# STATE OF MICHIGAN

# COURT OF APPEALS

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WILLIAM A. SCHAUFLER, JR., and MARY ANN SCHAUFLER,

Plaintiffs-Appellees,

v

TOWNSHIP OF BRUCE,

Defendant-Appellant.

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UNPUBLISHED
November 26, 1996

No. 183987
LC No. 92-003068

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet,* JJ.

PER CURIAM.

Plaintiffs owned a parcel of property in defendant township, which was zoned residential. Plaintiffs wished to develop the land commercially and sought a change in zoning to allow such development. Defendant declined to accommodate plaintiffs' request, stating that the surrounding area could not support large-scale development. Plaintiffs then filed suit in the Macomb Circuit Court on March 6, 1995. The trial court found that defendant's denial of plaintiffs' rezoning request was unreasonable and unconstitutional. Defendant now appeals. We affirm in part and reverse in part.

Defendant first claims that the trial court erred in failing to grant defendant's motion to dismiss plaintiffs' complaint. We disagree. To avoid an involuntary dismissal, plaintiffs needed to show that, on the facts and the law, they had a right to relief based on their claim that defendant's zoning ordinance, as it related to the parcel in question, failed to reasonably advance a legitimate governmental interest. *Rogers v Allen Park*, 186 Mich App 33, 38; 463 NW2d 431 (1990); MCR 2.504(B)(2). In support of their claim, plaintiffs presented the following evidence at trial: The parcel in question had been successfully used for modest commercial purposes since 1950. Recent residential developments in the area included construction of twelve to twenty new houses and development of a sixty-lot subdivision. A total of approximately two hundred households existed within a 1½mile radius of the subject property. To the north of plaintiffs' property was a church and a small flower/produce shop. In addition, a tavern was located within a mile of the parcel. Plaintiffs' expert witness, Jerome R. Schmeiser, opined that

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

there was no reasonable basis for defendant's refusal to allow commercial zoning. Schmeiser based his opinion on the success of the nearby nursery and the fact that the land was located on the corner of two major thoroughfares. This evidence was sufficient to survive defendant's motion for dismissal. Based on this evidence, a trier of fact could find that defendant's zoning ordinance, as it related to the parcel in question, failed to reasonably advance the asserted governmental interest of avoiding premature development. *Rogers, supra*. The evidence presented by plaintiff did not manifestly preponderate against the trial court's decision, and thus, the denial of defendant's motion was not clearly erroneous. *Sullivan Inc v Double Seal*, 192 Mich App 333, 339; 480 NW2d 623 (1991).

Defendant next contends that, at trial, it presented sufficient evidence to support its denial of plaintiffs' request for a change in zoning, and thus, the trial court erred in finding the zoning ordinance as it related to the parcel in question unconstitutional. We agree.

This Court reviews de novo a trial court's ruling on a constitutional challenge to a zoning ordinance. *Scots Ventures v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995). At trial, the ordinance was presumed valid and plaintiff had the burden of showing that the zoning was "an arbitrary fiat, a whimsical ipse dixit, and that there was no room for legitimate differences of opinion regarding the reasonableness" of the zoning classification. *Albright v Portage*, 188 Mich App 342, 353; 470 NW2d 657 (1991). In this case, the trial court found that "the plaintiff's [sic] proposed use is reasonable" and that defendant's denial of plaintiffs' request was thus unconstitutional. However, the duty of the trial court was not to determine whether plaintiffs' proposed use was reasonable, but whether defendant's zoning ordinance "either fails to advance or is an unreasonable means of advancing a legitimate governmental interest." *Rogers, supra*, at 38. Thus, in making a determination that the use proposed by plaintiff was reasonable, the trial court answered the wrong question.

With regard to the proper question of whether defendant's zoning classification, as it related to the subject parcel, advanced a legitimate governmental interest, defendant presented the following evidence that its decision to deny the request was a reasonable means of advancing the legitimate governmental interest of avoiding blight in the township: Glen Wynn, the community planner for defendant, testified that the township did not want to allow development for which there was inadequate demand, potentially leading to building vacancies and blight. Based on a market survey he conducted, Wynn determined that the subject property could support only a negligible amount of commercial development. He opined that, based on the character of the surrounding area, plaintiffs' proposed development was not a viable project. Wynn stated that, at the present time, the subject parcel was better suited for residential development. The court was required to determine if Wynn's testimony was credible.

The prevention and/or reduction of blight is a legitimate governmental interest which can be advanced by zoning ordinances. *Bloomfield Twp v Beardslee*, 349 Mich 296, 309; 84 NW2d 537 (1957); *Mid-Michigan Farm & Grain Ass'n v Henning*, 127 Mich App 735, 738; 339 NW2d 243 (1983). The evidence presented by defendant, if credible, made it clear that a legitimate difference of opinion existed regarding the reasonableness of defendant's zoning classification of the subject property.

Thus, the zoning classification should be upheld, *Albright*, *supra*, at 353, unless Wynn's testimony was discredited or stricken for some appropriate reason. We remand to the trial court for findings in this regard, vis-a-vis the presumption of validity above referenced.

Affirmed in part, reversed in part and remanded. We retain jurisdiction.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet