# STATE OF MICHIGAN

# COURT OF APPEALS

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PROPVEST LTD., LEEWARD SCHOOLS, INC., and LOUIS J. THEUNICK,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF ORION,

Defendant-Appellee.

UNPUBLISHED
April 29, 1997

No. 190380
Oakland Circuit Court
LC No. 93-467088

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Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's order granting summary disposition and dismissing their claims pursuant to MCR 2.116(C)(8) and (10). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Plaintiff Louis J. Theunick owns a parcel of land located in defendant township that is zoned S-E ("suburban estates"), requiring a minimum lot size of 1.5 acres. Plaintiff Leeward Schools, Inc. is the owner of a parcel of land adjacent to that owned by Theunick. Leeward's property is zoned REC-2 ("recreation"), which is intended to promote the use of the land for recreational uses over residential development. Together, the two parcels of land constitute a 104-acre lot wholly located in defendant township. This lot is adjacent to Bald Mountain State Park. Plaintiff Propvest, LTD. is a developer of manufactured housing communities that holds an option to purchase the 104-acre lot. The option is contingent upon defendant township rezoning the property to permit development of a mobile home park on the subject property.

Propvest submitted a rezoning application to defendant township, requesting the property be rezoned from SE and REC-2 to MHP ("mobile home park"). After a public hearing, the application was denied by defendant township. The espoused reasons for the denial were as follows:

1. It would require the installation of utilities that are not planned.

2. It does not meet the requirements of the Township Zoning Ordinance in regards to direct access to a major thoroughfare. The carrying capacity of Scripps Road, which is a gravel road, would not be adequate.

3. It would generate a phenomenal amount of additional traffic.

4. It does not conform with the Master Plan.

5. It would have a negative effect on the natural features of the Township and Bald Mountain State Park.

6. The petitioner has not shown that it cannot be used as presently zoned.

Plaintiffs then filed the present action, claiming that defendant's denial of Propvest's rezoning request constituted exclusionary zoning, was arbitrary and capricious, lacked any substantial relationship to the public health, safety, morals or general welfare, did not advance a reasonable governmental interest and amounted to taking of land without just compensation.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), ruling that because there was not an absolute prohibition of the asserted land use, plaintiffs' exclusionary zoning claim must fail. The trial court further dismissed plaintiffs' substantive due process claims, holding that the justification put forth by defendant furthered legitimate governmental interests. Finally, because plaintiffs had not demonstrated that the land could not be otherwise developed as zoned, the trial court dismissed plaintiffs' takings claim. Plaintiffs appeal the court's ruling, claiming summary disposition was inappropriate.

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Industrial Machinery & Equipment Co, Inc v Lapeer Co Bank & Trust*, 213 Mich App 676, 678; 540 NW2d 781 (1995). The party moving for summary disposition pursuant to MCR 2.116(C)(10) is entitled to judgment as a matter of law only if there is no genuine issue of any material fact. *Bourne v Farmers Ins Exchange*, 449 Mich 193, 196-197; 534 NW2d 491 (1995). When reviewing a motion for summary disposition, this Court may consider all the pleadings, affidavits and admissions, granting the benefit of the doubt to the non-moving party. *Id*.

Plaintiffs first argue that the trial court erred in dismissing their exclusionary zoning claim pursuant to MCR 2.116(C)(10). We disagree.

The Michigan Legislature addressed the problem of exclusionary zoning with the enactment of MCL 125.297a; MSA 5.2963(27a), which provides:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

Thus, a zoning ordinance may not totally exclude a lawful land use where (1) there is a demonstrated need for the land use in the township or surrounding area, and (2) the use is appropriate for the location. *English v Augusta Twp*, 204 Mich App 33, 37; 514 NW2d 172 (1994); *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 32; 448 NW2d 727 (1989). A zoning ordinance that totally excludes an otherwise legitimate use carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law with regard to the excluded use. *English, supra.* The total-prohibition requirement of this statute is not satisfied if the use sought by the landowner otherwise occurs within township boundaries or within close geographical proximity. *Guy v Brandon Twp*, 181 Mich App 775, 785-786; 450 NW2d 279 (1989).

Upon review of the record, we find that defendant township's ordinance does permit the construction of mobile home parks in any residential district, provided that it adhere to lot size restrictions that pertain to the particular residential zone. Additionally, it appears that there is a mobile home park currently located within defendant township. Furthermore, there is substantial mobile housing in the general proximity of defendant township. Accordingly, we cannot say that defendant township's ordinance totally prohibits mobile housing. *Guy*, *supra* at 785-786. Therefore, the trial court did not err in dismissing plaintiffs' claim.

Plaintiffs next allege that genuine issues of material fact exist as to whether defendant township's actions were arbitrary and capricious, and thus violated plaintiffs' constitutional guarantee of substantive due process. We agree.

Plaintiffs challenge both the constitutionality of defendant's zoning ordinance as well as defendant's denial of their rezoning request under the auspices of a substantive due process violation. Deliberate and arbitrary abuse of government power violates an individual's right to substantive due process. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 96; 445 NW2d 61 (J Brickley, dissenting). In order for a claim based upon substantive due process to proceed, the government action that is attacked must be, "an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness." *Brae Burn v Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957); see also *Bevan v Brandon Twp*, 438 Mich 385, 391, n 6; 475 NW2d 37, amended 439 Mich 1202 (1991). Furthermore, the burden remains with the challenging party to present evidence that the contested actions were unrelated to land use planning. *Cryderman v City of Birmingham*, 171 Mich App 15, 22-23; 429 NW2d 625 (1988). In applying these principles, four rules are utilized:

1. Zoning ordinances are clothed in the presumption of validity.

2. In order to sustain a constitutional attack on a zoning ordinance, the burden of proof is on the property owner to show that it has no real or substantial relation to public health, morals, safety, or general welfare.

3. If the claim is based upon denial of substantive due process, it is the burden of the attacking party to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property.

4. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases. [*Hecht v Twp of Niles*, 173 Mich App 453, 458-459; 434 NW2d 156 (1988).]

Plaintiffs first challenge the constitutionality of the defendant township's ordinance. However, the only justification asserted for finding defendant township's ordinance unconstitutional is that it maintains an "unfounded exclusion" of manufactured home communities. Because we find that defendant's ordinance does not impermissibly exclude said land use, we find that plaintiffs have failed to demonstrate the invalidity of defendant's ordinance based upon constitutional or substantive due process grounds.

Plaintiffs also claim that the six reasons put forth by defendant township for denying Propvest's rezoning request were arbitrary and capricious, and violated their constitutional right to substantive due process. Irrational governmental action may violate due process guarantees. *Bevan*, *supra* at 391. An individual's rights to substantive due process have been violated when government officials, in their capacity as officers of the municipality, act for partisan, political, or personal reasons unrelated to the merits of the issue or request presented. *Electro-Tech*, *supra* at 96.

Plaintiffs have presented extensive expert testimony refuting the six reasons put forth by defendant township. Likewise, defendant presented extensive rebuttal evidence supporting their justifications for denying the rezoning application. The trial court found that the reasons stated by defendant were legitimate governmental interests. However, determination of whether the reasons stated by defendant are arbitrary or capricious requires a factual determination, weighing the evidence as presented. See *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 533-534; 537 NW2d 610 (1995). Thus, because genuine issues of material fact exist as to plaintiffs' substantive due process claim, the trial court's grant of summary disposition was inappropriate.

Plaintiffs' final argument is that the trial court erred in granting summary disposition as to their takings claim. We agree.

Both the Fifth Amendment of the United States Constitution and article 10 section 2 of the Michigan Constitution prohibit governmental taking of private property without just compensation. *Bevan*, *supra* at 389-390. A taking can occur where a governmental entity exercises its police power through regulation that restricts the use of property. *Id.* However, the Supreme Court has declared that municipal land use regulations do not constitute a taking if they substantially advance legitimate state interests and do not deny an owner economically viable use of his land. *Nollan v California Coastal Comm*, 483 US 825, 834-835, 107 S Ct 3141; 97 L Ed 2d 677 (1987).[1]

Plaintiffs argue that a genuine issue of material facts exists as to whether the six reasons denying the rezoning request substantially advance a legitimate governmental interest. In order to substantially advance a legitimate government interest, these reasons must demonstrate a close nexus between the denial of the rezoning request and the justification for said denial. *Nollan*, *supra* at 837. While the six reasons presented by defendant township facially appear to present legitimate governmental concerns,

we find that plaintiffs have presented sufficient expert testimony refuting the propriety of these reasons as to present a genuine issue of material fact.

In addition to being substantially related to a legitimate government interest, the government action must also deny an owner all economically beneficial use of his land. *Lucas v South Carolina Coastal Council*, 505 US 1003, 1029; 112 S Ct 2886; 120 L Ed 2d 798 (1992). Plaintiffs presented expert testimony demonstrating that the land cannot be economically developed as presently zoned. In rebuttal, defendant township claims that the land at issue could be developed as a Planned Urban Development. We find that this conflicting testimony constitutes a genuine issue of material fact. Consequently, the trial court's grant of summary disposition as to plaintiffs' takings claim was inappropriate.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh

[1] The Supreme Court has made clear that the property at issue must be made "valueless" as a result of the government action. In *Lucas*, *supra*, the Supreme Court stated, "It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. . . . Takings law is full of these "all-or-nothing" situations." *Lucas*, *supra* at 1019 n 8.