

STATE OF MICHIGAN
COURT OF APPEALS

PITTSFIELD INVESTORS LLC, and J A BLOCH
& COMPANY,

UNPUBLISHED
March 21, 2013

Plaintiffs-Appellants,

v

No. 304087
Washtenaw Circuit Court
LC No. 08-000151-CH

PITTSFIELD CHARTER TOWNSHIP,

Defendant-Appellee.

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

In this zoning dispute, plaintiffs Pittsfield Investors, LLC, and J. A. Bloch & Company (collectively the Investors) appeal as of right the circuit court's order granting summary disposition in favor of defendant Pittsfield Charter Township (the Township). We affirm.

I. FACTS

A. BACKGROUND

The property at issue in this case consists of about 194 acres in the Township, located on Bemis Road between Platt and Warner roads. Joe Bloch, the president of J. A. Bloch & Company, purchased the property in 1973. The property is zoned for agricultural use. In the Township, property that is zoned for agricultural use may have no more than one house per 2.5 acres.¹ Bloch testified at his deposition that he previously developed part of the property into 2.5 acre lots, but that it took him 19 years to sell the lots.

In 2002, the Township updated its Comprehensive Plan. One of the guiding policies of the Comprehensive Plan is to “[p]reserve certain areas in the south side and central area of the Township, where utilities are not planned, that support rural character such as agricultural operations, large lot single family, open space and a low intensity transportation system.”

¹ Pittsfield Zoning Ordinance, § 11.04.

B. THE REZONING PETITION

In 2006, Bloch sold 100 acres of the property to Pittsfield Investors and entered into an agreement to turn the combined properties into a subdivision. In November 2006, the Investors petitioned the Township to rezone 131 acres of the property as suburban residential, and 63 acres as moderate-density multi-family residential. The Investors argued that the rezoning would create a transitional zone between the Township's agricultural district and a Toyota research complex south of Bemis Road, in York Township.

On January 11, 2007, the Township Board Planning Commission considered the Investors' petition. A variety of Township residents expressed their concerns, including that they relied on the current zoning when purchasing their homes, that they moved to the area because of its rural character, and that they were concerned about water and sewer issues. The Township hired Christopher Doozan of McKenna Associates, Inc to analyze the Investors' proposal and determine whether it was reasonable.

Doozan recommended that the Township deny the Investors' petition. Doozan's reasons included that (1) the Investors' proposed zoning was not compatible with the surrounding land use, on which the Toyota facility was likely to have a low impact, (2) there was no demonstrated need for housing in the Township, (3) the proposed zoning would be incompatible with the Township's zoning ordinance because it was not served by public utilities, (4) it was uncertain whether the Michigan Department for Environmental Quality would approve Investors' plans for on-site water and wastewater treatment, and such systems are not reliable, and (5) it was inappropriate to locate an urban-density area in the Township's rural area.

In response to the residents' concerns and Doozan's report, the Investors submitted a conditional zoning plan limiting the development to 600 units, with a 50 foot transition zone surrounding the development and open space encompassing the property's wetlands. They also hired Boss Engineering Company to determine whether on-site water and wastewater systems were feasible. Boss determined that on-site water and wastewater systems were feasible because the property has adequate groundwater and it was likely that the Investors could acquire a surface wastewater discharge system permit from the Michigan Department of Environmental Quality. However, Doozan continued to express the same concerns.

The Township Planning Commission recommended that the Township Board deny the Investors' petition. It found that the petition was not consistent with the Township's Comprehensive Plan or surrounding land uses, that the property lacked adequate sewer, water, and fire-fighting services, that there was no need for additional housing, and that 98% of residents who spoke at the January 2007 meeting were opposed to the amendment. Relying on the Planning Commission's findings, the Township's Board denied the Investors' petition.

C. MOTION FOR SUMMARY DISPOSITION

In February 2008, the Investors sued the Township in the circuit court, alleging that the Township's zoning ordinance violates guarantees of substantive due process and constituted a regulatory taking under the Michigan Constitution. On September 29, 2010, after extensive discovery, the Township filed a motion for summary disposition under MCR 2.116(C)(10).

The Investors agreed that the Township’s zoning ordinance states legitimate governmental interests, but contended that the ordinance does not advance those interests. One of the Investors’ community planning experts, David Birchler, testified that the Township’s zoning ordinance and Comprehensive Plan do not actually advance the stated goals. Another of the Investors’ community planning experts, Nicholas Lomako, agreed that respected experts in the field could reach different conclusions about whether the zoning in this case was reasonable. Lomako testified that the existing zoning furthered the Township’s stated objectives “in some ways,” by preserving rural character and natural systems, and promoting agricultural operations.

The Investors asserted that the Township’s zoning ordinance constituted a regulatory taking because they could not use their property as zoned. David Burgoyne, the Investors’ real estate appraiser, determined that the Investors could develop 42 lots with an expected average value of either \$125,000 or \$105,000 each, depending on whether they developed the property as zoned or under the Township’s alternative Open Space Development Option. Burgoyne determined that the Investors would take a loss of about \$475,000 or \$672,000 to develop the property. Burgoyne concluded that it was not feasible to develop the property residentially, and that the property had no net present value because “the developer would not have any economic incentive to invest in the raw land.”

Susan Shipman, the Township’s expert real estate appraiser, testified that land in the Township with a potential to be developed is typically valued between \$3,500 and \$15,000 an acre. Shipman testified that her conclusion, based on comparable land sales and what she asserted were errors in Burgoyne’s analysis, was that the land had a positive net present value between \$67,590 and \$306,807.

D. THE CIRCUIT COURT’S RULING

The circuit court granted the Township’s motion for summary disposition. It determined that there was at least a “debatable question” whether the Township’s zoning decision was rationally related to its goals. To reach this conclusion, the circuit court considered that reasonable planners—including the Investors’ experts—reached different conclusions about the reasonableness of the zoning. The court noted that even the Investors’ experts described one of the Township’s experts as a “good” planner and that the experts were all qualified, intelligent, articulate, and supported their conclusions.

The circuit court noted that the Township’s decision was consistent with its Comprehensive Plan and advanced its goals of preserving natural space and avoiding overcrowding. It noted that the Investors did not address “the strenuous opposition of virtually all residents of the area” And finally, the circuit court considered that the Township did not have sufficient infrastructure to support the water and wastewater needs of the proposed zoning district if the Investors’ private plans did not work. In light of all of these considerations, the circuit court concluded that the Township’s decision to deny the petition was not “unreasonable, arbitrary, capricious, or whimsical”

The circuit court also concluded that the Township’s zoning did not constitute a categorical regulatory taking. The circuit court opined that the Investors must show that they were “deprived *completely* of all economically beneficial use of the property[.]” The trial court

noted the Investors' "critical admission" that the property was not valueless at the Township's planning commission meeting on June 7, 2007. The trial court then opined that the Investors only demonstrated that they chose not to develop the property because it would not provide a return on their investment.

II. CATEGORICAL REGULATORY TAKINGS

A. STANDARD OF REVIEW

This Court reviews de novo the circuit court's determination on a motion for summary disposition.² Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." A genuine issue of material fact exists if reasonable minds could differ on the issue when viewing the record, including all the documentary evidence, in the light most favorable to the nonmoving party.³ This Court also reviews de novo issues of constitutional law.⁴

B. LEGAL STANDARDS

The Michigan Constitution prohibits the government from taking private property without compensation.⁵ Zoning laws may constitute a taking if their "application 'goes too far' in impairing a property owner's use of his land."⁶ There is more than one variety of regulatory taking:

[A] regulatory taking exists when: (1) the regulation fails to advance a legitimate state interest, or (2) the regulation denies an owner economically viable use of his hand. This second type of taking is subdivided into: (a) a categorical taking, or (b) a taking recognized on the basis of the application of the traditional balancing test.^[7]

In order to prevail on a claim of a categorical regulatory taking, the owner must show that the government's action has deprived them of "all economically beneficial or productive use of

² *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

³ *Id.* at 420; *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008); MCR 2.116(G)(5).

⁴ *Dorman v Twp of Clinton*, 269 Mich App 638, 644; 714 NW2d 350 (2006); *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

⁵ Const 1963, art 10, § 2.

⁶ *Bevan v Brandon Twp*, 438 Mich 385, 390; 475 NW2d 37 (1991), quoting *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922).

⁷ *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 585; 575 NW2d 531 (1998).

land.”⁸ Stated another way, the owner must show that “the value of his land has been destroyed by the regulation or he is precluded from using the land as zoned.”⁹

C. APPLYING THE STANDARDS

We conclude that the Investors did not demonstrate that the zoning ordinance destroyed the value of the land or precluded them from using it, and thus the trial court properly granted the Township’s motion for summary disposition.

An owner typically demonstrates a categorical taking by showing that the ordinance completely prohibits them from developing any part of the land.¹⁰ The Investors argue that the land has no value as farm property because the property taxes exceed its value as farm property. But the property has been farmed since 1973. Further, the Investors may develop the property residentially in two ways: (1) if there is no more than one house per 2.5 acres, or (2) according to the Township’s open-space development option.¹¹ Birchler, the Investors’ planning expert, determined that they could develop 42 lots under either of the Township’s available options. As demonstrated by the zoning map, “rural” and “large-lot” residential homes surround the property on three sides. Thus, we conclude that the Investors did not create an issue of material fact whether the ordinance completely prohibits them from using their land as it is zoned.

Nor have the Investors shown that the ordinance completely destroys the value of the land. The Investors argue that it is not “economically feasible” to develop the property because they would operate at an expected financial loss to do so. We reiterate that an owner is not guaranteed an economic profit from the use of his or her land.¹² When the land has some financial value under a zoning ordinance—even if that is a small fraction of the value the land could have if developed—the ordinance is not a categorical regulatory taking.¹³

Here, the Investors admitted at the June 7, 2007, planning meeting that the property is not valueless. Birchler testified that the property has a negative net present value, but that this means that “the developer would not have any economic incentive to invest in the raw land.” Birchler’s testimony thus does not demonstrate that the land is valueless. Shipman, the Township’s real estate appraiser, testified that land in the Township that had a potential to be developed is typically valued between \$3,500 and \$15,000 an acre. Thus, the Investors did not create an issue of material fact whether the ordinance completely destroyed the value of the land.

⁸ See *K & K Constr, Inc*, 456 Mich at 586, quoting *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992) (emphasis supplied).

⁹ *Bevan*, 438 Mich at 402-403.

¹⁰ *K & K Constr, Inc*, 456 Mich at 587.

¹¹ Pittsfield Zoning Ordinance, §§ 11.02, 11.04, 11.05, 56.22.

¹² See *Paragon Props Co v City of Novi*, 452 Mich 568, 579 n 13; 550 NW2d 772 (1996).

¹³ *K & K Constr, Inc*, 456 Mich at 587 n 13.

An owner whose taking is not complete should instead proceed under the traditional regulatory takings analysis, derived from the United States Supreme Court's decision in *Penn Central*.¹⁴ While the Investors cite *Penn Central* and argue in places in their brief that the zoning deprives them of "an economically viable use of their property," the Investors do not raise the *Penn Central*-type of takings issue in their statement of questions presented and do not analyze this issue in their argument. To properly present issues for our review, the appellant must raise their issues in their statement of questions presented,¹⁵ and must not give an issue cursory treatment.¹⁶ Thus, the Investors have abandoned this issue.

We conclude that, because the Investors have not shown any genuine issue of material fact concerning whether the zoning ordinance renders their property valueless or prohibits them from using it as zoned, the circuit court properly granted the Township summary disposition under MCR 2.116(C)(10).

III. SUBSTANTIVE DUE PROCESS

A. STANDARD OF REVIEW

As previously discussed, this Court reviews de novo both the trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) and issues of constitutional law.¹⁷ Summary disposition is appropriate if there are no issues of material fact and the moving party is entitled to judgment as a matter of law.¹⁸ The trial court properly grants summary disposition on a party's claim that a zoning ordinance violates his or her rights to substantive due process if, when viewing the evidence and inferences in the light most reasonable to the investors, reasonable minds could differ whether the zoning was an arbitrary and unreasonable restriction.¹⁹

B. LEGAL STANDARDS FOR SUBSTANTIVE DUE PROCESS CLAIMS BASED ON ZONING

The Michigan Constitution guarantees that no person will be deprived of property without due process of law.²⁰ The government violates a person's substantive due process rights

¹⁴ *Id.* at 587-588; see *Penn Central Transp Co v New York City*, 438 US 104, 124-125; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

¹⁵ See MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007).

¹⁶ *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008).

¹⁷ *Maiden*, 461 Mich at 118; *Dorman*, 269 Mich App at 644; *Harvey*, 469 Mich at 6.

¹⁸ MCR 2.116(C)(10).

¹⁹ *Kyser v Kasson Twp*, 486 Mich 514, 521; 786 NW2d 543 (2010).

²⁰ Const 1963, art 1, § 17.

when it deprives him or her of property by an arbitrary exercise of government power.²¹ Legislation complies with the requirements of due process when “the legislation bears a reasonable relation to a permissible legislative objective.”²²

Courts presume that zoning ordinances are a valid exercise of governmental power.²³ To overcome this presumption, the owner must prove that the zoning ordinance does not advance a reasonable government interest.²⁴ A zoning ordinance is only unconstitutional if “there is no room for a legitimate difference of opinion concerning its [un]reasonableness.”²⁵

C. THE CIRCUIT COURT’S APPLICATION OF THESE STANDARDS

The Investors argue that the circuit court improperly utilized a “shock the conscience” standard to analyze its substantive due process claim and that this improper standard affected the validity of the circuit court’s order. We agree that the circuit court stated an improper standard, but conclude that its error was harmless.

The Township concedes that the circuit court cited a standard that does not apply to this type of exercise of governmental power. The circuit court quoted *Mettler Walloon, LLC*, which states that “when executive action is challenged in a substantive due process claim, the claimant must show that the action was so arbitrary (in the constitutional sense) as to shock the conscience.”²⁶ But a township’s enactment of a zoning ordinance is a legislative function.²⁷ This standard was not appropriate because this action is not an executive action.

However, this Court will not reverse a court’s decision on the basis of a harmless error in the circuit court’s order.²⁸ An error is harmless when it is not decisive to the outcome of the case.²⁹ Here, the heading of the circuit court’s substantive due process analysis is “[w]hether the denial of plaintiffs’ petition reasonably advances the Township’s legitimate governmental interests.” The circuit court analyzed the interests stated by the Township and whether its policy advanced those interests. And the circuit court concluded that, at best, the Investors showed “a difference in opinion on a matter of legislative policy.” Thus, though the circuit court cited the

²¹ *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003).

²² *Kyser*, 486 Mich at 521, quoting *Shavers v Attorney General*, 402 Mich 554, 612; 267 NW2d 72 (1978).

²³ *Id.*; *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957).

²⁴ *Id.*

²⁵ *Id.* (modification in original), quoting *Brae Burn, Inc*, 350 Mich at 432.

²⁶ *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 200; 761 NW2d 293 (2008).

²⁷ *Kyser*, 486 Mich at 520.

²⁸ MCR 2.613(A); see *Ypsilanti Fire Marshal*, 273 Mich App at 529.

²⁹ See *Id.*

“shock the conscience” standard, it clearly applied the proper standard. We conclude that the circuit court’s error is harmless because it did not affect the outcome of the case.

D. REASONABLE ADVANCEMENT OF GOVERNMENT INTERESTS

The Investors argue that the Township’s zoning ordinance does not advance the Township’s stated governmental interests. We conclude that the circuit court did not err when it determined that there were no questions of fact concerning at least some of the Township’s asserted interests and, because reasonable minds can differ on whether the Township’s zoning ordinance advances those interests, it was entitled to judgment as a matter of law.

In this case, the trial court determined that there were no questions of fact concerning whether the zoning ordinance advanced four of the Township’s eight asserted interests: that (1) the request conflicted with the Township’s comprehensive plan; (2) the request conflicted with the Township’s goals of preserving natural space and avoiding overcrowding; (3) the Township lacked public infrastructure in the area of the proposed zoning; and (4) a large majority of the Township’s residents expressed their objections to and concerns about the proposed rezoning. We reiterate that to show that a zoning ordinance is not reasonable, an owner must show that *no* reasonable government interest is advanced by the zoning ordinance.³⁰ When reasonable minds can reach different conclusions on whether the zoning ordinance is unreasonable, a party has not demonstrated that the ordinance violates his or her rights to substantive due process.³¹

Here, the Township’s and the Investors’ experts largely reached different conclusions about whether the zoning ordinance advanced the Township’s interests. The circuit court noted the competency of both parties’ experts when it considered their different conclusions. Thus, the record reflects that there are legitimate differences of opinion concerning whether the zoning ordinances advance at least some of the Township’s legitimate objectives.

But even assuming, for the purposes of argument, that this disagreement among experts did not sufficiently demonstrate that reasonable minds can disagree, the Investors’ expert, Lamako, testified that “the agricultural zoning does support rural character, does permit agricultural operations, [and] does permit large-lot single-family development.” He agreed that the 2.5 acre requirement prevents overcrowding. And he agreed that reasonable experts in the field can reach different conclusions about whether the Township’s ordinance advanced its stated interests.

Thus, from the record in this case there is no question of material fact whether the Township’s ordinance was an arbitrary exercise of governmental power because reasonable minds can—and do—differ when considering whether the zoning ordinance advances legitimate governmental interests. We conclude that the circuit court properly determined that there were

³⁰ *Kyser*, 486 Mich at 521.

³¹ *Id.*

no questions of material fact and the Township was entitled to judgment as a matter of law on the Investors' substantive due process claim.

We affirm.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ William C. Whitbeck