

STATE OF MICHIGAN
COURT OF APPEALS

RONALD DICICCO and CARRIE DICICCO,

Plaintiffs-Appellees,

v

CITY OF GROSSE POINTE WOODS,

Defendant-Appellant.

UNPUBLISHED

August 8, 2006

No. 265163

Wayne Circuit Court

LC No. 03-310396-CZ

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Defendant appeals by leave granted the order denying its motion for summary disposition in this dispute over the constitutionality of a zoning ordinance as applied to plaintiffs' property. We reverse and remand.

Background

This case marks the fourth time these parties have appeared before this Court in a controversy, dating back to 1997, involving plaintiff's 1995 purchase of a 42-foot wide portion of residential property in the City of Grosse Pointe Woods for \$5,500 with the intent to build a 4,000 square foot home. On January 10, 1997, plaintiffs applied for a building permit, which was granted by the city's chief building official, Melissa Spranger. Plaintiffs began construction near the end of August 1997. Neighbors Roland and Carol Bernardi filed an action shortly thereafter,¹ and the circuit court entered a temporary restraining order on November 6, 1997, prohibiting plaintiffs from engaging in further excavation or construction.²

Under a zoning ordinance amended in 1975, the city required that lots in the area have a minimum width of 60 feet. An exception was made for lots that were "of record" in 1975. The central question initially presented to the trial court was whether plaintiffs' parcel was a lot of

¹ The Bernardis alleged that the construction was causing a loss of lateral support to their property.

² Plaintiffs continued with the construction by performing additional excavation, pouring basement walls, and connecting to utilities after the issuance of the order.

record as of 1975. The court found that the property was not a lot of record on the map in the county register at the time the zoning ordinance was amended and that the lot was therefore not grandfathered in under the prior zoning. The trial court granted summary disposition in favor of the Bernardis and the Bernardi's complaint against the city was dismissed by stipulated order in February 1998.

Plaintiffs then filed an application for leave to appeal the determination that their lot was not "of record." This Court denied the application "for lack of merit in the grounds presented." Meanwhile, in February 1998, plaintiffs filed for a variance in accordance with § 98-408(C)(5) of the city's zoning ordinance. After a hearing at which both sides, as well as several neighbors, appeared, the members of the zoning board of appeals (ZBA) unanimously voted to deny the request.

Plaintiffs appealed to the circuit court. The circuit court agreed with plaintiffs' position that the property likely could not be put to any other appropriate use other than having a house built on the property, but pointed out that plaintiffs were aware of the restrictions when they purchased the property. After consideration of whether the building of the home would negatively affect the use and enjoyment of adjacent property owners, whether the building of the home would interfere with the health or safety of anyone in the neighborhood, and whether substantial injustice would occur in granting the variance, the court concluded that the neighbors prevailed on the balancing of the interests test and that the ZBA's decision was not arbitrary and capricious and had record support that was substantial, competent, and material.

Plaintiffs filed an application for leave to this Court, which granted the application³ and consolidated that appeal with an appeal pending in the related circuit court case involving the Bernardis. In March 2002, this Court issued an opinion, relying on the law of the case doctrine to reject plaintiffs' arguments that their lot was a lot "of record" in 1975, and reiterating that plaintiffs' lot was not a lot of record when the 1975 ordinance was enacted. This Court also addressed the ZBA's denial of plaintiffs' request for a variance, ruling that the record contained insufficient factual findings by the board to permit appellate review. The Court remanded to the ZBA for further explanation of why it denied the variance.⁴

The ZBA held a hearing on November 4, 2002. After hearing arguments, a board member moved to deny the variance because the lot was not of record, any hardship was self-created, the building permit was invalidated, substantial injustice to the neighborhood would occur if the board granted the variance, the Wedgewood property⁵ was not comparable, the

³ Docket No. 222751.

⁴ *DiCicco v Grosse Pointe Woods*, unpublished opinion per curiam of the Court of Appeal (Docket Nos. 222751, 222998, issued 03/01/02), slip op at 5-6.

⁵ Apparently a home was built on Wedgewood, a nearby street, on an irregular lot that measured over 60' in its front width, but narrowed to 43' in the back. The Wedgewood lot was a lot of record.

variance requested was over 25% of the lot size, and no practical difficulty existed. The board voted unanimously to deny the variance for the reasons stated.

Plaintiffs appealed to the circuit court. In its opinion, the court first noted that the board failed to provide a full explanation of the reasons for denying the variance. The Court continued:

Because the Board failed to identify and explain the basis and reasoning for its denial based on the criteria mandated by the applicable ordinance, this Court must find that the decision was not supported by competent, material, and substantial evidence on the record. This is particularly so inasmuch as the DiCissos presented unrefuted evidence that the property could not be appropriately improved without the variance and there was a lack of evidence (only a conclusory finding) that granting the variance would constitute a substantial injustice to the neighbors. (In fact, the DiCiccoc presented evidence that many other lots within the neighborhood were less than 60' wide, some narrower than the DiCissos' lot and thus, the proposed improvement would not be out of character for the neighborhood. In addition, they presented statements from 23 prospective neighbors that the proposed home would constitute a dramatic improvement). There was also a lack of evidence that granting the variance would adversely affect the public safety of the community.

The circuit court thus reversed the ZBA's decision and remanded the matter to it to grant plaintiffs' application for a variance.

Defendant thereafter filed an application with this Court. This Court peremptorily reversed in an order dated October 29, 2003,⁶ which provided in pertinent part:

A review of the findings made by the ZBA on remand reflects that the board's decision was supported by competent, material, and substantial evidence on the record and represented the reasonable exercise of discretion granted by law to the board of appeals. MCL 125.585(11). This Court gives considerable weight to the factual findings from the lower tribunals. *Bell River Assoc v China Twp*, 223 Mich App 124, 129; 565 NW2d 695 (1997). Indeed, this Court defers to determinations of fact made by a ZBA if those determinations are supported by competent, material, and substantial evidence on the record. *The Jesus Center v Farmington Hills Zoning Bd of Appeals*, 215 Mich App 54, 60; 544 NW2d 698 (1996). The pertinent ordinance provides that the ZBA may choose, in its discretion, to permit a variance where the lot cannot be appropriately improved without the variance "provided that the purpose and spirit of this chapter shall be observed, public safety secured and substantial justice done." Section 98-408(C)(5). In this case, the record contained evidence that the spirit of the chapter would not be upheld by the granting of the variance, which comprised over 25% of the required property width. As noted by the ZBA, the record also reflected

⁶ Docket No. 249786

that substantial injustice would result to the immediate neighbors should the variance be granted.

Thus, plaintiffs were precluded from building a home on the property.⁷

The present lawsuit

In April 2003, plaintiffs filed the present suit challenging the constitutionality of the city's zoning classification under its ordinance, as applied to plaintiff's property, on taking, due process, and equal protection grounds. Defendant moved for summary disposition and, following a hearing, the trial court issued a written opinion on August 26, 2005.

As to the due process and equal protection claims, the court dismissed any facial challenge to the ordinance after finding that plaintiffs challenged the ordinance only as applied. With regard to the "as applied" challenge, the court ruled that defendant failed to raise its specific challenges to plaintiffs' "as applied" substantive due process and equal protection claims in its motion for summary disposition.

As to the taking claim, the court applied the balancing test required in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978), which requires an examination of the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-back expectations. The court ruled that plaintiffs failed to show that that the application of the ordinance's minimum lot width requirements did not substantially advance a legitimate governmental interest. But the court found that an issue of fact existed as to the ordinance's interference with plaintiffs' investment-backed expectations:

Here, the plaintiffs bought the Property in 1995 for around \$5,000 and they did not inquire into a building permit until 1996. The plaintiffs state that the sale price of the Property was so low because it was in "dual probate" at the time and the heirs did not want to wait for lengthy negotiations on a higher price. However, the plaintiffs' appraisal expert testified that if the lot were a "buildable lot" that it would be worth \$160,000. Moreover, because the City enacted the Ordinance in 1975, the plaintiffs either knew or should have known that the Property did not meet the 60 foot minimum width requirement. Notably, there is no evidence to suggest that the plaintiffs relied on any representations made by the defendant concerning the buildability of the Property prior to the plaintiffs purchasing it. Therefore, the Court believes that in light of the facts previously enunciated, there is a question of fact as to whether the plaintiffs' expectations that they would be entitled to build a single-family residence on the Property were unreasonable.

As to the economic effect, the court ruled that the evidence also was disputed:

⁷ The Supreme Court denied plaintiffs' application for leave to appeal in an order dated 5/28/04.

[T]he defendant asserts that the 2004 “assessed value” of the Property is \$10,120.00 per the March 9, 2004 evaluation notice. However, the defendant has failed to submit a copy of this document to the Court. The defendant also argues that the Property retains value as a residential property because it could be sold to neighbors. Indeed, the plaintiffs’ appraiser testifies that the Property retained value if sold to neighboring property owners and the plaintiffs have not supplied any evidence that they have attempted to sell the Property. On the other hand, the plaintiffs assert that the value of the Property as zoned is \$0 per the notice of change in assessed valuation issued on February 23, 2004, which they submitted along with their response to the defendant’s motion.

In light of the fact that there exists a disputed issue of fact as to the economic effect of the Ordinance on the Property, the Court finds that it is unable to properly perform the balancing test required under *Penn Central*. Thus, the Court will deny the defendant’s motion for summary disposition as to Count III, the takings claim, of the plaintiffs’ complaint.

The court issued an order of partial summary disposition, denying defendant’s motion as to the taking claim and with regard to the “as applied” constitutionality of the ordinance. The trial court denied defendant’s motion for reconsideration, finding in part that defendant improperly raised for the first time in its motion for reconsideration its argument regarding plaintiffs’ “as applied” substantive due process and equal protection claims.

I.

Defendant argues that the trial court erred by expressly declining to consider defendant’s motion for summary disposition with regard to plaintiffs’ “as applied” substantive due process and equal protection claims. We agree. In defendant’s brief in support of the motion for summary disposition defendant states that, “Plaintiffs are now attempting to claim that the City’s ordinance as applied to the Property in question results in a violation of substantive due process.” Defendant then presents legal argument and analysis regarding the substantive due process claim. Defendant also states in the brief that “Plaintiffs’ equal protection claim is identical to the substantive claim which is addressed in Section I, *supra*.” Thus, contrary to the trial court’s finding, defendant did address the issues of substantive due process and equal protection “as applied.”

We review de novo a trial court's ruling regarding a constitutional challenge to a zoning ordinance. *Jott, Inc v Clinton Twp*, 224 Mich App 513, 525; 569 NW2d 841 (1997). However, we give considerable deference to the trial court's factual findings, and we will not disturb such findings unless we would have reached a different result if we had been in the trial court's position. *Id.* at 525-526. The following rules apply when this Court reviews a challenge to a zoning ordinance:

(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.* [*Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998), quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992). (Emphasis added).]

The actual reason stated by the trial court for its decision, that defendant did not address or dispute plaintiffs' "as applied" challenge, is erroneous. Because the trial court did not decide this case on the grounds raised by defendants in the trial court, i.e., that the zoning ordinance as applied does not violate substantive due process or equal protection guarantees, we do not address the question whether summary disposition should be granted on any of those arguments. On remand, the trial court shall resolve the summary disposition arguments actually raised by defendant.⁸

II

Defendant argues that it is entitled to summary disposition of plaintiffs' takings claim. This Court reviews de novo whether a government has effectuated a taking of property. *K & K Const, Inc v Dep't of Nat'l Resources (On Remand)*, 267 Mich App 523, 544; 705 NW2d 365 (2005).

The government may effectively "take" a person's property by overburdening that property with regulations." *K & K Const, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998), cert den (1998). "While all cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest⁹ or (2) where the regulation denies an owner economically viable use of his land." *Id.* at 576. The latter type is relevant here.

The second type of taking, based on economics, is subdivided into two situations: (1) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land" (citation omitted); or (2) a taking under the traditional "balancing test" established in *Penn Central, supra*. *K & K, supra*, 456 Mich at 576-577. The trial court relied on the *Penn Central* balancing test.

Under the *Penn Central* balancing test, "the question whether a regulation denies the owner economically viable use of land requires at least a comparison of the value removed with the value that remains." *Bevan, supra* at 390. "The owner must show that the property is either

⁸ We note, however, that the trial court ruled that plaintiffs had not shown that the ordinance did not advance a government interest and that plaintiffs do not challenge that ruling.

⁹ As to a legitimate state interest, "zoning regulation has been upheld where it promotes the health, safety, morals, or general welfare even though the regulation may adversely affect recognized property interests." *Bevan v Brandon Twp*, 438 Mich 385, 390; 475 NW2d 37 (1991). A broad range of governmental purposes will satisfy this test and courts presume the validity of an ordinance. *Id.* at 398.

unsuitable for use as zoned or unmarketable as zoned.” *Id.* at 403. The balancing test requires a court to determine: “(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.” *K & K, supra*, 456 Mich at 577.

The first *Penn Central* factor is the character of the government’s action. The government actions are the enactment of the 1975 ordinance and the denial of a variance to plaintiffs due to that ordinance. This prong, however, was not discussed in the court below and does not appear to be at issue.

The next *Penn Central* factor is the economic effect of the regulation on the property. Defendant relied on a March 9, 2004, evaluation notice to show that no economic effect resulted, but the circuit court rejected that document because defendant had not provided it to that court. Plaintiffs relied on the change in assessed valuation issued on February 23, 2004, as did the trial court. Defendant disputes that that valuation is valid because it designated the property as a public alley and was corrected eleven days later by the March 9, 2004, notice. Even considering the February valuation in a light most favorable to plaintiffs, however, that does not mean that the property has no value under the *Penn Central* analysis. Undisputed is the fact that the property retains value: the plaintiffs’ own appraiser testified that the property retained value if sold to neighboring property owners. Consequently, plaintiffs have not shown that the property is without value or unmarketable as zoned.

As to the third *Penn Central* factor, the circuit court’s own opinion reflected that plaintiff’s investment-backed expectations were unreasonable. The record shows that plaintiff Ronald DiCicco owns over a dozen properties in addition to the one at issue in this case. Plaintiffs bought the property in 1995 and paid just \$5,500 for it. Their own appraisal expert testified that if the lot were a “buildable lot” that it would be worth \$160,000, which supports a finding that plaintiffs were unreasonable in believing that their \$5,500 lot was buildable. Moreover, the circuit court recognized that, because defendant enacted the ordinance in 1975, plaintiffs either knew or should have known that the property did not meet the 60-foot minimum width requirement. Further, the circuit court noted that the record contained no evidence to suggest that plaintiffs relied on any representations made by defendant concerning the buildability of the property before they purchased it. In light of the above, we conclude that the circuit court erred in finding a question of fact as to the reasonableness of plaintiffs’ expectations regarding the property’s buildability.

Based on the foregoing *Penn Central* analysis, we find that plaintiff has failed to make out a case of regulatory taking and therefore the trial court should have granted defendant’s motion for summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper