STATE OF MICHIGAN

COURT OF APPEALS

WOLVERINE COMMERCE, LLC, Plaintiff-Appellee,	UNPUBLISHED November 20, 2008
v	Nos. 278417, 282532 Washtenaw Circuit Court
PITTSFIELD CHARTER TOWNSHIP, Defendant-Appellant.	LC No. 05-000321-CH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order enjoining interference with plaintiff's proposed housing project on certain property on the basis of a finding that defendant's zoning of the property is arbitrary, capricious, not in furtherance of any reasonable governmental interest, and an unconstitutional, confiscatory taking. Defendant also appeals as of right the trial court's subsequent order awarding expert witness fees to plaintiff. We reverse.

This case concerns a parcel of property (referred to simply as "the property") located roughly in the center of Pittsfield Township, south of Ann Arbor, at the northeast corner of Platt and Morgan Roads. Morgan Road is a dirt east-west road that dead-ends at US 23; Platt Road is a north-south county road that had once been intended to have an access interchange with I-94, although that interchange was abandoned at some point. The property has been farmed for many years, and plaintiff's principal, Mark Lewis, testified that the property is in "some kind of farming program." Plaintiff receives approximately a thousand dollars a year from the farmer, although there was no testimony given as to how much of a profit – if any – the farmer himself makes. Although the property was zoned agricultural until plaintiff pursued the rezoning at issue here, defendant's 1968 master plan listed the property as intended for residential use. Defendant changed that designation to industrial in its 1975 master plan, apparently due to the wishes of the prior owner. That industrial classification in the master plan has been retained to this day. The same prior owner also owned a parcel immediately to the north of the property, and that parcel is presently a business park. Across Morgan Road to the south are residences.

Lewis testified that plaintiff had operated a successful business park elsewhere in the area for many years, and some tenants wanted their own buildings; Lewis believed there would be "natural synergy" to purchasing the property at issue here for another business park, despite certain "warts" he perceived in the property – that it was not on a main road, did not have ready access to expressways, was not very visible, and seemed "to be emerging as a residential

recreational and church kind of area." Nevertheless, he believed that purchasing the property would be "a suitable risk," in significant part because it was already "master planned for" industrial or business park use. The purchase closed "sometime in 1997," whereupon plaintiff began simultaneously marketing the property and seeking rezoning of the property to an industrial PUD[1] classification to permit a business park. Rezoning proved contentious due to opposition from area residents, but in mid-2002, plaintiff's Wolverine Commerce Park plan was approved, although certain regulatory permits took longer. However, by 2004, plaintiff concluded that even though it was "ready to put a shovel in the ground," it had in fact made a "very expensive mistake" and sought to again rezone the property for R3 moderate density residential. Defendant denied that subsequent rezoning request and a subsequent request for a variance.[2] Plaintiff commenced the instant suit.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). The clear error standard of review affords a certain amount of deference to the trial court's findings, and this Court will only reverse those findings if definitely and firmly convinced that the trial court was mistaken. *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 222-223; 707 NW2d 353 (2005).

The "government may effectively 'take' a person's property by overburdening that property with regulations." *K&K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576-577; 575 NW2d 531 (1998). It may do so where the regulation is arbitrary, meaning it violates substantive due process because it advances no legitimate state interest or does so irrationally. *Dorman v Clinton Twp*, 269 Mich App 638, 650-651; 714 NW2d 350 (2006). It may also engage in a "categorical taking," under which the landowner is denied "*all* economically beneficial or productive use" of the property. *Id*. at 646 (emphasis in original) (internal quotes omitted). All the regulatory takings tests for the various circumstances share a common theme: "each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle v Chevron USA Inc*, 544 US 528, 539; 125 S Ct 2074; 161 L Ed 2d 876 (2005).

It is well-established that a property owner can challenge the validity of a zoning ordinance despite purchasing the property with full awareness of that ordinance. *Kropf v Sterling Heights*, 391 Mich 139, 152; 215 NW2d 179 (1974). Our Supreme Court noted that an unreasonable ordinance cannot become reasonable just because a parcel of property changed owners. *Id*. The United States Supreme Court has made a similar observation. *Palazzolo v Rhode Island*, 533 US 606, 626-628; 121 S Ct 2448; 150 L Ed 2d 592 (2001). However, a

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[1] PUD stands for "planned unit development."

[2] Defendant contends that plaintiff did not exhaust its administrative remedies because plaintiff allegedly did not pursue its variance request with sufficient seriousness. Defendant offers us no authority or rationale for establishing or verifying this seriousness threshhold, and we decline the invitation to create our own. We perceive no basis for concluding that the variance request was not made in good faith.

landowner's awareness of an existing regulatory scheme at the time the property is purchased is still a relevant consideration: "equity is no better served by ignoring a claimant's knowledge of existing land-use regulations than it would be by holding that the claimant's knowledge of those regulations absolutely barred recovery regardless of how inequitable those regulations might be." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 556; 705 NW2d 365 (2005), citing Justice O'Connor's concurring opinion in *Palazzo*, *supra*.

A property owner cannot *create* a taking. For example, a property owner may not artificially divide a parcel and then consider only one part of it in isolation. *Bevan v Brandon Twp*, 438 Mich 385, 395-397; 475 NW2d 37 (1991). Alternatively, a "self-imposed hardship," where the landowner does something to the property that makes it unusable as zoned, cannot be attributed to a governmental "taking." *Johnson v Robinson Twp*, 420 Mich 115, 125-126; 359 NW2d 526 (1984). For example, where a predecessor in title (the plaintiffs' grandfather) engaged in sand-mining and thereby turned part of a real property parcel into a swamp that could not be used under the existing ordinances, "they have no one to blame but their grandfather." *Bierman v Taymouth Twp*, 147 Mich App 499, 505-507; 383 NW2d 235 (1985).

The "self-imposed hardship" rule has so far only been applied in Michigan where a landowner or a landowner's predecessor in title either (1) altered the physical properties of the land in some way, or (2) subdivided a contiguous parcel of land at some time after the zoning ordinance at issue was enacted. We conclude, however, that the principle applies with equal force here. It is undisputed that plaintiff did not subdivide the property and only made *de minimus* changes to its physical condition. But the *legal* conditions imposed on the property – both the master plan and the zoning ordinance – were all brought about by the direct efforts of plaintiff and plaintiff's predecessor in title. The "self-imposed hardship" rule is a natural corollary of the principle that one has no cause of action for bringing an injury on one's self. Plaintiff correctly asserts that it did not cause the property to become unsuitable for the uses for which it is zoned. On the other hand, plaintiff *did* cause the property to become zoned for uses to which it is – taking plaintiff's factual assertions as true – unsuited. Either way, plaintiff was responsible for causing a mismatch between the property's zoning and the property's usability.[3]

Nevertheless, plaintiff's self-imposed hardship does not cut off a claim that a zoning ordinance is completely arbitrary. See *Bierman*, *supra* at 507. Such a challenge involves two independent proofs: "first, that there is no reasonable governmental interest being advanced by the present zoning classification itself. . . or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate

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[3] Indeed, as we discuss further *infra*, plaintiff did not merely purchase the land with knowledge of its zoning and master plan status, plaintiff purchased the property in part *because* of the master plan designation with the full intent of having it rezoned to industrial, notwithstanding knowledge of the "warts" on the property that it now contends make the property unusable for industrial purposes. No matter how the situation is viewed, plaintiff cannot blame any entity but itself for presently being in possession of a parcel of property that is (allegedly) not suited to any purpose for which it is zoned.

land use from the area in question." *Kropf, supra* at 158.[4] A zoning ordinance is presumed to be valid in the face of such an accusation, and the challenging party must show that it has "no real or substantial relation to public health, morals, safety or general welfare." *Bevan, supra* at 398 (quotation omitted). Unless a zoning ordinance is utterly arbitrary and capricious, or renders property essentially valueless, or unless administrative due process was not followed, the courts have no authority to question the wisdom of a municipality's zoning decision. See *Brae Burn, Inc, v Bloomfield Hills*, 350 Mich 425; 86 NW2d 166 (1957).

Plaintiff contends that the zoning regulation at issue is utterly baseless. However, we perceive no argument, nor could we agree with any, that reservation of land for some particular use, such as industrial, in a controlled and planned manner is *inherently* an illegitimate exercise of power or otherwise unrelated to the general welfare. We do not perceive plaintiff's argument to be that the zoning ordinance completely "fails to advance a legitimate governmental insterest," but rather that "it is an unreasonable means of advancing a legitimate governmental interest." *Hecht v Niles Twp*, 173 Mich App 453, 461; 434 NW2d 156 (1988). To sustain such an attack, plaintiff must show "'that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness.'" *Kropf, supra* at 162, quoting *Brae Burn, Inc, supra* at 432. Plaintiff presented evidence tending to show that the township has a glut of industrial property and that plaintiff's property is not in an area that is suited to industrial uses. Defendant presented evidence tending to show that the area was suitable for at least some industrial uses and that plaintiff's assertions were based on an inappropriately narrow view of what could be done on the property.

We generally defer to the trial court's superior position to evaluate the credibility of witnesses, notwithstanding the de novo standard of review that applies here. *Kropf, supra* at 163. In this case, the trial court did not set forth in its findings of fact any credibility impressions, *id*., and several witnesses only testified by deposition. In any event, plaintiff's proofs that the property is unsuitable as zoned were based on (1) plaintiff's own inability to market the property; (2) expert testimony that the area was better suited to residential uses; (3) expert testimony that there was too much industrial land in the township as a whole; and (4) the business park plan would not make enough of a profit soon enough to be realistically feasible. In contrast, defendant's proofs included testimony (1) that one individual's inability to market property did not mean the property was unmarketable at all; (2) that the property was in fact inappropriately situated for residential uses and "great" for industrial uses; (3) that the township was actually "overbuilt in residential condominiums;" and (4) plaintiff's specific business park plan was not the only possible use of the property. The evidence in the record clearly shows that there *is* "room for a legitimate difference of opinion" regarding the reasonableness of the property's zoning classification. The fact that the property might be better suited to residential uses does not make industrial zoning irrational. *Kropf, supra* at 160-161.

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[4] It is worth noting that it is only presumptively unlawful for a municipality to *totally* exclude an otherwise-legitimate use from *anywhere* within its boundaries; the plaintiff has the burden of affirmatively showing with competent evidence that the exclusion of a use from a particular parcel is arbitrary and capricious. *Kropf, supra* at 155-156.

Once again, plaintiff purchased the property in part *because* of its status in the master plan, and it affirmatively *pursued* its rezoning to the present classification; all with full knowledge prior to its purchase of what plaintiff's principal testified were "warts" on the property. Consequently, it lacks weight for plaintiff now to contend that the zoning that it sought is fundamentally inappropriate. This is particularly true in this case, given (1) plaintiff's description of itself as highly experienced, and (2) no showing that the proffered reasons for asserting that the present zoning is inappropriate were undiscoverable before plaintiff pursued the present classification.[5] As Lewis himself testified, plaintiff simply made a "very expensive mistake." In short, plaintiff contends that the zoning it affirmatively pursued is so inappropriate that it constitutes a confiscatory taking. We disagree: plaintiff is not suffering from a violation of constitutional rights by defendant, but rather from its own business decision.

The zoning ordinance at issue is based on furtherance of a legitimate governmental interest. The evidence shows that there is a legitimate difference of opinion regarding how the zoning ordinance goes about furthering that interest. To the extent the property is not easily marketed as zoned, plaintiff itself is responsible for that situation. The trial court clearly erred in finding defendant's zoning ordinance to be a confiscatory taking of plaintiff's property. In light of this conclusion, we need not consider the other issues raised by plaintiff.

Reversed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis

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[5] We caution that it would be inequitable to call this hardship "self-imposed" if, for example, plaintiff had been a non-savvy individual who sought a now-challenged zoning on the basis of erroneous information that he or she could not have discovered to be erroneous until it was too late. But here, plaintiff repeatedly described itself as very experienced and knowledgeable; and the alleged changed circumstances in the area that make industrial zoning allegedly inappropriate took place by 1995, two years before plaintiff purchased the property.