

STATE OF MICHIGAN
COURT OF APPEALS

DAN & JAN CLARK, LLC,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF ORION, GERALD
A. DYWASUK, JILL D. BASTIAN, ALICE P.
YOUNG, MICHAEL GINGELL, JOHN M.
STEIMEL, ROBERT POTE, DOUGLAS ZANDE,
BRAD LARE, MARK CRANE, SANDRA DYL,
and DICK CHRISTIE,

Defendants-Appellees.¹

UNPUBLISHED

June 25, 2009

No. 284238

Oakland Circuit Court

LC No. 07-081444-CZ

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Plaintiff, Dan & Jan Clark, LLC, appeals as of right the trial court's order granting summary disposition to defendant Charter Township of Orion (the Township). We affirm.

I. Basic Facts and Procedural History

This case arises out of a rezoning dispute for 6.64 acres located on the west side of Lapeer Road (a/k/a M-24), south of Scripps Road, in the Township (the Clark property).² Plaintiff purchased the land in 1999, intending to develop it commercially pursuant to its then-existing zoning classification of GB-2, General Business. The following additional properties are relevant to this appeal and will be referred to as follows: 1) the adjacent property to the south of the Clark property (Home Depot property); 2) the adjacent property to the north of the Clark property (Atchoo property); and 3) the property to the north of the Atchoo property (Bald Mountain property).

¹ Although all defendants are listed as Appellees, plaintiff has not appealed the dismissal of the "individual defendants." Accordingly, the only defendant present in this appeal is the Township.

² Although plaintiff owns two parcels, we refer to them collectively.

In 2005, the state of Michigan agreed to transfer the Bald Mountain property from state ownership to a private owner. The Township opposed the transfer, arguing that the Bald Mountain property served as a necessary break between the residential and commercial uses on adjacent properties and that residential or commercial development of the site would “severely compromise the sanitary sewer for the area.” The Bald Mountain property was zoned Rec-2, Recreational 2. Fearing the new owner’s intention to build a golf course on the Bald Mountain property would be a nonconforming use with the Rec-2 zoning classification, the Township Board undertook a study of the Lapeer Road area and resolved to update its master plan. It determined that permitting new development or expansion and rezoning in the area would be “counter-productive” and imposed a 120-day moratorium on June 20, 2005, which was later extended for an additional 180 days. Under the moratorium, consideration on applications for new development, expansion or rezoning in the Lapeer Road area was deferred, but property owners were permitted to request a waiver of the moratorium and receive a hearing to show that “the temporary deferral pronounced in this Resolution will result in the preclusion of any viable economic use of their property, or otherwise violates applicable provisions of State or Federal constitution or law.” If the property owner made such a showing, the Township Board would grant a deferment “to the degree necessary to cure the contravention.”

During the moratorium, Regency Centers offered to purchase the Clark property for use as a Target store, contingent upon Regency Center’s purchase of the Atchoo property and another 3.44 acres from a different neighboring property. On February 6, 2006, an attorney representing plaintiff appeared at the Township Board meeting to support Regency Center’s request for a waiver of the moratorium. Although the Clark property needed no rezoning, Regency Center’s plan required rezoning the Atchoo property from OP-1, Office and Professional, to GB-2, thereby necessitating the waiver. The Township Board concluded that the property owners had not shown that waiting the two remaining months of the moratorium would result in the loss of all economic viability to their properties and denied the application.

The Township Planning Commission completed its master plan update on April 10, 2006. The plan noted that “[t]he commercial market analysis in the 2003 Master Plan and the 2001 Brown Road Plan also states that more than enough commercially zoned land already exists within the Township” and resolved to “[m]inimize the potential for commercial development outside of the existing commercial nodes.” The Clark property was considered in conjunction with the Atchoo property. Although the update acknowledged that the current zoning for the Clark property was GB-2, it indicated that “the Township’s current 2003 Master Plan designates these parcels for General Office.”

On April 19, 2006, the Township Planning Commission adopted the master plan update, and on April 21, 2006, the Township filed an application to rezone the Bald Mountain property from Rec-2 to SE, Suburban Estates, and to rezone the Clark property from GB-2 to OP-1. Orion Land Holdings, LLC also filed an application to rezone the Bald Mountain Property from Rec-2, but wanted the new zoning to be GB-2 and RM-2, Multiple-Family Residential.

Dan Clark appeared before the Township Board and spoke in opposition to the rezoning of the Clark property. He indicated his concern that he was “being bundled” with the Bald Mountain property “obviously for some higher purpose” and wanted to know why anyone would consider “rezoning good General Business-2, which is a valuable commodity at this point, because it’s the only GB-2 even on the strip that’s vacant and available, to Office, which

essentially has just about no value at all.” Clark was told that the change to office was an attempt to create a buffer between commercial use and residential use, that the change in elevation and retaining wall between the Home Depot property and the Clark property made that the “natural change between General Business and Office and Professional that then naturally changes to recreation and/or residential,” and that there were already a number of General Business operations standing empty in the area. Although it was noted that there was already OP-1 property between the Home Depot property and the Bald Mountain Property, i.e. the Atchoo property, one of the commissioners indicated that there is no established acreage amount to constitute a buffer.

Ultimately, the Township Board concurred with the recommendations and reasoning of the Township Planning Commission and rezoned the Bald Mountain property from Rec-2 to SE, rezoned the Clark property from GB-2 to OP-1, and denied rezoning the Atchoo property, leaving it OP-1. Plaintiff appealed the decision to rezone the Clark property and requested a variance to permit the uses allowed under a GB-2 zoning designation, but its appeal was dismissed for lack of jurisdiction. Plaintiff filed suit, alleging substantive due process violations, an unconstitutional taking, equal protection violations, civil conspiracy, exclusionary zoning, a violation of the Headlee Amendment, and a claim under 42 USC 1983. The Township filed for summary disposition pursuant to MCR 2.116(C)(8) and (10), which the trial court granted.

II. Analysis

A. Procedural Defects

Plaintiff first argues that reversal is required because the Township improperly filed its petition for rezoning during the moratorium and its petition was defective because it sought to rezone multiple, nonadjacent properties in a single petition, contrary to MCL 125.284.³

The initial moratorium was enacted on June 20, 2005 and was to last for 120 days, which would have been October 18, 2005. The extension was for 180 days, and indicated that “[t]he period of time commencing on June 20, 2005 . . . shall be extended for an additional period of 180 days.” Calculating 180 days from October 18, 2005 results in April 16, 2006. The petition requesting rezoning was not filed until April 21, 2006. Accordingly, the petition was not filed during the moratorium. As to plaintiff’s claim that the Township’s petition was defective because it sought to rezone multiple, nonadjacent properties, we fail to see how MCL 125.284 supports plaintiff’s position. Nothing in the statute relates to how many properties, adjacent or otherwise, may be contained within a single petition for rezoning; it is simply a notice provision. Accordingly, we conclude that there are no procedural defects with the Township’s petition.

³ MCL 125.284 is part of MCL 125.271 *et seq.*, the Township Planning Act, which was repealed by 2006 PA 110, effective July 1, 2006. However, because the Township’s petition was filed and accepted prior to June 30, 2006, it is appropriate to consider any statutory requirements related to petitions in existence at that time.

B. Equal Protection

Plaintiff next argues that the trial court improperly granted summary disposition on its equal protection claim. We agree that the trial court erred in concluding that plaintiff had not requested a waiver, as the evidence before the trial court clearly established that Regency Centers was acting as an agent for plaintiff. However, we affirm the trial court's denial of summary disposition because plaintiff has failed to prove an Equal Protection claim. See *Burise v City of Pontiac*, 282 Mich App 646, 652, n 3; ___ NW2d ___ (2009) (“When a trial court reaches the right result for the wrong reason, the ruling will not be disturbed”).

1. Denial of Waiver

Because plaintiff is not a member of a protected class, its equal protection claims are subject to rational basis analysis. *Dowerk v Oxford Twp*, 233 Mich App 62, 73; 592 NW2d 724 (1998). Under the rational basis test, plaintiff must show that the denial of the application for waiver was “arbitrary and thus irrational.” *Id.* The Township Board denied the application for waiver of the moratorium because it determined:

there hasn't been a showing to my satisfaction that allowing the next two months to conclude themselves, with the formulation of this Master Plan Work, is diminishing or depleting all economic viability. They haven't shown the Board the documentation, presentation, or testimony, or otherwise, that says that these particular purchasers are going to walk from these projects [I know it was threatened at the last meeting, but I noticed that it's still the same applicant this time, even though the option was supposed to expire]. I haven't seen enough that says that this temporary deferment which we are almost through – we're almost at the end now, can't be allowed to run its course. These particular applications would still have the opportunity to proceed at that time and, certainly, have ample opportunity in the concluding stages of that work.

These reasons appear neither arbitrary nor irrational.

2. Review Procedures for Waiver

Plaintiff also claims that the township violated its equal protection rights by applying different review procedures to its application for waiver of the moratorium than it applied to applications for waiver on other properties, specifically those made by Suzanne Turpen and Autumn Creek. However, plaintiff has failed to show that it was similarly situated to either of these applicants. Turpen had claimed that the moratorium prevented her from being able to enter into a purchase agreement with a buyer for her property (the sole offer to purchase in 18 years) and Autumn Creek claimed that failure to waive the moratorium would result in the loss of its option. Unlike Turpen, plaintiff had received multiple offers to purchase its property, including contracts made in 1999, 2003 and 2005. As for Autumn Creek, it had already begun development on the property prior to the moratorium, whereas no development had begun on plaintiff's property. Also, for both Turpen and Autumn Creek, the moratorium was the singular reason they could not move forward and the waiver ended the Township Board's involvement. This was not true with the Clark property. Rather, even if the Township Board had granted the waiver, the next step would have been a request for rezoning of the other involved properties.

“Thus, for purposes of equal protection, plaintiff is not situated similarly to” Autumn Creek and Turpen and, therefore, “has suffered no constitutional deprivation of the equal protection of the laws.” *Id.* at 74.

C. Due Process

1. Enactment and Enforcement of Moratorium

Plaintiff first argues that its due process rights were violated because the moratorium was simply a resolution and could not trump the existing Township ordinances. Plaintiff relies on *Rollingwood Homeowners Corp v Flint*, 386 Mich 258, 267; 191 NW2d 325 (1971), which held that “[t]he attempt to legislate by resolution is simply a nullity.” However, plaintiff has failed to prove that the moratorium was an attempt to legislate by resolution. *Rollingwood’s* conclusion was based on the fact that “where the substance of city action requires the adoption of an ordinance, a resolution cannot operate as a *de facto* ordinance.” Here, the substance of the zoning board’s action did not require the adoption of an ordinance. “Resolutions are for implementing ministerial functions of government for short-term purposes. Ordinances are for establishing more permanent influences on the community itself.” *Id.* at 264 (internal quotations and citations omitted). The moratorium lasted less than a year, even with the extension, making it clearly short-term. Additionally, it did not create new procedures or even affect *all* petitions related to rezoning and special use. Rather, it simply deferred consideration of any *new* petitions until after a review of the master plan. We conclude that the moratorium was properly enacted as a resolution and did not operate as a *de facto* ordinance.

In fact, we believe the moratorium actually protected plaintiff’s due process rights. The Township Board could have determined to defer decisions on all new applications for rezoning and special use until the master plan had been reviewed without issuing a moratorium. There is no provision requiring that decisions must be made within any particular time frame, such that the Township Board could have simply tabled discussion of each new petition until the review was complete. Instead, it created a policy that would equally affect all new petitions for rezoning and special use, but included a mechanism within the resolution to permit applications for waiver. Applicants were not denied a right to apply for rezoning, but instead were informed that decisions about such matters were temporarily deferred. Applicants were not even absolutely prevented from having their petitions considered, but were given the opportunity to request a waiver from the moratorium and receive a hearing on their applications for waiver, giving them the opportunity to show that the moratorium was interfering with their constitutional rights.

In any event, substantive due process simply requires that a governmental act not be arbitrary and “be rationally related to a legitimate governmental interest.” *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). Because the land swap would potentially change the character and ownership of a large section of the Township, it was certainly reasonable and legitimate for the Township to conclude that a review of the master plan was appropriate. Indeed, MCL 125.3845(2) requires a review of a master plan every five years to determine whether amendments are necessary. Thus, while it had not been five years since the master plan had been reviewed, it was certainly legitimate for the Township to reconsider the plan in light of a substantial change in ownership. It was also reasonable for the Township to determine that it would be counterproductive to grant rezoning requests on properties when they were in the midst of a review process, as it could become unclear whether property owners were

seeking to rezone from the existing plan or the updated plan. Accordingly, even taking the evidence in the light most favorable to plaintiff, the enactment and enforcement of the moratorium was neither arbitrary nor without reasonable explanation and, therefore, did not deny plaintiff its due process rights. *Id.*

2. Rezoning

Plaintiff also argues that the rezoning of the Clark property violated its due process rights because the action was unreasonable. For both facial and “as applied” challenges to an ordinance, the plaintiff must show “(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of the other types of legitimate land use from the area in question.” *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Plaintiff must prove that the zoning ordinance does not serve any rational relation to the public health, safety, welfare, and prosperity of the community. *Dorman v Clinton Twp*, 269 Mich App 638, 651; 714 NW2d 350 (2006) (internal quotations and citations omitted). Although this Court considers each case based on the existing facts and conditions rather than some future potential condition, *Frericks, supra* at 608, a plaintiff’s particular circumstances are irrelevant to whether a zoning decision was valid because zoning ordinances reflect general policy decisions applicable to the entire community. *Greater Bible Way Temple v City of Jackson*, 478 Mich 373, 389-390; 733 NW2d 734 (2007).

Judicial review of a challenge to an ordinance on substantive due process grounds requires application of three rules:

“(1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner’s use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge.” [*Yankee Springs Twp v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004), quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

Because this claim was decided on summary disposition under MCR 2.116(C)(10), the third rule does not apply. Thus, the question is whether, drawing all reasonable inferences from the admissible evidence in the light most favorable to plaintiff, reasonable minds could differ as to whether the rezoning was an arbitrary and unreasonable restriction on the use of the Clark property. See *Campbell v Kovich*, 273 Mich App 227, 229-230; 731 NW2d 112 (2006). If there is room for a legitimate difference of opinion concerning reasonableness, plaintiff’s claim must fail. *Frericks, supra* at 594.

We note that plaintiff’s assertions that the Clark property was rezoned because the Township was angry about the land swap involving the Bald Mountain property are irrelevant, as neither the motives of a planning commission in making a recommendation, nor the motives of a zoning authority in granting a rezoning application, are relevant. *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525, 528; 656 NW2d 212 (2002).

There is no question that the community planning experts for both plaintiff and the Township disagreed about the proper use and zoning of the Clark property. Plaintiff's expert, Rodney Arroyo, testified that allowing the Clark property to be put to commercial use was in keeping with the commercial character of the area and provided for commercial use next to an existing commercial use and that the high vacancy rate, lack of demand for office use, and the unsightly nature of the adjacent Home Depot made the Clark property unsuitable for office use.

Both of the Township's experts, Donald Wortman and Philip McKenna, testified that they disagreed with Arroyo's conclusions that the Clark property should be zoned GB-2. McKenna testified that he supported the rezoning of the Clark property and could not support a decision to have the Clark property zoned commercial. In his opinion, a master plan designation of general business commercial for the Clark property would be an unreasonable decision as something else was necessary to transition from the residential zoning of the Bald Mountain property to the north and the general business commercial to the south. Wortman believed that there was a market for professional office property and McKenna testified that, even if he assumed that there was no market for office zoning and that the Clark property would remain fallow for the foreseeable future, even as long as 25 years, his opinion would not change.

Thus, the evidence in this case shows that there is clearly room for legitimate differences of opinion as to the zoning and use of the Clark property. Where there is room for a legitimate difference of opinion concerning an ordinance's reasonableness, there is no due process violation. *Frericks, supra* at 594. Accordingly, summary disposition was proper.

D. Taking

A taking can occur when the government overburdens property with regulations. *K & K Constr 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) 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 (b) 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. *Lucas, supra* 505 US at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to “sacrifice *all* economically beneficial uses [of his land] in the name of the common good” *Id.* 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. *Penn Central*, 438 US 104 at 124 [*Id.* at 576-577.]

This same test is used for regulatory takings based on moratoria. *Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency*, 535 US 302, 342; 122 S Ct 1435; 152 L Ed 2d 517 (2002).

1. Categorical

To show a categorical taking, plaintiff may 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). Plaintiff relied on the latter argument, providing the affidavit of Edward Weglarz, which stated that he had marketed the Clark property, that he had never received an offer to purchase the Clark property for office use, and that there is no market for office buildings in that area. In *Bevan*, our Supreme Court concluded that the record did not support the plaintiffs' statement that their attempts to sell the property had been unsuccessful where it showed only one unsuccessful attempt to sell the property. *Id.* at 404. The Court held that "[n]o evidence was provided . . . concerning the extent or effort or methods used in attempting to sell the property. The record does not reflect the price at which the property was offered, or the value of comparable lands, or any other evidence that would justify a conclusion that the property as zoned is unmarketable." *Id.* The same is true here. Accordingly, summary disposition was appropriate.

2. *Penn Central*

The second type of taking requires evaluation of the *Penn Central* factors. The first factor is the character of the government's action. "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). Here, plaintiff's property was not the only property to bear the burden for the public good. The ten-month deferral of applications for new development applied to all properties in the Lapeer Road area and all property owners had the same opportunity to apply for a waiver from the moratorium. The Township instituted the moratorium in order to study the area and possibly update the master plan. The United States Supreme Court has stated that such moratoria are essential tools for successful development. *Tahoe-Sierra, supra* at 337-338.

The second factor is the economic effect of the regulation on the property. The moratorium itself did not appear to economically impact the Clark property because the evidence showed that Regency Centers extended its offer to purchase the Clark property to the time period following the ten-month moratorium.

The third factor is the extent by which the regulation has interfered with distinct, investment-backed expectations. "To claim a vested interest in a zoning classification, the property owner must 'hold[] a valid building permit and [have] completed substantial construction.'" *Dorman, supra* at 649, quoting *Seguin v Sterling Heights*, 968 F2d 584, 590-591 (CA 6, 1992) (alterations in *Dorman*). Plaintiff had no building permit and had not started

construction on the Clark property prior to the moratorium, or at the time the rezoning application was submitted or decided.

Each of the factors weighs in favor of concluding that a regulatory taking did not occur. Plaintiff failed to demonstrate a genuine issue of material fact that the moratorium or the rezoning amounted to a regulatory taking of the property under the *Penn Central* balancing test, making summary disposition appropriate.

E. Exclusionary Zoning

To prove a claim of unlawful exclusionary zoning, a plaintiff must show that:

(1) the challenged ordinance section has the effect of totally prohibiting the establishment of the land use sought within the city or village, (2) there is a demonstrated need for the land use within either the city or village or the surrounding area, (3) a location exists within the city or village where the use would be appropriate, and (4) the use would be lawful, otherwise. [*Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 684; 625 NW2d 377 (2001).]

Plaintiff's claim fails because it cannot show either the first or second element. Plaintiff's own evidence proves that there is already existing GB-2 zoned land, including the Home Depot property adjacent to plaintiff's property. Indeed, the very existence of the Home Depot precludes plaintiff's contention that no large format retailers are permitted in the area. Additionally, plaintiff has failed to show that there is a demonstrated need for GB-2 land in the Township. At best, plaintiff has shown that there is some *demand* for GB-2 property, but it has not demonstrated even a factual question as to whether there is a *need* for such property. In fact, the Township Board minutes indicate that there is not a need, as much of the existing GB-2 land is vacant. Accordingly, summary disposition was proper.

F. Tree Ordinance

The Township's tree ordinance, Art XXVII, § 27.12 of the Township Ordinance (the "Tree Ordinance") prohibits the removal, transplant or destruction of any protected tree, defined as one "having a diameter breast height (d.b.h.) [a tree's diameter in inches measured by diameter tape at 4.5 feet above the ground] of four (4) inches or greater and subject to the regulations of this Ordinance," § 27.12(B)(5), (10), on undeveloped land, without first obtaining a tree removal permit (which required payment of a fee) and that trees removed subject to the tree permit must be either replaced or relocated, or the property owner must contribute to a Township tree fund that would be used to relocate or replace the trees. § 27.12(C)(1), (E), (H) and (M). Plaintiff argued that the Tree Ordinance's differentiation between undeveloped and developed land, and those owners with more than or fewer than five acres, were violations of equal protection; that it resulted in a de facto taking of plaintiff's property; and that it imposed a tax in violation of the Headlee Amendment.

1. Equal Protection

a. Developed Property

Plaintiff first claims that there is no rational basis for distinguishing between property owners with undeveloped parcels and those with improved or developed parcels. Under the Tree Ordinance, “A person shall not remove, transplant, or destroy . . . on any *undeveloped* land in the Township, any protected tree . . . without first obtaining a Tree Removal Permit” § 27.12(C)(1) (emphasis added). The definition of “undeveloped” includes not only parcels of land that have not been improved, but also portions of land that do not contain buildings or developments on improved parcels. § 27.12(A)(2)(a). Based on the broad definition of “undeveloped,” the ordinance appears to apply to all existing trees, regardless of whether any of the other land upon which the trees are found has already been developed. Thus, the ordinance does not distinguish between “established property owners and new development” as plaintiff suggests.

Additionally, the Tree Ordinance contains multiple exceptions, including “activities within building envelope.” No tree removal permit is required “for construction of structures or other activities within a building envelope or building site. This shall include roads, road rights-of-way, driveways, essential utilities, retention/detention ponds, or septic fields.” § 27.12(D)(2). The “building envelope” is “the area enclosed or to be enclosed by the exterior walls of the proposed structure, plus a reasonable area beyond such walls up to fifteen (15) feet” Given such a broad exception to the requirement of a tree removal permit, plaintiff has failed to provide any evidence that the Tree Ordinance prevents development of undeveloped property.

b. Land Area

Plaintiff also argues that the Tree Ordinance arbitrarily distinguishes between owners with parcels greater than five acres and owners of parcels with five acres or less, thereby constituting an equal protection violation. To survive summary disposition, plaintiff was required to create a genuine issue of material fact to “negate every conceivable basis which might support” the ordinance. *Conlin v Scio Twp*, 262 Mich App 379, 390-391; 686 NW2d 16 (2004) (internal quotations and citations omitted). Plaintiff provided the affidavit of Donald Juchartz, who opined that “[t]here is no scientific support to treat trees on private property of more than 5 acres differently than trees on private property of less than 5 acres.” Although this opinion arguably creates a genuine issue of material fact as to whether it was scientifically reasonable for the Township to extend privileges to property owners with fewer than five acres, plaintiff offered no evidence negating the aesthetic basis for privileges extended to such property owners. The Township conceivably distinguished between property owners with more than five acres because clear-cutting woodlands spanning larger parcels would have a more devastating effect on aesthetics. Having failed to create a genuine issue of material fact as to this governmental basis for the ordinance, the trial court properly granted summary disposition as to the equal protection claim. *Id.*

2. Taking

Plaintiff next argues that the Tree Ordinance effectuated a taking of the Clark property. Because plaintiff is asserting that the Tree Ordinance is facially invalid, we disagree with the

Township that plaintiff's taking claim is not ripe. Although "as applied" challenges to zoning ordinances are subject to the rule of finality, "[f]inality is not required for facial challenges because such challenges attack they very existence or enactment of an ordinance." *Paragon Properties Co v City of Novi*, 452 Mich 568, 577; 550 NW2d 772 (1996).

If the Tree Ordinance overburdened plaintiff's property, this could constitute a taking. *Dep't of Natural Resources, supra* at 576. Plaintiff needed to show either a categorical taking or a taking under the *Penn Central* balancing test. *Id.* at 576-577. Plaintiff failed to raise a genuine issue of material fact as to either type of taking. Although the Tree Ordinance went into effect in 2000, plaintiff had multiple offers from buyers seeking to purchase and develop the Clark property after that time. Thus, plaintiff's own evidence proves that the ordinance did not destroy all economic viability of the Clark property, such that there was no categorical taking.

Plaintiff also failed under the *Penn Central* balancing test. The Tree Ordinance provides that "[r]egulation of the removal of tree resources will achieve a preservation of important physical, aesthetic, recreational, and economic assets for both present and future generations" and concludes that preserving woodlands and regulating tree removal is beneficial to the health, safety, and general welfare of the Township residents by preventing erosion and flooding, reducing noise and pollution, and increasing economic value in the land. § 27.12(A)(1). These are both reasonable and legitimate concerns for the Township's ordinance, and the regulations contained in the ordinance are specifically related to those interests.

As to the economic impact, plaintiff asserts that the ordinance has economically impacted the Clark property, but has provided no evidence to support its position. As noted previously, plaintiff has received multiple purchase offers for the Clark property since the Tree Ordinance was enacted, yet plaintiff did not even allege that these offers would have been higher but-for the Tree Ordinance. Plaintiff also failed to offer any evidence that the Tree Ordinance interferes with distinct, investment-backed expectations on Township properties. Absent any evidence, there can be no question of fact on this issue, making summary disposition appropriate.

3. Headlee Amendment

Finally, plaintiff argues that the charges imposed by the Tree Ordinance constitute an illegal tax that violates the Headlee Amendment. The Township argues that the ordinance imposes a fee, not a tax. "Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred." *Westlake Transportation, Inc v Pub Service Comm*, 255 Mich App 589, 612; 622 NW2d 784 (2003).

In determining whether a charge imposed by a unit of government is a fee or a tax, a court must consider: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related; and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. [*Id.*]

In this case, § 27.12(H)(1) of the Tree Ordinance provides, "For each protected tree required to be preserved under the terms and standards set forth above, and which is permitted to be removed by permit granted under this Section, the applicant shall replace or relocate trees . . .

.” Replacement is to be made on the owner’s parcel or, if this is not feasible or desirable, may be made elsewhere in the Township. § 27.12(H)(3). Alternatively, property owners may contribute to the tree fund which shall be used “to purchase and install trees within a reasonable proximity of the development in connection with which funds have been paid to the Tree Fund.” § 27.12(M)(2); see also § 27.12(H)(2)(f).

Requiring property owners to replace their removed trees or pay the Township a fee that will permit the Township to replace the removed trees insures one of the stated purposes of the section, namely to preserve important physical, aesthetic, recreational, and economic tree resources for present and future generations. Accordingly, this charge serves the regulatory purpose of the ensuring adequate woodlands for noise and pollution reduction, flood and erosion prevention, and recreational and aesthetic promotion, thereby satisfying the first criterion. See *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 659-660; 697 NW2d 180 (2005).

The Tree Ordinance permits property owners to remove trees. In exchange for this permission, the Township established the replacement requirement to plant one tree for each tree removed. § 27.12(H)(2). This one-to-one ratio is proportionate. Moreover, even when property owners elect to pay money to the tree fund rather than replace the trees, there is no evidence that the fee imposed by the Township is disproportionate to the costs incurred to replace the removed trees. See *id.* at 665-666. Accordingly, the ordinance appears to meet the second criterion.

Finally, with the third criterion, the replacement or tree fund requirements are not voluntary, but mandatory conditions in order to receive a permit. Nevertheless, this Court has concluded that “the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax.” *Id.* at 666. Following *Wheeler*, because the first two criteria indicate that the Tree Ordinance imposes a fee, the lack of volition in this case does not render the charge a tax. *Id.* at 666-668. “[A]lthough the monetary penalty authorized by [the ordinance] certainly could generate some *de minimis* revenue for the township, the documentation offered . . . failed to demonstrate that the penalty confers any tax-like benefit on the general public.” *Id.* at 667-668. Because the Tree Ordinance does not impose a tax, it does not implicate the Headlee Amendment. Summary disposition was proper.

G. 42 USC 1983

Case law is clear that “42 USC 1983 itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes.” *Jackson v Detroit*, 449 Mich 420, 430 n 13; 537 NW2d 151 (1995). Because we concluded that summary disposition was properly granted as to all of plaintiff’s previous claims, summary disposition was also proper as to this claim.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro