's zoning ordinance precludes the ZBA from hearing and deciding appeals "from any decision or order of the Planning Commission with respect to applications for special use permits or planned unit developments." However, plaintiffs' argument rests on an erroneous categorization--that the variance application they filed with the ZBA was an appeal from a PUD decision. Amicus curiae advance a similar categorization, arguing that the ZBA had no authority "to review or approve Appellants' PUD after it was overturned by referendum," and that "under the guise of granting variances, the ZBA totally redesigned Appellants' PUD." As defendant argues, the record is clear that the application plaintiffs filed with the ZBA requested variances from area, frontage, and density requirements of the AG zoned property, and that the filing occurred after the referendum that defeated the PUD amendment to the zoning ordinance, i.e., after plaintiffs' property had reverted to its pre-amendment zoning classifications. Because no PUD determination from which to appeal existed at the time, plaintiffs' variance application was not an appeal from a PUD decision.

Plaintiffs argue that even assuming that their appeal to the ZBA did not involve a PUD, the ZBA still lacked subject-matter jurisdiction because § 28.02(a) of defendant's zoning ordinance provides that the ZBA "hear and decide appeals from and review any order, requirements, decisions, or

determinations made by any administrative official," and in this case there was no decision or determination by an administrative official. This argument also fails.

Under the TZA, zoning boards of appeal are authorized to grant variances from the requirements of a zoning ordinance:

> Zoning variances are generally granted or denied by the local board of zoning appeals. *See* MCLA 125.220, .290, .585, MSA 5.2961(20), .2963(20), .2945. Townships have authority to grant variances under the following provision of MCLA 125.293, MSA 5.2963(23):
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> > [. . . .] Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals . . . may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done.
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> *Johnson v Robinson Township*, 420 Mich 115, 123, 359 NW2d 526, 530 (1984); *Compton Sand & Gravel Co v Dryden Township*, 125 Mich App 383, 396, 336 NW2d 810, 815 (1983). [Cameron, Michigan Real Property Law, § 23.12, p 1070.]

The TZA provides that a ZBA "shall hear and decide all matters referred to it or upon which it is required to pass under an ordinance adopted pursuant to this act." MCL 125.290; MSA 5.2963(20). Pursuant to its statutory authority under the TZA, defendant authorized its ZBA to grant variances through § 28.04 of its zoning ordinance, which provides that the Board "shall have the power to hear and decide . . . any request for interpretation of the Zoning Ordinance, requests for variances and decide any special questions on which the Board is authorized to pass." The TZA further provides that ZBA's "may impose conditions with an affirmative decision pursuant to section 16d(2)." MCL 125.293; MSA 5.2963(23). Section § 16d(2) of the TZA provides that the conditions may include conditions "to ensure compatibility with adjacent uses of land." Section 28.04 of defendant's zoning ordinance authorizes the ZBA to grant variances such as those granted in this case, i.e., involving area, frontage and density requirements, and to grant less of a variance than requested by the applicant.

Thus, because plaintiffs' request for variances is improperly characterized as an appeal, and the ZBA was authorized to consider and act on plaintiffs' variance application, the variances, which plaintiffs may choose to ignore altogether, are not void as a matter of law and the trial court did not err in taking the variances into account in its takings analysis.

III

Plaintiffs next advance a substantive due process challenge, arguing that no legitimate governmental interest is advanced by the present AG zoning classification, and that the referendum's results and AG zoning arbitrarily and capriciously exclude other types of legitimate land use. Plaintiffs assert that the referendum's rejection of the PUD rezoning constituted a taking because it deprived them

of their PUD zoning, necessitated a stop of all infrastructure construction work then in progress, and deprived them of their legitimate investment-backed expectations.

A zoning ordinance challenge on substantive due process grounds requires the following proof: (1) that no reasonable governmental interest is 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. *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Three basic rules of judicial review apply:

> (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. [*Frericks, supra* at 594, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

Plaintiffs argue that the trial court erred in concluding that defendant had a reasonable interest in preventing incompatible land uses because both single-family residences and intensive agricultural operations are permitted uses in the AG zone, thus, by definition, there is no incompatible use at issue. They further argue that their expert land-planner testified that the zoning ordinance demonstrates that continued AG zoning is inappropriate when public water and sewer become available, and that that position is supported by the planning commission and township board's approvals of the PUD rezoning. Plaintiffs argue that their expert land-planner testified that the PUD met defendant's 1980 master-plan goal of increasing the supply of land available for residential development and encouraging PUD housing, and met the 1996 master plan goals. Plaintiffs argue that their appraiser testified that plaintiffs' highest and best use was for residential development.

The record establishes that plaintiffs' land is immediately adjacent to the east boundary of an intensive turkey farm operation that Harley Sietsema purchased in 1979, ten years before plaintiff purchased the property at issue. The Sietsema farm processes about 200,000 turkeys a year, and houses structures that include barns, equipment storage and manure recycling storage buildings, grain bins, and dryers which operate twenty-four hours a day. Sietsema operates approximately twenty vehicles, including seven semi-tractors, bulldozers, combines, and pick-up trucks. Chemicals are applied to the field that is contiguous to plaintiffs' east boundary line, where crops are grown and turkey manure is spread. There was testimony that the farm generates noise, odors, dust, and chemicals. To protect the turkeys, Sietsema implemented a "bio security system," pursuant to which no one is permitted to enter the turkey barns without showering, changing clothes, and using disinfectant on their shoes.

The zoning ordinance pertaining to an AG district provides for certain permitted uses as a matter of right, including single-family residences with lots of not less than one acre and frontage of not less than 150 feet, and:

A. Farms for both general and specialized farm operations, including the following agricultural activities:

1. crop production, including berry farms, row crops, orchards, field crops, grain, hay, pasturelands and vineyards.

2. commercial animal raising . . .

3. farm buildings designed and constructed to store implements, hay, grain, poultry . . .

4. wholesale nurseries . . .

5. egg hatcheries.

6. confined animal feeding operations and intensive animal raising.

* * *

C. Conservation area for flora or fauna, forest preserve, game refuge.

D. Parks or recreation areas owned or operated by a government agency.

E. Permitted Accessory Uses.

1. Uses customarily accessory to farm operations.

2. Permitted accessory uses and buildings . . .

3. Home occupation as an accessory to a permitted use . . .

F. Adult foster care small group home, licensed . . .

The TZA recognizes as legitimate governmental interests the goals of insuring compatibility of adjacent uses of land, and insuring that the land use be consistent with public health, safety, and welfare. MCL 125.286d(2); MSA 5.2963(16d). The 1996 Master Plan recommends that incompatibility between residential developments and adjacent agricultural land uses be addressed by a number of zoning techniques, including the use of open space. Defendant's community planning expert, Paul LaBlanc, testified at trial that the zoning of plaintiffs' property advanced several governmental interests, including to meet the citizens' needs for food and fiber, to ensure the appropriate location and relationships of land uses to one another, and to protect the public health, safety and welfare. LaBlanc opined that the zoning ordinance, as modified by the variances, was consistent with defendant's 1996 Master Plan. Dr. David Skjaerlund, Executive Director for the Rural Development Council of the Michigan Department of Agriculture, testified that the zoning ordinance reasonably addressed defendant's interest in reducing the incompatibilities brought about by placing a residential development next to an established agricultural operation. He testified that it was inappropriate to locate seventy homes in a high-density

fashion within fifty feet of a very intensive livestock operation, and that his experience was that when these two property uses are adjacent to one another, conflicts arise in the form of nuisance complaints from residential neighbors.

Taking into account the evidence plaintiffs presented, the trial court concluded that there was a clear and compelling governmental interest in preventing incompatible land uses and that a closely adjacent residential development would be highly incompatible with the turkey-farm operation. The record supports that defendant determined that a reasonable balance of land uses could be reached by limiting the density and number of lots on plaintiffs' AG property to twenty one-acre lots, or by allowing plaintiffs, through the variance, to increase the density and number of lots, provided that they left an open space separating the residences from the adjacent turkey farm. Defendant also adopted as a condition to the variance a sunset clause that would terminate the open space requirement after the adjacent property ceased being used for intensive agricultural operations. There was ample trial testimony to support the trial court's findings of incompatibility, and that the AG zoning of the property reasonably served to decrease that incompatibility. The record supports the trial court's determination that plaintiffs failed to prove that there is no room for legitimate difference of opinion on the reasonableness of the zoning of their property. The trial court properly determined that plaintiffs' substantive due process claim fails.

To the extent plaintiffs argue that the referendum was the equivalent of an arbitrary and capricious denial of the PUD, this argument also fails. The PUD provided for a buffer between the turkey farm and the lots adjacent to it. Although the existing zoning permitted the development of lots immediately adjacent to the turkey farm, it minimized the number of such lots by requiring one acre/150 foot wide lots. It would not be arbitrary or capricious to reject the PUD on the basis that it allowed too many homes to be constructed too close to the turkey farm.

Plaintiffs also argue that even assuming that an incompatible use exists, defendant cannot impose an unconstitutional burden on plaintiffs to solve this problem, that requiring the 7.5 acre designated open space constitutes a taking without just compensation, and that neither the TZA nor the right to farm act, MCL 286.471 *et seq.*; MSA 12.122(1) *et seq.*, authorize defendant to require plaintiffs to provide land to be used to abate the noise, dust and odor nuisances from the Sietsema turkey farm.

A government may effectively "take" a person's property by overburdening that property with regulations. *K & K Construction v DNR,* 456 Mich 570, 576; 575 NW2d 531 (1998). The Fifth Amendment is violated "when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" *Lucas v So Carolina Coastal Council,* 505 US 1003, 1016; 112 S Ct 2886; 120 L Ed 2d 798 (1992); *K & K Construction, supra* at 576. In determining whether zoning regulation effects a taking, the owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned. *Bevan v Brandon Twp,* 438 Mich 385, 403; 475 NW2d 37 (1991). The diminution of property value by application of regulations, without more, does not amount to an unconstitutional taking. *Paragon, supra* at 579 n 13, citing *Penn Central Trans Co v New York,* 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

Plaintiffs' argument that the 7.5 acre designated open space requirement constituted a taking without just compensation overlooks a principle fundamental to takings analysis—the "nonsegmentation" principle:

> This principle holds that when evaluating the effect of the regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. Courts should not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Rather, we must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel. [*K&K Construction, supra* at 578-579.]

Plaintiffs are only required to maintain the open space if they choose to use the variance option. The variance offers plaintiffs additional flexibility in the use of their property; they need not use the variance.

The zoning ordinance as applied to plaintiffs' property does not effect an unconstitutional taking. As found by the trial court, the AG-zoned parcel could be used for agricultural purposes or residential use under the AG zoning:

> . . . . Of the original Knoper farm, plaintiff made a gift of the corner piece to his mother's charity ($20,000) and leased the two houses for an unspecified fee and also leased the farm land. Defense witness James Crum testified the soils are suitable agriculture [sic]: ornamental trees, turf grass, bent grass and sod for athletic fields. Harley Sietsema testified he paid over $3,000 an acre for similar farm land. Stanley Boelkins, a real estate appraiser, said there was a strong demand for non-farm rural homesites with acreage. To establish a taking plaintiffs must show the restrictions in the zoning ordinance preclude its use for any purpose to which it is reasonably adapted. This property has considerable value as farmland ($90,000) and $200,000 for rural residential (Boelkins).

Further, defendant did not impose the open-space requirement pursuant to the right to farm act or to abate the adjacent nuisance. Defendant did so as a condition of granting plaintiffs that which plaintiffs asked for. Again, plaintiffs are free to ignore the variances and develop the property without the buffer zone in according with the existing zoning.

Thus, plaintiffs' taking claims fail, as they did not establish that the zoning ordinance deprived them of economically viable use of the land. *K & K Construction, supra* at 576-577.

IV

A

Initially, we note that defendant asserts that this Court lacks jurisdiction over the appeal. We find it unnecessary to address the substance of defendant's argument in this regard in light of the Supreme Court's order of remand to this Court.

Defendant also asserts that plaintiffs lack standing to appeal the ZBA decision because they are not aggrieved parties. "In order to have any status in court to challenge the actions of a zoning board of appeals, a party must be "aggrieved." *Unger v Forest Home Twp,* 65 Mich App 614, 617; 237 NW2d 582 (1975). A plaintiff must allege and prove that he suffered some special damages not common to other property owners similarly situated. Proof of general economic loss is not sufficient to show special damages. *Id.*

> Generally, an aggrieved party is one whose legal right is invaded by an action, or whose pecuniary interest is directly or adversely affected by a judgment or order. It is a party who has an interest in the subject matter of the litigation. [See, e.g., *In re Freeman Estate,* 218 Mich App 151, 155; 553 NW2d 664 (1996).] While this definition requires that the court examine the subject matter of the litigation in each case and then determine a party's interest in it, certain general rules are applied to all situations.
>
> The first obvious rule is that a person who is not "aggrieved" by a judgment or order cannot be an aggrieved party. Somewhat less obvious, however, is the requirement that the party must be aggrieved by the act of the court, i.e., the judgment or order, and not by the party's own action. Thus a party who enters into a consent judgment, or agrees to the entry of a mediation award, or who actually receives the relief requested in the complaint is not an aggrieved party and has no further right of appeal. [7 Martin, Dean & Webster, Michigan Court Rules Practice, Rule 7.203 P 139.]

Defendant argues that because plaintiffs are not claiming that the ZBA should have granted them more relief than they received, they are not aggrieved. It argues that plaintiffs are requesting that this Court destroy the variance relief that defendant granted plaintiffs, which, defendant argues, increased the flexibility in their permitted use of the property by giving them more leniency than the applicable area, frontage and density requirements would have permitted them under the zoning ordinance. We disagree.

While plaintiffs were granted some relief through the variances, they were not granted the full relief requested. Plaintiffs contend that their legal rights and pecuniary interests have been affected by the trial court's determination. Plaintiffs argue that the ZBA's decision-making process deprived them of procedural due process, and that its imposition of the condition that plaintiffs maintain a 7.5 acre open space constituted a temporary taking without just compensation. Plaintiffs contend their pecuniary

interest was directly affected because before the ZBA granted the variance and under the existing AG zoning, plaintiffs could build houses on the 7.55 acre open space, while the ZBA's condition requiring the open space prohibits plaintiffs from using the 7.55 acres for building houses until one year after the turkey farmer decides to cease operating the farm.

B

Plaintiffs assert that the ZBA's decision was not supported by competent, material and substantial evidence, and the circuit court erred in concluding otherwise.

A reviewing court must defer to determinations of fact made by a ZBA if supported by competent, material and substantial evidence on the whole record. *Macenas v Michiana*, 433 Mich 380, 395; 446 NW2d 102 (1989); *Gordon v Bloomfield Hills*, 207 Mich App 231, 232; 523 NW2d 806 (1994). This Court "must give due deference to the agency's regulatory expertise and may not 'invade the province of exclusive administrative fact finding by displacing an agency's choice between two reasonably differing views.'" *Davenport v Grosse Pointe Farms Zoning Bd*, 210 Mich App 400, 405-406; 534 NW2d 143 (1995), quoting *Gordon, supra* at 232.

Plaintiffs argue that the ZBA's utilization of a two-step process to decide plaintiffs' appeal "evidences an intent to separate the collection of evidence, which occurs during or before the public hearing, from the decision-making process, which occurs during the public meeting." They argue that the first step was the January 9, 1997 public hearing, at which plaintiffs' counsel explained the need for variances and residents expressed their thoughts. Plaintiffs note that no spokesperson of defendant addressed the ZBA about plaintiffs' proposed development, nor did defendant submit documentary evidence, other than the staff report. The second step, according to plaintiffs, was the February 3, 1997 public meeting, during which defendant's zoning administrator presented his twenty-page staff report and recommendation to the ZBA and answered questions, and the ZBA voted later in the meeting to adopt the report and recommendations. Plaintiffs argue that the staff report contained findings of fact that were not supported by evidence presented at the public hearing, and that the ZBA had no evidentiary basis for elevating those unsupported statements into findings of fact. Plaintiffs note that the ZBA received no evidence that plaintiffs' AG-zoned property could reasonably be used for agricultural purposes or for an adult foster care small group home, and no evidence regarding the water table level, soil, feasibility of using septic systems on the AG-zoned land, costs to develop plaintiffs' property with a 7.55 acre open area, the rationale for requiring the 7.55 acre open area as a buffer from the adjacent turkey farm, and the effectiveness of deed disclaimer statements.

After the staff report was received into the record by the ZBA, the zoning administrator at the February 3, 1997 meeting covered the items in the report and the board discussed the facts the administrator presented, before the ZBA adopted the report's findings of fact. Plaintiffs, who were represented by counsel, made no objections. There is ample record evidence to support the ZBA's determination. Plaintiffs' reply brief does not dispute that plaintiffs acknowledged during the public hearing that their property in the AG district had been and was then being used for asparagus production. Nor do plaintiffs dispute that their site plan contained the information needed to determine the economic feasibility of developing lots under the variance. Plaintiffs do not dispute that they

presented no evidence that the AG property could not be used for an adult foster care home. Nor do plaintiffs dispute defendant's contention that the zoning ordinance, master plan, plaintiffs' site plan, and testimony presented below contained facts to support the ZBA's determination. Thus, plaintiffs' claim fails.

Plaintiffs also assert that the ZBA failed to provide them with procedural due process during the February 3, 1997 public meeting when the staff report was introduced, discussed, and relied upon.

In general, due process requires notice of the nature of the proceeding, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. *Klco v Dynamic Trading Co*, 192 Mich App 39, 42; 480 NW2d 596 (1991). The opportunity to be heard does not require a full trial-like proceeding, but does require a hearing to the extent that a party has to know and respond to the evidence. *Id.*

Defendant argues, and plaintiffs do not dispute, that plaintiffs in the instant case initiated the proceedings by filing a variance application, received notice of the proceedings, and were present at both hearings with counsel. Plaintiffs were given opportunity to provide information with their variance application and presented their position at the January 9, 1997 hearing. Plaintiffs do not dispute that they received a copy of the staff report prepared by defendant's township zoning administrator at the beginning of the February 3, 1997 meeting, but did not present questions to the administrator. Plaintiffs did not object when the motion was made for the ZBA to approve the proposed resolution. After the resolution was adopted, plaintiffs asked to make a statement, and the board advised them to put the statement in writing. Plaintiffs did not do so. The record does not support plaintiffs' argument that they were not given opportunity to challenge the staff report's contents.

Plaintiffs' final argument is that the ZBA's decision is not a reasonable exercise of discretion as required under the TZA. Plaintiffs argue that nothing in the TZA or defendant's zoning ordinance allows the ZBA to "redesign, reconfigure, downsize, or rezone plaintiffs' proposed development or to impose a 7.55 acre open area." Plaintiffs argue that the 7.55 acre open space "is an invalid exercise of the police power because it grants the turkey farmer effective control over when that land may be used for residential purposes." Plaintiffs argue that the ZBA abused its discretion by effectively rezoning plaintiffs' land under the guise of granting a variance.

These arguments appear to be reassertions of arguments addressed and rejected above. Defendant was authorized under the TZA and zoning ordinance to consider plaintiffs' variance application and to grant the variances it did. The variances granted did not take away rights from plaintiffs. Plaintiffs are free to develop their entire property as originally zoned, into one-acre residential lots. If plaintiffs choose to use the variances, they will not be able to build a structure or road within the designated open space, *in exchange for* being able to build additional lots with smaller permitted widths and area than under the original zoning. The sunset clause plaintiffs object to is a benefit to plaintiffs, since elimination of the sunset clause would make the conditions permanent. The sunset clause is tied to the conflicting land use, it is not an unlawful delegation of authority to the turkey farmer. As discussed previously, there is ample record support for the court's finding that plaintiffs' proposed residential development would have a negative impact on the turkey farm operation.

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

[1] This application was assigned docket number 212219.

[2] This application was assigned docket number 212532.

[3] This appeal of right was assigned docket number 212531.

[4] The defendant in *Paragon* denied the plaintiff's request to rezone a property parcel from single-family residential to mobile home district zone. The plaintiff brought suit alleging that the property had no economic potential for development as zoned, the highest and best use would be for mobile home development, that the defendant's denial of its rezoning request unconstitutionally deprived it of its property in violation of due process, and that the zoning ordinance as applied to the property was unreasonable, confiscatory, and discriminatory. 452 Mich at 572. The defendant filed a motion for summary disposition on the basis that the plaintiff had not sought a use variance from the ZBA and thus had not obtained a final decision regarding the potential uses of the property. The circuit court denied the motion and at trial held that the zoning ordinance as applied effected an unconstitutional taking. This Court reversed on the basis that the constitutional claim was not ripe because the plaintiff had not sought a variance from the ZBA and had not brought a state inverse condemnation claim. *Id.* at 573. The Supreme Court affirmed, concluding that Paragon's constitutional claim was not ripe for review because it failed to obtain a final decision from which an actual or concrete injury could be determined:

> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality. *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65, 70; 498 NW2d 1 (1993), citing *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108; 87 L Ed 2d 126 (1985).
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> > [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . .
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> * * *

The finality requirement aids in the determination whether a taking has occurred by addressing the actual economic effect of a regulation on the property owner's investment-backed expectations. As noted in *Williamson*, factors affecting a property owner's investment-backed expectations "simply cannot be

evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." [*Paragon, supra* at 576-579.]

[5] Section 28.02 of the zoning ordinance provides in pertinent part:

> In addition to the duties and powers prescribed in the previous sections of this ordinance, the Board of Appeals shall hear and decide all matters relating to the following:
>
> A. The Board of Appeals shall hear and decide appeals from and review any order, requirements, decisions, or determinations made by any administrative official charged with the enforcement of any provisions of this ordinance, except that the Board of Appeals shall not hear and decide appeals from any decision or order of the Planning Commission with respect to applications for special use permits or planned unit developments, nor shall it hear appeals from the decisions of the Township Board regarding the same matters.