S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

GEORGE J. CIPA and BONNIE G. CIPA, Plaintiffs–Appellants,	UNPUBLISHED September 27, 1996
v	No. 184244 LC No. 91-001727-CE
CITY OF EASTPOINTE and CITY OF EASTPOINTE ZONING BOARD OF APPEALS, Defendants–Appellees.	

Before: Michael J. Kelly, P.J., Hoekstra and E.A. Quinnell,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order denying their motion for summary disposition and effectively granting summary disposition to defendants in this inverse condemnation case. Plaintiffs argue that the trial court erred as a matter of fact and law in granting summary disposition to defendants. We reverse and remand.

Plaintiffs filed separate applications for occupancy permits and/or variances to the off-street parking and loading/unloading zone requirements in the City of Eastpointe's zoning regulations to allow them to use the bottom floor of their Eastpointe property as an antique store and the top floor as a residential apartment. The Zoning Board of Appeals (ZBA) denied these requests. Plaintiffs filed with the circuit court a claim of appeal from those decisions and a complaint alleging, among other claims, that the decisions constituted a taking of their property without compensation. Plaintiffs argued that the ZBA's decision constituted a taking either because it divested them of a vested non-conforming use or because it prevented them from making any economically viable use of their property.

The circuit court found that the ZBA erred in denying plaintiffs' request to use the second floor of their property as an apartment, but did not evaluate the ZBA's decision with respect to the ground floor because, during the course of litigation, the City offered to permit the requested use. The trial court then found that the ZBA's decision was not a temporary taking and that plaintiffs were not entitled

to damages. This ruling constituted an award of summary disposition to defendants. See MCR 2.116(I)(2). We find that the trial court erred as a matter of fact and law in granting summary disposition to defendants.

A zoning ordinance which divests a property owner of a vested non-conforming use may constitute an unconstitutional taking. *Bevan v Brandford Twp*, 438 Mich 385, 401; 475 NW 2d 37 (1991). Although the ground floor of plaintiffs' property was used for business purposes by plaintiffs' predecessors until a few months before plaintiffs purchased the property, under the Eastpointe zoning ordinance, a non-conforming use is lost if it is abandoned for twelve consecutive months. Eastpointe Ordinances, § 1294.05(e). Because the trial court did not determine whether plaintiffs retained a vested non-conforming use allowing them to operate a business in the ground floor, there remains a genuine issue of material fact whether this denial was a temporary taking of a vested use.

Land use regulations may also constitute an unconstitutional taking if they do not substantially advance a legitimate state interest or if they deny the land owner all economically viable use of his land. *Bevan*, *supra* at 391. Although plaintiffs may only be awarded damages for a taking if they were denied all economically viable use of both floors of their building, *id.* at 393-394, we will consider the takings claims for each floor separately to conform to the trial court's order and for the sake of clarity.

The trial court found that there could be no taking of the ground floor because, during the course of litigation, the ZBA offered to allow plaintiffs to operate an antique store in that area as requested. However, a regulatory decision which is later invalidated or rescinded may create a temporary taking for the period during which the decision was in effect. *Poirer v Grand Blanc Twp*, 167 Mich App 770, 774; 423 NW 2d 351 (1988). Plaintiffs' temporary taking claim became ripe when the ZBA entered its final order denying plaintiffs' occupancy permits and/or variances in 1991. *Seguin v City of Sterling Heights*, 968 F 2d 584, 587 (CA 6, 1992); *Poirer v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 548-549; 481 NW 2d 762 (1992). Although a temporary taking cannot be based on the "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like," *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*, 482 US 304, 321; 107 S Ct 2378; 96 L Ed 2d 257 (1987), litigation over the validity of a regulatory decision was explicitly excluded from the definition of "normal delays." *Id*. Therefore, defendants' argument that plaintiffs cannot claim a taking until after the appeal from the ZBA's final order is complete must fail.

The Eastpointe Zoning Ordinance requires off-street parking and a loading/unloading zone for all permitted business uses. Eastpointe Ordinances, §§ 1292.02, 1292.04. Plaintiffs argue that they could not operate any business in that space and, therefore, were denied all economically viable use of their land when they were denied the requested variances. However, the denial of a single permit may not constitute a takings where other permits would be approved. *Carabell v Dept of Natural Resources*, 183 Mich App 225, 232-233; 454 NW 2d 395 (1989). Since plaintiffs have the burden of showing that the ZBA's decision deprived them of all economically viable uses of their land, *Hecht v Niles Twp*, 173 Mich App 453, 499; 434 NW 2d 156 (1988), there remains a genuine issue of material fact whether plaintiffs would be able to acquire a variance for another type of business.

The trial court also found that there could be no taking of the second floor because plaintiffs were involved in a dispute with the owner of the adjacent building over plaintiffs' access to the single staircase which provided access to the upper floor of both buildings. This finding was in error. Although the value of the second floor may have been diminished by the necessity of purchasing an easement or constructing a new stairway, this relates to damages rather than the existence of the taking. The trial court failed to determine whether plaintiffs had other economically viable uses for the second floor after the ZBA's decision precluding residential use of the second floor and denying the off-street parking and loading/unloading zone variances requested for the ground floor business. *Bevan*, *supra* at 391. Thus, there remains a genuine issue of material fact with respect to this issue.

We reverse the order of the trial court and remand for trial on the issues of whether plaintiffs were divested of a vested non-conforming use when the ZBA denied them occupancy permits and/or variances for their property and, if not, whether the decision denied plaintiffs all economically viable use of both floors of their property. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Edward A. Quinnell