STATE OF MICHIGAN

COURT OF APPEALS

DEWEY THOMAS,

Plaintiff-Appellant,

v

GENOA TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
March 11, 2010

No. 289434
Livingston Circuit Court
LC No. 06-22391-CZ

Before: Talbot, P.J. and Whitbeck and Owens, JJ.

PER CURIAM.

In this zoning case, plaintiff appeals as of right from the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. Facts

Plaintiff, Dewey Thomas, owns a 1.6 acre triangular piece of real property located in Genoa Township (the Township). The property is bordered by roads on all sides and is zoned Low Density Residential (LDR) under the Township's zoning ordinance. However, plaintiff is currently operating a drive-thru coffee and donut shop on the property under the terms of a consent judgment.

II. Standard of Review

We review de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "A trial court tests the factual support of a plaintiff's claim when it rules upon a motion for summary disposition filed under MCR 2.116(C)(10)." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "The court's task is to review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial." *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). Documentary evidence submitted by the parties is viewed in the light most favorable to the nonmoving party. *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). In addition, the proper interpretation and application of a statute presents a question of law that this Court considers de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. Government Taking

Plaintiff argues that the trial court improperly granted defendant's motion for summary disposition of plaintiff's takings claim. We disagree.

Plaintiff urges this Court to completely ignore the consent judgment and decide this case based solely on the property's zoning classification of LDR. We decline to do so. Although the property is zoned as LDR, the consent judgment is still in effect, and the zoning requirements for defendant's property are found within that document. The consent judgment modifies the zoning classification of plaintiff's property and allows him to use the property in ways that would be impermissible under the LDR classification. There is no legal reason, and it is contrary to common sense, to ignore this legal document and treat the property as strictly LDR.

Plaintiff argues that defendant's conduct perpetrates an unconstitutional taking. Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). A taking can occur when the government overburdens property with regulations. *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576, 575 NW2d 531 (1998). " '[T]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' " *Id .*, quoting *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922). There are two types of takings resulting from regulations denying an owner economically viable use of land: a "categorical" taking, where the owner is deprived of "all 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 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).

"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." *K & K Constr*, 456 Mich at 577. "A person may recover for this type of taking in the case of a physical invasion of his property by the government . . ., or where a regulation forces an owner to 'sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . .' *Id.*, quoting *Lucas*, 505 US at 1019 (emphasis in original). "In the latter situation, the balancing test, a reviewing court must engage in an 'ad hoc, factual inquiry,' 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.*, citing *Penn Central*, 438 US at 124.

A. Categorical Taking

To show a categorical taking, plaintiff must prove that the property is unsuitable for use as zoned or unmarketable as zoned. *Bevan v Brandon Twp*, 438 Mich 385, 403; 475 NW2d 37 (1991). An ordinance effects a regulatory taking if it precludes the use of the land for any purposes to which it is reasonably adapted. *Troy Campus v City of Troy*, 132 Mich App 441, 450-451; 349 NW2d 177 (1984). Thus, where a permitted use can be constructed on the property, the plaintiff cannot show that the property is unsuitable as zoned. *Bevan*, 438 Mich at 404. Plaintiff argues that his property is zoned LDR and that the property would be much less

valuable were it utilized solely as residential. However, we find that, in this situation, "as zoned" encompasses both the zoning classification of LDR, and the legal non-conforming use outlined in the modifications of that classification contained in the consent judgment.

The manner in which the property is currently being used, and which it may continue to be used under the consent judgment, allows plaintiff economically viable use of his property. Plaintiff has been able to generate revenue from the operation of the coffee shop on the property. Furthermore, plaintiff's own market analysis indicated that the land had some value when zoned residential and that it would be even more valuable if used commercially. While the report concluded that a gasoline station would provide "highest and best use" of the property, it nonetheless noted that any commercial use of the property would be more valuable than residential use. Therefore, while it is unclear exactly how much, if any, actual "profit" plaintiff is earning from his coffee shop at this location, the evidence established that the property, as currently being utilized, has economic value. Plaintiff has failed to establish a genuine issue of material fact that he has been deprived of all beneficial or productive use of his land. *Lucas*, 505 US at 1015. Thus, plaintiff failed to establish a categorical taking.

B. *Penn Central*

1. Character of the Government's Action

The trial court properly determined that the first prong of the *Penn Central* test favors defendant. "The relevant inquiries are whether the governmental regulation singles plaintiffs out to bear the burden for the public good and whether the regulatory act being challenged here is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559, 705 NW2d 365 (2005). Plaintiff's land has not been forced to bear a greater portion of the regulatory burden, nor has it received fewer benefits than other parcels in the Township. Indeed, it appears that through the consent judgment, plaintiff's property is actually less burdened than most other LDR zoned properties.

In addition, the trial court concluded that the Township's initial denial of plaintiff's rezoning request was based upon its belief that such a request was barred by the consent judgment. This belief was in no way arbitrary or capricious and did not exhibit any animosity toward plaintiff. It was merely based upon a belief that the only way to change the zoning classification of plaintiff's property was through modification of the consent judgment. When the Township did, in fact, review the request for a modification of the consent judgment, it denied the request for a multitude of seemingly logical and legitimate reasons. There was no evidence that plaintiff was in any way singled out or subject to any sort of personal animus.

2. Economic Effect of the Regulation

Next, the trial court properly concluded that the second *Penn Central* factor also favored defendant. "The Taking Clause does not guarantee property owners an economic profit from the use of their land." *Paragon Properties Co v City of Novi*, 452 Mich 568, 579 n 13; 550 NW2d 772 (1996). Moreover, the Township is not required to zone property for its most profitable use. *Dorman,* 269 Mich App 647. Plaintiff was never ousted from his property, none of his property was required to be dedicated to public use, and plaintiff was not denied all economically viable

use of his land. The denial of plaintiff's request to put a gasoline station on the property did not render it without value.

To establish a taking, "a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned." *Bevan,* 438 Mich at 403. The mere fact that a regulation reduces the value of the regulated property is insufficient to establish a compensable regulatory taking. *K & K Const,* 267 Mich App at 553. Plaintiff's business tax records indicate that his use of the property generated revenue. Furthermore, an expert appraiser testified that the property has substantial value for use as permitted under the consent judgment. So, this factor does not support finding defendant effected a regulatory taking of plaintiff's property requiring just compensation. 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[.]' *Penn Central,* 438 US at 124, quoting *Pennsylvania Coal Co,* 260 US at 413.

3. Investment-Backed Expectations

Finally, the trial court properly determined that the third *Penn Central* factor also favored defendant. Although a person's knowledge of a regulatory enactment does not act as an absolute bar to a takings claim based on the regulation, a "key factor" in determining whether a regulation has interfered with investment backed expectations "is notice of the applicable regulatory regime[.]" *K & K* Const, 267 Mich App 555. Plaintiff was aware, when he acquired an interest in the property, that it was zoned LDR and that it was governed by the consent judgment. Such notice "should . . . . be taken into account" and "does . . . shape the analysis of whether plaintiff's expectations were reasonable." *Id.* at 555, 557. Plaintiff argues that the market study he commissioned provided a reasonable basis for an investment-backed expectation that a gas station would be permitted. However, the study was done several years after plaintiff gained an ownership interest in the property and after he had already attempted to negotiate changes to the property's zoning classification. Plaintiff had already been involved in litigation regarding the zoning of this property through his power of attorney on behalf of his sister even before he gained an ownership interest. He had no reason to believe that the zoning of this parcel would change, or even that the consent judgment would be modified simply because he acquired an interest in the property. Furthermore, the Township had already accommodated a non-conforming use of the property in an attempt to make the unusually situated land more usable. Although he has shown that a gasoline station might be profitable, he has not shown that such a plan would comport with traffic flow standards or ingress and egress requirements. Thus, he had no legitimate investment-backed expectation to use the property as a gasoline station.

IV. Substantive Due Process

Next, plaintiff argues that the trial court improperly granted defendant's motion for summary disposition of plaintiff's substantive due process claim. We disagree.

Both the Michigan and United States Constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. A plaintiff who alleges an unconstitutional taking as a result of a zoning ordinance may also challenge the validity of the zoning ordinance as a violation of substantive due process. *Dorman,* 269 Mich App at 650. "The essence of a claim of a violation of

substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). (emphasis in orginal)

While the bulk of Michigan jurisprudence relating to substantive due process claims in land use cases frames the question as a "challenge to a zoning ordinance," see, e.g., *Kropf v Sterling Heights*, 391 Mich 139, 157; 215 NW2d 179 (1974); *Yankee Springs v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004), further examination reveals that the same standards are applied to cases in which a landowner challenges the denial of a rezoning request, see *A & B Enterprises v Madison*, 197 Mich App 160, 161-162; 494 NW2d 761 (1992) (explicitly applying same framework to challenge of denial of rezoning). Moreover, there is no substantive difference between these kinds of claims. In either case, the landowner is asserting that the existing zoning classification is not reasonable and justified, whether the unreasonableness is manifested as the original creation of the classification or the subsequent affirmation of the classification by the municipality's denial of a rezoning request. Further, in either case, the landowner is seeking to demonstrate that *another* classification is more appropriate for the land. In *A & B Enterprises*, 197 Mich App at 162, this Court wrote:

> In order to successfully challenge a zoning ordinance, a plaintiff must prove (1) that there is no reasonable governmental interest being advanced by the present zoning classification, or (2) that the ordinance is unreasonable because of a purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration. . . .
>
> Judicial review of a substantial due process challenge requires application of three rules: (1) the ordinance is presumed valid; (2) the challenger has the burden of providing that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property . . .; and (3) the reviewing court gives considerable weight to the findings of the trial judge.

Further, this Court has recently emphasized that "[t]o sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Mettler Walloon LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008). Moreover, the Due Process Clause "is not a guarantee against incorrect or ill-advised [governmental] decisions." *Bishop v Wood*, 426 US 341, 350; 96 S Ct 2074; 48 L Ed 2d 684 (1976). In disputes over municipal actions, including the issuance of building permits, only the most egregious official conduct can be considered arbitrary in the constitutional sense. *City of Cuyahoga Falls, Ohio v Buckeye Community Hope Foundation*, 538 US 188, 198-199; 123 S Ct 1389; 155 L Ed 2d 349 (2003).

This Court in *Mettler Walloon* surveyed numerous federal decisions that addressed substantive due process claims in the context of enforcement of land use regulations and concluded that, "under federal law, even a violation of state law in the land use planning process does not amount to a federal substantive due process violation." *Mettler Walloon*, 281 Mich App at 203. This Court quoted *Koscielski v City of Minneapolis*, 435 F3d 898, 902 (CA 8, 2006), in turn quoting *Anderson v Douglas Co*, 4 F3d 574, 577 (CA 8, 1993), opining that '[d]ue process claims involving local land use decisions must demonstrate the "government action complained

of is truly irrational, that is something more than . . . arbitrary, capricious, or in violation of state law.'

Here, plaintiff argues that the Township violated his right to substantive due process when it totally failed to review his rezoning application because it believed such a review was precluded by the consent judgment. However, plaintiff was able to seek a remedy with the same potential effect by requesting a modification of the consent judgment. Had the Township totally refused to hear his request in any form, perhaps that could be considered "irrational." However, here, the Township considered plaintiff's request, and reviewed and rejected it for a variety of reasons, all of which fall short of "truly irrational." The Township's reasons included:

1. The action is contrary to the consent judgment.
2. The site is rural in nature and not in agreement with the Township master plan.
3. The existing land use is appropriate for neighborhood service area.
4. Traffic is a concern at this intersection.
5. The area is not appropriate for regional service commercial; which is better located along the Grand River corridor.
6. There would be intense light and noise problems with the establishment of a gas station in this residential area.
7. The number of persons who signed the petitions indicates that the business as it is established is flourishing.

Thus, the Township's action was based upon planning principles, and advanced legitimate Township interests. The Township presented evidence to the trial court in support of the reasons listed above. Plaintiff, on the other hand, has not presented evidence that the Township's decision was so arbitrary and capricious as to shock the conscience, or that it was irrational. There is simply no evidence that this denial rises to the level of a substantive due process violation under the standard set forth in *Mettler Walloon*, 281 Mich App at 198. Thus, the trial court properly concluded that no genuine issue of material fact existed with regard to plaintiff's substantive due process claim.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens