STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH C. ZYSKOWSKI, MARY C. ZYSKOWSKI and E. PATRICK MURPHY,

Plaintiffs-Appellees
Cross-Appellants,

v

CITY OF PONTIAC, a municipal corporation,

Defendant-Appellant,
Cross-Appellee.

UNPUBLISHED
September 24, 1996

No. 176160
LC No. 92427561 CZ

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,* JJ.

PER CURIAM.

In this zoning case, defendant appeals as of right and plaintiffs cross-appeal from an order declaring invalid certain zoning restrictions on plaintiffs' property. We affirm.

I

Plaintiffs acquired three contingent, but distinct, segments of property in the City of Pontiac. Property 1 contains approximately 12.51 acres and was zoned multiple-family residential. Property 2, approximately 22 acres, is zoned for single-family residences and is located off Giddings Road. Property 3 was the backyards of single-family lots fronting Giddings Road. These lots have long backyards through which runs Galloway Creek. The area plaintiffs acquired is the part of the backyards situated behind the creek.

Property 3 is situated between Property 1 and Property 2. When the three segments are aggregated, they provide a "landman"[1] such as plaintiff Joseph Zyskowski an acreage which could be used for a single development. As plaintiffs began acquiring interests in this acreage, they did not

---

* Circuit judge, sitting on the Court of Appeals by assignment.

investigate the realities of selling and developing it as zoned. Later, they learned that developers were not interested in developing the acreage for its existing zoned uses.

Plaintiffs concluded that the only viable, economically-feasible residential usage of the property was manufactured housing. However, the City Council denied their rezoning application. They then filed the instant suit. In their complaint, plaintiffs alleged that the zoning ordinance was unreasonable and arbitrary. Moreover, it amounted to a confiscation without just compensation. Finally, they asserted that it was invalid, because it excluded manufactured housing from the city.

A bench trial was held litigating the constitutionality of the City's zoning ordinance as it pertained to plaintiffs' property. After oral argument, the judge found that the ordinance did not amount to exclusionary zoning. In a written opinion, he concluded that the zoning restrictions were unreasonable and invalid as applied to plaintiffs' property. He also found that the property was "confiscated" by the zoning restrictions. The trial judge determined that plaintiffs should be allowed to develop the property consistent with the proposed use.

Defendant filed a motion for modification of the judge's findings with respect to the confiscation. It argued that plaintiffs created their own hardship by severing the backyards of existing homesteads. The judge found the argument untimely. The parties then resolved the issue of damages by entering into a settlement agreement, reserving their appellate rights.

On appeal, defendant argues that plaintiffs failed to demonstrate that Property 1 may not be reasonably used for single family residential purposes. It asserts that, even though Property 1 was zoned for multiple-family residence, testimony revealed that the city would have allowed single-family residences to be built on that parcel.

II

Zoning cases that are based on constitutional challenges are reviewed de novo by this Court. *English v Augusta Twp*, 204 Mich App 33, 37; 514 NW2d 172 (1994); *Guy v Brandon Twp*, 181 Mich App 775, 778; 450 NW2d 279 (1989). However, we do not set aside a trial judge's findings of fact unless we find them clearly erroneous. MCR 2.613(C).

In order to successfully challenge a zoning ordinance on substantive due process grounds, a challenging party 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 the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration. *Kropf v Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974); *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992). The reasonable basis must be grounded in the police power, which our courts have defined as including protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public. *Hecht v Niles Twp*, 173 Mich App 453, 460; 434 NW2d 156 (1988).

Where substantive due process is claimed, the zoning ordinance is presumed valid. *A & B Enterprise, supra*. The challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of property, an arbitrary fiat, a whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its reasonableness. *Id*.

With regard to the confiscation claim, both the Fifth Amendment of the United States Constitution and art 10 § 2 of the Michigan Constitution prohibit governmental taking of private property without just compensation. *Bevan v Brandon Twp*, 438 Mich 385, 389-390; 475 NW2d 37 (1991). To sustain an attack on a zoning ordinance, an aggrieved property owner must show that, if the ordinance is enforced, the consequent restrictions on his property preclude its use for any purpose to which it is reasonably adapted. *Kropf, supra* at 163. However, a zoning ordinance is not confiscatory where the claim is merely that the property is not being put to its most profitable use. *Cohen v Canton Twp*, 38 Mich App 680, 689; 197 NW2d 101 (1972).

We agree with the trial judge that plaintiffs proved that the zoning ordinance was a violation of their substantive due process rights and amounted to a confiscation without compensation. While it is true that no expert witness gave a specific opinion with respect to the feasibility of building single-family residences on Property 1, an inference can be drawn from the evidence as a whole that it was not feasible.

The testimony indicated that Property 1 was subject to the same difficulties as the other segments. For instance, Property 1 provided the same location deficiencies. It was located near railroad tracks and high power lines. Moreover, plaintiff Zyskowski testified that he could not find a developer interested in developing it. The property could not be used for single-family residences in part because of cost, and in part because there is no market for single-family residences in that area.

Dr. Kate Warner, Professor of Urban Planning at the University of Michigan, testified that single-family conventional affordable housing could not be developed on plaintiffs property without substantial infusions of public money. It is not entirely clear if Dr. Warner's opinion was intended to apply only to Property 2 and Property 3 which were zoned single-family residential or to the entire acreage. However, given the similarities between the different segments in terms of location and deficiencies, the trial judge could have inferred that her opinion also applied to Property 1.

Lawrence Golicz, a real estate appraiser, testified that it was not economically feasible to build standard single-family homes on plaintiffs' property. There is not a large market for single-family lots in the City of Pontiac. In fact, there have been no single-family subdivisions developed there in the last twenty-five years. The cost of putting in a subdivision, especially on plaintiffs' land, is too high to permit a profit.

There was an abundance of testimony that affordable manufactured housing as planned by plaintiffs would be consistent with defendant's housing plan. David Birchler, a community planner, and Dr. Warner testified that there was need for this type of housing in Pontiac. Moreover, manufactured

housing would not have an adverse impact on the area. Plaintiffs' property is appropriate for manufactured housing and their plan is reasonable and compatible with the area.

The governmental interest that the ordinance advances is the need to protect the land for the future in order to provide an opportunity for new subdivisions with larger lots and conventional single-family housing. However, the test of the validity of an ordinance is not whether the prohibition may at some time in the future bear a real and substantial relationship to the public health, safety or general welfare, but whether it does so at the present time. *Gust v Canton Twp*, 342 Mich 436; 70 NW2d 772 (1955). Plaintiffs established that there is no current market for single-family homes in Pontiac and that his property is adaptable for manufactured homes. Therefore, the ordinance, as applied to their property, violates plaintiffs' substantive due process rights.

With regard to the confiscation claim, the testimony established that there was no market for single-family residences on plaintiffs' property. Defendant's argument that Property 1 should be considered independent of Properties 2 and 3 is unconvincing. Generally, a person's property should be considered as a whole when deciding whether a regulatory taking has occurred. *Bevan*, *supra* at 393. Contiguous lots are to be considered as a whole despite the owner's division of the property into separate, identifiable lots. *Id*. at 395. Therefore, contrary to defendant's argument, all three segments of plaintiffs' property may be aggregated in determining if an unconstitutional taking occurred. Plaintiffs presented sufficient evidence for the trial judge to determine that a taking occurred.

III

Next, defendant argues that plaintiffs themselves created the lack of usefulness of Property 3 by severing the backyards from the existing homesteads. Therefore they cannot argue that the ordinance caused a taking of this property. We disagree.

Plaintiffs presented evidence that their plight was due to the unique circumstances of the property, rather than the lot split. Defendant relies on *Bierman v Taymouth Twp* for the proposition that a properly adopted ordinance does not become an arbitrary and unreasonable restriction when the owner voluntarily disrupts the natural condition of the land so as to make it useless in its resulting state.[2] However, we find the reliance misplaced. In *Bierman*, the plaintiff changed part of the land to a swamp-like condition during a sand-mining operation, thus rendering that land useless in its present form. Because the swamp-like condition was caused by a landowner rather than the zoning ordinance, the court concluded that it was not the ordinance that deprived them of the use of their property.

This case differs significantly from *Bierman*. Here, there was no evidence that plaintiffs changed the natural condition of the land. The creek was a preexisting condition that caused hardship to the prior owners, in that it divided their property. Because there was evidence that plaintiffs' problems were not due to a self-imposed hardship, the judge did not abuse his discretion in denying defendant's motion to modify the judgment under MCR 2.604(B); See, also, *Guy v Brandon Twp*, 181 Mich App 775; 450 NW2d 279 (1989).

IV

Defendant argues that the trial judge erred repeatedly when ruling on critical evidentiary issues. We will not disturb an evidentiary ruling absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

With regard to the evidence about potential enterprise zones, we note that defendant's brief lacks citation to supporting authority. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis of the claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Therefore, the issue was not properly presented for appeal. Regardless, we find that the trial judge's ruling that the proffered testimony about the enterprise zoning was speculative is amply supported by the record.

Next, the trial judge did not abuse his discretion by not allowing the City Assessor, Bruce Stewart, to testify as an expert witness. Stewart was not listed as an expert in the answer to interrogatories or on the witness list. MCR 2.401(I)(1)(b); Stepp *v Dep't of Natural Resources*, 157 Mich App 774, 778-779; 404 NW2d 665 (1987). The judge also did not abuse his discretion by refusing to allow testimony from Stewart about the specific sales of residential parcels in the area of plaintiffs' property on grounds of hearsay and relevancy. *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 316; 333 NW2d 264 (1983).

Defendant's third evidentiary issue entitled "Overruling of Objection Raised by City which had been Sustained for Plaintiffs," contains no citation to authority. Therefore, we will not review it. *In re Toles, supra*.

We decline to address defendant's argument that the judge erred in admitting a third party's offer to purchase the subject property. At trial, defendant objected to the admission of the agreement, because it was not signed. However, on appeal, it now argues that the evidence was hearsay and violated the statute of frauds. An objection on one ground below is insufficient to preserve an appellate attack on a different ground. *Williams v Coleman*, 194 Mich App 606, 620; 488 NW2d 464 (1992).

Defendant also assigns error to the judge's liberal allowance of plaintiffs' experts to testify beyond their areas of expertise. Once again, defendant has failed to cite any authority in support of its argument. Therefore, it is not properly before this Court. *In re Toler, supra*.

Finally, defendant challenges the trial judge's exclusion of certain testimony of its planning expert, Sands, because it was based on hearsay. An expert may base an opinion on hearsay, or the findings and opinions of another expert. *Triple E Produce Corp v Mastronardi Produce LTD*, 209 Mich App 165, 175; 530 NW2d 772 (1995). However, a review of the record reveals that the judge did not preclude Sands from giving an opinion based on hearsay. It merely prohibited him from stating what he was told with respect to a project other than the one at issue in this case. No offer of proof was made as to how the testimony on the other development was essential to Sands' opinion about the property at issue here. Therefore, the judge did not abuse his discretion in excluding it.

Having ruled in favor of plaintiffs, we find it unnecessary to address the issue raised in their cross-appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Marilyn Kelly
/s/ J. Richardson Johnson

[1] A landman, as defined by plaintiff, is a person who locates properties and places them with a developer for development within a short period of time.

[2] 147 Mich App 499; 383 NW2d 235 (1985).