STATE OF MICHIGAN

COURT OF APPEALS

DENNIS DUBUC and CAROL DUBUC, Plaintiffs-Appellees,	UNPUBLISHED July 15, 2008
v	No. 277420 Court of Claims
DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellant.	LC No. 05-000105-MZ

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by leave granted an order of the circuit court granting partial summary disposition in favor of plaintiffs. We affirm and remand.

In 2002, plaintiffs applied for a permit under the Wetlands Protection Act, MCL 324.30301 *et seq*. to fill wetlands on their property located in Kalkaska County. The property is a 1.73-acre lot in a residential neighborhood. Plaintiffs intended to build a home on the lot. Defendant denied the permit. Plaintiffs filed the instant action, seeking damages on a theory of a taking of real property. Plaintiffs' complaint alleged both a categorical taking and a regulatory taking under the balancing test of *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). The trial court granted defendant partial summary disposition, dismissing the categorical taking claim. This decision is not before us on this appeal. Thereafter, the trial court granted summary disposition in favor of plaintiffs on the regulatory taking claim on the issue of liability. The trial on damages was stayed pending the outcome of this appeal.

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 188; 597 NW2d 817 (1999). In reviewing a motion brought under MCR 2.116 (C)(10), we evaluate the evidence actually proffered in support or opposition of a claim to determine whether there is a genuine issue of material fact to be presented to the jury or whether the moving party is entitled to judgment as a matter of law. *Id.* at 119-121.

The Michigan Supreme Court described the *Penn Central* balancing test in *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 577; 575 NW2d 531 (1998), as follows:

> In . . . 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.

Before considering these factors, however, it must be determined which parcel or parcels are to be considered in determining if a taking has occurred:

> The first step in our analysis is to determine which parcel or parcels owned by the plaintiffs are relevant for the taking inquiry. The determination of what is referred to as the "denominator parcel" is important because it often affects the analysis of what economically viable uses remain for a person's property after the regulations are imposed. Plaintiffs urge us to focus our analysis only on parcel one, while defendant argues that we must look at all four of plaintiffs' parcels as a single unit.
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> One of the fundamental principles of taking jurisprudence is the "nonsegmentation" principle. This principle holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be view with respect to the parcel as a whole.
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> This Court has previously found the nonsegmentation principle applicable to two adjoining parcels of property with unity of ownership. [*K & K*, *supra* at 578-579.]

The determination of the appropriate denominator parcel, as *K & K*, *supra* at 580, explains, is factual in nature:

> Determining the size of the denominator parcel is inherently a factual inquiry. As explained in *Ciampitti v United States*, 22 Ct Cl 310, 318-319 (1991):
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> "Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.

Defendant argues that the trial court misapplied the nonsegmentation principle in looking only to the single lot at issue here as the denominator parcel. We disagree.

Defendant argues, somewhat disingenuously, that the proper denominator parcel is the entire collection of seventeen parcels that plaintiffs previously owned in the vicinity. Defendant,

however, conveniently ignores the fact that plaintiffs never owned all of these parcels at the same time. That is, it is not the case, as defendant would seem to like us to infer, that plaintiff once owned a larger tract of land and thereafter subdivided it into seventeen parcels, with the subject parcel being the last to be developed. Were this the situation, it would certainly weigh heavily in defendant's favor—the entire point of the nonsegmentation principle, as the Court in *K & K* explained, is to prevent a developer from developing and selling off all but the affected portion of a larger parcel and then claim that his (remaining) property has no economic value because of regulatory taking.

But *K & K* and *Ciampitti* also warn against looking at too broad of a parcel as that may disguise the effects of a regulatory taking. That is precisely what defendant would have us do here. Defendant's argument conveniently overlooks the fact that plaintiffs bought and sold these parcels in various individual transactions over the course of more than fifteen years, beginning with the purchase of a parcel on Hoiles Drive in 1985 upon which plaintiffs' personal residence stands. While it does appear that some of the seventeen parcels were originally part of a larger parcel that was subdivided, it would appear both that it was a previous owner that had platted the subdivisions and that plaintiffs had not bought the parcels as a group. Indeed, Dennis Dubuc's affidavit reflects purchases occurring in seven different years. In fact, according to the Dubuc affidavit, after 1994 plaintiffs only owned the parcel upon which their personal residence sits until the purchase of the parcel in 2001 that is the subject of this appeal. Furthermore, there is a limited degree of contiguity (some, but not all, of the parcels are contiguous) and, while presumably at some point in the past all were part of the same parcel, that is not the case at the time the subdividing began and plaintiffs began purchasing and developing the various lots.

In short, none of the factors identified in *K & K* and *Ciampitti* are present here with respect to the subject parcel. Plaintiffs acquired it after having divested themselves of all the remaining parcels in the area (save for their personal residence), it was never part of a larger parcel owned by plaintiffs, and although it is contiguous with some parcels that plaintiffs had previously owned, it is not contiguous with a parcel that plaintiffs owned contemporaneously with the subject parcel.

Indeed, to accept defendant's argument, we would have to create a rule that the appropriate "denominator parcel" should include all parcels that the landowner ever owned in the area even if not at the same time. Such a rule would create a disincentive to a developer ever revisiting an area that they previously had developed lest they inadvertently create a larger "denominator parcel." This is not the purpose served by the nonsegmentation rule. By keeping in mind that the nonsegmentation rule is designed to prevent the owner of a larger parcel from creating a taking where none otherwise exists by subdividing the larger parcel in such a way that the wetlands are isolated into a smaller parcel that is thus taken, we see that the rule has no application here. Plaintiffs simply did not isolate a portion of their larger property so as to create a taking.

For these reasons, we conclude that the trial court did not improperly overlook the appropriate application of the nonsegmentation principle. Rather, it has no applicability here. Simply put, the appropriate denominator parcel is the single lot at issue here.

Having determined that the parcel itself is the appropriate denominator parcel, we may now turn our attention to the three-prong balancing test. This Court, in *K & K Constr, Inc v*

Dep't of Environmental Quality, 267 Mich App 523, 529; 705 NW2d 365 (2005) (*K & K II*), restated the test as follows:

> Stated another way, if the land-use regulation, like traditional zoning and wetland regulations: (1) is comprehensive and universal so that the private property owner is relatively equally benefited and burdened by the challenged regulation as other similarly situated property owners, and (2) if the owner purchased with knowledge of the regulatory scheme so that it is fair to conclude that the cost to the owner factored in the effect of the regulations on the return on investment, and (3) if, despite the regulation, the owner can make valuable use of his or her land, then compensation is not required under *Penn Central*.

With respect to the character of the government action (*Penn Central*) or the equally benefited burdened (*K & K II*) factor, this Court in *K & K II*, *supra* at 562-563, concluded that the far-reaching general applicability of the WPA weighs heavily against the finding of a regulatory taking. But, we agree with the trial court that the remaining factors weigh in favor of finding that a taking has occurred. With respect to the investment-backed expectations (*Penn Central*) and whether plaintiffs purchased with the knowledge of the regulatory scheme (*K & K II*), it is true that the WPA was in place well before plaintiffs purchased the parcel. While a factor to be considered, the fact that property was acquired after the regulatory scheme went into place alone does not resolve the inquiry in favor of defendant. *K & K II*, *supra* at 555. Here, the parcel is located in a residential area, with houses on either side, in an environment where defendant had granted similar permits in the past, including for the parcels on either side of the subject property. It was reasonable for plaintiffs to conclude that the subject parcel would be similarly treated and a permit issued.

Finally, there is the factor of the economic impact of the regulation (*Penn Central*), or as *K & K II* phrases it, whether the owner can make valuable use of the land despite the regulation. Plaintiffs' expert appraiser opined that, absent the regulation, the parcel was worth $27,500 and, with the regulation (i.e., denial of the permit), the parcel was unmarketable. Defendant essentially presents two arguments on this issue. First, defendant blatantly misrepresents the opinion of plaintiffs' appraiser. In its brief, defendants claims that plaintiffs' appraiser found that the lot has a value of $27,500 if the lot was undevelopable, a $7,500 increase over the purchase price. In fact, plaintiffs' appraiser opined that the lot was worth $27,500 if it was developable and worthless if it remained undevelopable due to the permit denial.

Defendant's second argument is even less persuasive. Defendant argues that the opinion of its expert should be accepted. But its expert based his opinion on the diminution of the value of all of the parcels in the area that plaintiffs ever owned. That is, it was based upon the presumption that all seventeen parcels constitute the appropriate denominator parcel, an argument that we have rejected. Moreover, that expert's opinion stated that the overall value of the parcels was $1,080,000 if the subject parcel is buildable, but only $1,030,000 if the subject parcel remains unbuildable. In other words, defendant's expert would seem to imply that the difference in value to the parcel is $50,000, even more so than that given by plaintiffs' expert.

In sum, we agree with the trial court that the effect of the regulation is to deny plaintiffs the complete economic use of the land.

For the above reasons, we conclude that the trial court did not err in concluding that there was a regulatory taking and granting summary disposition in favor of plaintiffs on the issue of liability. Therefore, the matter may proceed to trial on the issue of damages.

Affirmed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiffs may tax costs.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra