STATE OF MICHIGAN

COURT OF APPEALS

BROOKSIDE ACQUISITIONS, LLC, GRANT-PERRY DEVELOPMENT COMPANY, LLC, MARTIN BADER, IRENE BADER, SOUTH LYON LIMITED PARTNERSHIP-II, SHIRLEY WAYBURN, Individually and as Trustee of the SHIRLEY WAYBURN Revocable Living Trust, WAYBURN FAMILY LIMITED PARTNERSHIP, GERALD SUCHER, JEAN SUCHER, RICHARD SUCHER, CECILIA SUCHER, KATHY DIANE CISSE, CAROL HOPE DUBRIN, and CANDICE SUCHER SAVAGE,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF LYON,

Defendant-Appellee.

UNPUBLISHED
November 17, 2005

No. 257416
Oakland Circuit Court
LC No. 2003-051158-CZ

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Plaintiffs requested rezoning of a large parcel of land in Lyon Township for the purpose of developing a mobile home park. After defendant's township board denied the rezoning request, plaintiffs filed a four-count complaint in circuit court.[1] The trial court granted

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[1] In Count I, plaintiffs alleged that defendant's refusal to rezone plaintiffs' property deprived them of their rights to own and make lawful, reasonable use of the property, engage in a lawful business, and to be free from unlawful interference in the development of a manufactured housing community. Plaintiffs alleged that defendant's actions were wholly arbitrary, capricious, unreasonable, and discriminatory, violating their rights to due process and equal protection. In Count II, plaintiffs alleged that defendant's refusal to rezone the property deprived them of any reasonable use of the property, constituting a taking without just compensation. In Counts III and IV, plaintiffs alleged that defendant violated the Township Rural Zoning Act, specifically, MCL 125.597a and MCL 125.273, respectively.

defendant's motion for summary disposition under MCR 2.116(C)(8) and (10), and plaintiffs appeal as of right. We affirm.

The property at issue is zoned R-1.0 (residential or agricultural use). Plaintiffs sought to have the property rezoned to a mobile home park district to enable development of a manufactured housing community containing 709 units. Among the many reasons cited by defendant's township board for denying plaintiffs' rezoning request were that (1) the rezoning would interfere with defendant's master plan, (2) the rezoning would conflict with defendant's future land use map, (3) a high-density development would be inconsistent with the rural-residential character and residential-agricultural zoning of the area, (4) defendant currently has a higher proportion of mobile home units than most of the surrounding communities and the proposed development would not correct any inequitable situations currently existing in the community, and (5) the proposed development would burden the existing infrastructure.

Defendants moved to dismiss plaintiffs' claims under MCR 2.116(C)(8) and (10). The trial court concluded that defendant's present zoning classification constituted a rational and reasonable exercise of its police power to regulate land uses within the township, that plaintiffs could not show that the present zoning classification deprived plaintiffs of all economically beneficial uses of their property, and that plaintiffs could not establish a violation of the Township Zoning Act, MCL 125.271 *et seq.*, because there were already two other existing mobile home parks within the township. Accordingly, the court granted defendant's motion for summary disposition.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.*

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiffs first argue that the trial court erred by dismissing their claim alleging a violation of their rights to substantive due process and equal protection. In *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003), this Court addressed the tests to be used for evaluating equal protection and substantive due process claims:

> The state and federal constitutions guarantee equal protection of the laws. US Const, Am XIV; Const 1963, art 1, § 2; *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). When no suspect or somewhat suspect classification can be shown, the plaintiff has the burden of establishing that the statute is arbitrary and not rationally related to a legitimate governmental interest. *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). This test specifically

applies to zoning ordinances. *Cryderman v Birmingham*, 171 Mich App 15, 26; 429 NW2d 625 (1988).

> The state and federal constitutions also guarantee that no person will be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Marlin v Detroit (After Remand)*, 205 Mich App 335, 339; 517 NW2d 305 (1994). Unless a fundamental right is involved, the statute need only be rationally related to a legitimate governmental interest. *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 549; 656 NW2d 215 (2002). The essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an *arbitrary* exercise of power. *Id*.

Zoning ordinances must be reasonable to comply with due process. *Landon Holdings, supra* at 173. In order to prove a substantive due process claim, a plaintiff must show that (1) there is no reasonable governmental interest being advanced by the present zoning classification, or (2) an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of land use on the property in question. *Frericks v Highland Twp,* 228 Mich App 575, 594; 579 NW2d 441 (1998).

"Zoning regulations are valid where there is a '"rational relation to the public health, safety, welfare and prosperity of the community"' and where the regulations are '"not such an unreasonable exercise of [the police] power as to become arbitrary, destructive or confiscatory."'" *Id*. at 607-608 (citations omitted). An ordinance is presumed valid and the burden is on the challenger to prove "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." *Id*. at 594, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992). "The use of surrounding areas, traffic patterns, and available water supply and sewage disposal systems certainly are relevant considerations in the reasonableness of a particular exclusion." *Johnson v Lyon Twp,* 45 Mich App 491, 494; 206 NW2d 761 (1973)

Plaintiffs argue that the trial court improperly concluded as a matter of law that all zoning classifications are ipso facto constitutional. A review of the trial court's decision reveals that it did not hold that all zoning classifications are constitutional regardless of what evidence might be developed, but rather that "*the* zoning classifications" at issue in this case were a rational and reasonable exercise of defendant's police power and had a rational relationship to public health, safety, and welfare, by regulating the location and density of housing in the township.

Plaintiffs also contend that there were genuine issues of material fact that precluded summary disposition of their due process and equal protection claims under MCR 2.116(C)(10). We disagree. Plaintiffs assert that defendant's decision to enforce the R-1.0 zoning ordinance, and to reject their request for rezoning, was primarily based on three factors: (1) the requested rezoning would have an adverse impact on adjacent roads, (2) the requested rezoning would be incompatible with defendant's unadopted sewer master plan, and (3) the requested rezoning would be inconsistent with defendant's master plan and future land use map. According to plaintiffs, defendant's reliance on these factors was unreasonable, arbitrary, and capricious, and

there are genuine issues of material fact whether these factors support defendant's decision to deny plaintiffs' rezoning request. Initially, we note that these were not the only reasons given by defendant's township board for denying plaintiff's rezoning request. In any event, defendant's reliance on these factors was not arbitrary, capricious, or unreasonable.

Although plaintiffs prepared a traffic study to assess the impact of their proposed development on the immediate area, Christopher Doozan, an urban planner who analyzed the rezoning request for defendant, concluded that the study underestimated the impact on traffic and roads surrounding the proposed development. While Doozan was not a traffic engineer, he regularly considered the impact of traffic when reviewing rezoning requests, and claimed he had reviewed such information hundreds of times while performing his job.

We find no merit to plaintiffs' argument that the trial court improperly resolved an issue of fact by accepting Doozan's opinions about the impact on traffic in the affected area. To prove a due process violation plaintiffs were required to show that defendant's decision was not based on a reasonable governmental interest or that the decision was purely arbitrary, capricious, and unfounded. The trial court did not make any factual determination relative to Doozan's opinions or plaintiff's traffic study, but observed that defendant relied, in part, on Doozan's recommendations, which clearly were not unreasonable or arbitrary. In recommending that defendant not rezone the property, Doozan offered several specific reasons why he believed the project would adversely impact the surrounding area. Plaintiffs were required to show that there was no room for a legitimate difference of opinion regarding whether the existing zoning was reasonable. Doozan provided a reasonable explanation for why he believed plaintiffs' traffic study did not support rezoning because of shortcomings with plaintiff's study.

Plaintiffs also argue that it was unreasonable for defendant to deny rezoning based on an evaluation of the project's impact on an unadopted sewer plan. We disagree. Although the sewer plan had not been formally adopted, defendant had been following the plan for three or four years and applying it to other developments. This case is factually distinguishable from *Christine Bldg Co v City of Troy*, 367 Mich 508; 116 NW2d 816 (1962). In that case, Troy's zoning ordinance imposed a 21,780-square-foot-minimum lot size requirement on parts of the city, purportedly to limit the density of the population in proportion to the sewer capacity of each area. The Supreme Court affirmed the trial court's finding that the zoning ordinance was unreasonable and arbitrary because the city allowed 8,500-square-foot lots in other areas where sewers did not exist, but imposed the 21,780-square-foot-minimum lot size requirement at issue in the part of the city where a sewer system existed. *Id.* at 518. Here, defendant had uniformly applied its sewer plan and limited high density developments throughout the township so as not to severely limit the system's capacity in the future.

Plaintiffs further argue that defendant unreasonably denied their rezoning request because no property in the township could satisfy the five factors identified in the ordinances as being necessary for a mobile home park. But at least one other site identified by Doozan was better suited for development as a mobile home park. Although the site lacked an existing sewer system, there were plans to extend the sewer to that area. The fact that at least one other site was better suited for this purpose is evidence of the reasonableness of defendant's decision to deny rezoning to plaintiffs. *Johnson, supra* at 494. More importantly, defendant had already allotted a significant portion of its housing to mobile homes in two other existing parks in the township.

Defendant's determination that further expansion of this type of land use was not necessary in the township was not unreasonable, arbitrary, or capricious.

For the same reasons they offer in support of their due process claim, plaintiffs argue that the trial court also erred in dismissing their equal protection claim. The analysis of both claims is essentially the same. *Landen Holdings, supra* at 177. As previously explained, plaintiffs have not shown that defendant unreasonably denied their request for rezoning, or that defendant's decision was arbitrary or capricious. Rather, defendant reasonably denied the rezoning request for reasons that were rationally related to its legitimate interest in regulating the location and density of housing within the township. Accordingly, plaintiffs cannot establish a violation of their right to equal protection. *Id*. at 173, 176.

Next, plaintiffs argue that the trial court erred in summarily dismissing their takings claim. We disagree.

Plaintiffs alleged that defendant's existing zoning ordinances precluded any economically viable use of their property, resulting in a confiscatory taking of their property. Regulation of land that goes too far can constitute a taking. *K & K Construction, Inc v Dep't of Natural Resources,* 456 Mich 570, 576; 575 NW2d 531 (1998). In general, a taking may exist "(1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land." *Id*.

Plaintiffs argue that defendant's zoning ordinance does not advance a legitimate state interest, again relying on the arguments they make in support of their due process and equal protection claims. As previously discussed, defendant's enforcement of its existing zoning ordinance and refusal to rezone the property to a mobile home district advances a legitimate state interest by limiting the density of housing within the township. Accordingly, plaintiffs' claim was properly dismissed on this theory.

Plaintiffs further argue that they have been deprived of all economically viable use of their land. As this Court explained in *K & K Construction, supra* at 576-577:

> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," *Lucas v South Carolina Coastal Council,* 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).
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> In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas, supra* at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good. . . ." *Id*. at 1019 (emphasis in original). In the latter situation, the balancing test, a

> reviewing court must engage in an "ad hoc, factual inquir[y]," 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. *Penn Central*, 438 US 124.

Plaintiffs submitted evidence that it would not be economically viable to develop their property to a maximum density of 130 residential lots. However, plaintiffs failed to show that this was the only means of developing the property, and that all other permissible developments were not economically viable. At most, plaintiffs have demonstrated that their property would be worth more if rezoned, not that it is currently worthless. "A zoning ordinance is not unconstitutional merely because the land would be worth more if rezoned." *Albert v Kalamazoo Twp*, 37 Mich App 215, 217; 194 NW2d 425 (1971). Plaintiffs have not shown that the current zoning ordinance does not prevent them from making reasonable use of their property or render it worthless. *Id*. The trial court properly granted summary disposition for defendant on this claim.

Plaintiffs also argue that the trial court erred by not permitting them to amend their complaint. When a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), it must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless amendment is not justified or it would be futile to do so. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001); MCR 2.116(I)(5). An amendment is considered futile if it merely restates allegations already made or adds new allegations that fail to state a claim. *Yudashkin*, *supra.* A trial court's denial of a motion to amend is reviewed for an abuse of discretion. *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). Here, plaintiffs did not explain below, nor do they explain on appeal, how they could have amended their complaint to correct the deficiencies in their claims. Thus, they have not demonstrated an abuse of discretion by the trial court.

Plaintiffs additionally argue that, contrary to what defendant argued below, their claims are ripe for adjudication, and further, that the corporate plaintiffs, Brookside Acquisitions, L.L.C., and Grant-Perry Development Company, L.L.C., have standing to participate in this action as holders of an option to purchase an interest in the property. The trial court did not reach these issues, choosing instead to address plaintiffs' claims on the merits. An issue not decided by the trial court is not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Because we conclude that the trial court correctly granted summary disposition for defendant on the merits of plaintiffs' claims, we too find it unnecessary to address these issues, and decline to do so. *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 555; 672 NW2d 513 (2003).

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper