# STATE OF MICHIGAN

# COURT OF APPEALS

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ROBERT L. ROCHON and HELEN M. ROCHON,

Plaintiffs-Appellees,

v

CHIPPEWA TOWNSHIP and CHIPPEWA ZONING BOARD OF ZONING APPEALS,

Defendants-Appellants.

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UNPUBLISHED
September 7, 2004

No. 247465
Isabella Circuit Court
LC No. 00-002002-CZ

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendants appeal as of right from an order determining, on the basis of stipulated facts, that plaintiffs' property had been taken under the Fifth Amendment, US Const, Am V, entitling plaintiffs to just compensation. Plaintiffs own two parcels of land totaling 2.24 acres that are subject to a zoning ordinance that requires a minimum of five acres to construct a house. We reverse and remand.

"[T]here is no single standard of review that applies in zoning cases." *Macenas v Village of Michiana*, 433 Mich 380, 394; 446 NW2d 102 (1989). We review de novo questions of law. *Jude v Heselschwerdt*, 228 Mich App 667, 670; 578 NW2d 704 (1998). We review a trial court's findings of fact for clear error and will not reverse unless we are left with a definite and firm conviction that a mistake has been made. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000).

Defendants first argue that the trial court applied an outdated and incorrect standard to determine whether the zoning ordinance here was a taking. The trial court relied on *Troy Campus v City of Troy*, 132 Mich App 441; 349 NW2d 177 (1984) and concluded that the relevant question was whether the zoning classification at issue here had precluded any use of the land for which it is reasonably adapted. Defendants argue that *Troy Campus* has been superseded by later precedents. We agree.

The relevant law here was recently summarized by our Supreme Court in *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998), a unanimous decision. The Court stated that a land use regulation effectuates a taking "where the regulation denies an owner economically viable use of his land." *Id*. at 576.[1] Such a denial can be either (a) "a 'categorical' taking, where the owner is deprived of 'all economically beneficial or productive use of land'" or (b) "a taking recognized on the basis of the application of the traditional 'balancing test'" wherein the reviewing court must engage in an ad hoc analysis "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." *Id*. at 576-577 (citations omitted). This recitation of the applicable law has more recently been reiterated with approval in *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23-24; 614 NW2d 634 (2000).

The *K & K* Court further made it clear that, for a categorical taking to exist, there must be a denial of *all* economically beneficial or productive use of the land at issue. *K & K*, *supra* at 586. That is a different standard than whether any use of the land for which it is reasonably adapted has been precluded, as stated in *Troy Campus* and applied by the trial court here. We remand for further fact finding by the trial court and a decision regarding the applicability of the "categorical taking" standard announced in *K & K*. Further, the trial court should consider whether, alternatively, the regulation at issue here is a taking on the basis of the application of the "balancing test" described in *K & K*.

Further, before making those determinations, the trial court should "address an important preliminary matter" and "determine which parcel or parcels owned by plaintiffs are relevant for the taking inquiry." *Id*. at 578. Defendants argue that the trial court should have examined the circumstances surrounding plaintiffs' ownership of surrounding property (totaling 12.31 acres) rather than just the 2.24 acres for which plaintiffs sought a variance from the zoning ordinance. We agree.

Plaintiffs argue that the stipulated facts here settled this matter, but the stipulation merely established that "the subject land in issue" was the two parcels (2.24 acres) that were subject to the variance request. In determining whether the zoning regulation as to those parcels constituted a taking, plaintiffs' ownership of surrounding parcels, either now or in the past, may be relevant. As noted in *K & K*, "factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit . . . and no doubt many others would enter the calculus." *Id*. at 580 (citation omitted). "The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment." *Id*. For example, even assuming that, as plaintiffs have alleged, they no longer

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[1] A taking can also occur where a regulation does not substantially advance a legitimate state interest, *id*., but plaintiffs do not argue that the regulation at issue here fails to do so. Accordingly, there is nothing to defendant's argument that the trial court improperly failed to presume the ordinance validly advanced a legitimate state interest as it would have been required to do had this been the issue raised. *Bevan v Brandon Twp*, 438 Mich 385, 398; 475 NW2d 37 (1991).

own surrounding parcels, it is not clear when they were sold, especially in relation to the date that the zoning ordinance became effective. Our Supreme Court has reasoned that a property owner cannot transform an imminent zoning regulation into a taking simply by transferring a parcel of property away and claiming that the regulation, when imposed, constitutes a taking because of its disproportionate effect on the smaller parcel retained. *Adams*, *supra* at 25.

We are certainly not suggesting that this scenario, in fact, occurred here. Rather, we mention it as an illustration of the kind of fact question that must be considered for a proper determination of the taking question at issue here. The stipulated facts submitted by the parties to the trial court are insufficient in this regard.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette