

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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OTSEGO COUNTY,

Plaintiff-Counterdefendant-  
Appellee,

V

BRADFORD SCOTT CORPORATION,

Defendant-Counterplaintiff-  
Appellant.

UNPUBLISHED  
July 21, 2011

No. 295828  
Otsego Circuit Court  
LC No. 07-012048-CH

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Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Defendant-counterplaintiff Bradford Scott Corporation (BSC) appeals as of right the circuit court's order granting summary disposition in favor of plaintiff-counterdefendant Otsego County (hereafter "the county"). Although the circuit court dismissed several of BSC's constitutional counts, as well as a claim of gross negligence, BSC is solely appealing the summary dismissal of its unconstitutional temporary takings claim. We affirm.

BSC is a developer that owns or owned all of the lots in two platted subdivisions – Enchanted Forest # 2 (EF 2) and Enchanted Forest # 4 (EF 4). EF 2 and EF 4 are peninsulas that are divided by a channel-waterway that connects Guthrie Lake and Section 1 Lake. The parties agree that EF 4 is landlocked, and this case entails BSC's efforts to construct an 80-foot long by 16-foot wide bridge over the channel in order to connect EF 2 and EF 4, thereby providing access to EF 4 vis-à-vis EF 2. The plats were created and recorded in the early 1970s, and they envisioned access to EF 4's seven lots through seven non-buildable lots located at the peninsula tip of EF 2, although a bridge was not expressly identified as the means of access. The plats were approved by the Otsego County Road Commission, Otsego Lake Township Board, District Health Department, and the Otsego County Plat Board. These approvals, as reflected in plat language, indicated that the plats were in compliance with 1967 PA 288, which was known as the Subdivision Control Act of 1967, and which is now referred to as the Land Division Act, 1996 PA 591. Separate litigation in 2000 failed to provide BSC with a viable land route to EF 4.

The property encompassing EF 2 and 4 was located in a Recreation-Residential (RR) District covered by Article 7 of the zoning ordinance. Article 7 contains a list of "principal uses permitted" and a list of "permitted uses subject to special condition;" bridges are not expressly

enumerated on either list. “One-family dwellings” are a permitted principal use in an RR District, and it was BSC’s intent to construct one-family dwellings on the lots in EF 4.

We shall not set forth here the extensive history of communications between BSC and the county relative to BSC’s efforts to initiate construction of the bridge; however, we have thoroughly scrutinized the record and are extremely familiar with said history. After the county’s zoning administrator, Richard Edmonds, gave BSC mixed and questionable directions on how BSC was required to proceed under the county’s zoning ordinance with respect to bridge construction and after a couple of years of litigation,<sup>1</sup> the Otsego County Zoning Board of Appeals (ZBA) and the Otsego County Planning Commission gave permission for the bridge project to go forward. The delay in constructing the bridge allegedly caused BSC to suffer financial losses with respect to the development and sale of lots in EF 4, and it is this delay that formed the basis of the temporary takings claim. The circuit court granted the county’s second motion for summary disposition mainly pursuant to the rule of finality because BSC, which did not believe that the zoning ordinance had any application to bridges, failed for several years to pursue the matter beyond its communications and disagreements with Edmonds. After BSC finally did petition the ZBA and planning commission, approval was granted to build the bridge.<sup>2</sup>

We review de novo a ruling on a motion for summary disposition, *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006), constitutional issues, *Adair v Mich*, 486 Mich 468, 477; 785 NW2d 119 (2010), matters regarding ripeness and the rule of finality, *Hendee v Putnam Twp*, 486 Mich 556, 566; 786 NW2d 521 (2010), and questions of law generally, *Oakland Co Bd of Co Rd Comm’rs*, 456 Mich 590, 610; 575 NW2d 751 (1998). The circuit court’s ruling was also premised on its findings made previously in relationship to the evidentiary hearing. This Court reviews a trial court’s findings of fact in a bench trial or evidentiary hearing for clear error. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). In the application of the clearly erroneous standard, “regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to

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<sup>1</sup> BSC had obtained MDEQ, county road commission, and soil erosion and sedimentation control permits, which BSC concluded was sufficient to start construction; however, Edmonds demanded compliance with Article 15 of the zoning ordinance, which, in part, pertained to tree-cutting, excavation, and structure placement within 50 feet of a lake (area referred to as shorelands or the greenbelt). In March 2006, Edmonds posted a stop-work order on the site, and in November 2006, the county issued a civil citation against BSC. The case was removed from the district court to the circuit court pursuant to a motion and after BSC filed a five-count counterclaim.

<sup>2</sup> The circuit court denied the county’s first motion for summary disposition except with regard to the gross negligence count that is not at issue in this appeal. The circuit court then held an evidentiary hearing addressing application of the zoning ordinance and exclusionary zoning. Following the hearing, BSC began to cooperate with county zoning officials.

support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. The Fifth Amendment's Taking Clause applies to the states through the Fourteenth Amendment. *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576 n 3; 575 NW2d 531 (1998). The Michigan Constitution provides:

Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record. [Const 1963, art 10, § 2.]

The government may effectively “take” a person's property by overburdening that property with regulations, and the general rule is that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. *K & K Constr*, 456 Mich at 576. All taking cases require a case-specific inquiry. *Id.* Land use regulations can effectuate a taking when the regulatory action denies an owner economically viable use of his land as analyzed pursuant to the traditional “balancing test” established in *Penn Central Transportation Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). *K & K Constr*, 456 Mich at 576-577. With respect to the balancing test, a reviewing court must engage in an ad hoc, factual inquiry, focusing 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.” *Id.* at 577, citing *Penn Central*, 438 US at 124. The Taking Clause does not guarantee a property owner an economic profit from the use of his or her land. *Paragon Props Co v City of Novi*, 452 Mich 568, 579 n 13; 550 NW2d 772 (1996).

The concept of a temporary taking has been recognized and accepted by the courts as a basis to demand just compensation. *Lucas v South Carolina Coastal Council*, 505 US 1003, 1011-1012; 112 S Ct 2886; 120 L Ed 2d 798 (1992) (“temporary deprivations of use are compensable under the Takings Clause”); *First English Evangelical Lutheran Church v Los Angeles Co*, 482 US 304, 316, 321; 107 S Ct 2378; 96 L Ed 2d 250 (1987); *Cummins v Robinson Twp*, 283 Mich App 677, 716-717; 770 NW2d 421 (2009). However, normal delays associated with obtaining permits, changes in zoning ordinances, variances, and the like do not amount to a compensable regulatory taking. *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 334-335; 122 S Ct 1465; 152 L Ed 2d 517 (2002). The United States Supreme Court stated:

A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication. [*Id.* at 335.]

Requiring a governmental agency to compensate a property owner for the loss of value while considering applications for permits and variances under a zoning ordinance would either

become cost-prohibitive or lead to hasty, presumably haphazard, decisions. *Cummins*, 283 Mich App at 719. There can be no temporary regulatory taking absent an extraordinary and abnormal delay. See *Tahoe-Sierra Preservation Council*, 535 US at 335; *Cummins*, 283 Mich App at 719. In *Tahoe-Sierra Preservation Council*, 535 US at 333-334, the United States Supreme Court also indicated that a temporary regulatory taking can occur where the government stalls on zoning matters and proceeds with a lack of diligence and absence of good faith. In *Wyatt v United States*, 271 F3d 1090, 1098 (Fed 2001), the United States Court of Appeals for the Federal Circuit observed:

[I]t is true that a taking may occur by reason of “extraordinary delay in governmental decisionmaking.” Other courts have recognized that extraordinary delay must be “substantial” and that the Supreme Court has condoned delays up to “approximately eight years.” The length of the delay is not necessarily the primary factor to be considered when determining whether there is extraordinary government delay. Because delay is inherent in complex regulatory permitting schemes, we must examine the nature of the permitting process as well as the reasons for any delay. Moreover, it is the rare circumstance that we will find a taking based on extraordinary delay without a showing of bad faith.

Complex regulatory schemes often require detailed information before the issuance of a permit. . . . Finally, we must recognize that delay in the permitting process may be attributable to the applicant as well as the government. [Citations omitted.]

Generally speaking, requiring a property owner to obtain building and occupancy permits cannot itself constitute a taking of property. *Cummins*, 283 Mich App at 719.

With respect to the rule of finality, a claim that governmental actions in connection with zoning regulations effect a taking of a property interest is not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the zoning regulations to the relevant property. *Cummins*, 283 Mich App at 711. The rule of finality applies to all constitutional “as applied” challenges to zoning regulations, ensuring that a property owner has suffered an actual and concrete injury. *Id.*, quoting *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 160-161; 683 NW2d 755 (2004). An as-applied challenge is one in which a landowner alleges a specific and identifiable injury resulting from application of a zoning ordinance or decision to the landowner’s property. *Hendee*, 486 Mich at 568 n 17. Such a challenge is always subject to the rule of finality and is not ripe for review until the landowner can establish that a final decision caused the alleged injury. *Id.* A claim that a zoning action constituted a taking for purposes of the Just Compensation Clause of the Fifth Amendment “is subject to the rule of finality.” *Paragon Properties*, 452 Mich at 576-577. The rule of finality applies even to a constitutional claim premised on 42 USC 1983. *Cummins*, 283 Mich App at 711. When an administrative body, such as the ZBA, is empowered to review an initial decision by participating in the decision-making process regarding the regulation at issue, the initial decision is not a final, reviewable decision. *Id.* at 712. Before a claim that the imposition of a regulation to a parcel of property has effected a taking is ripe for adjudication, the property owner must have pursued alternative relief, such as in the form of a variance. *Id.* Under ripeness rules, a takings claim based on zoning regulations depends on the landowner first having taken

reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property. *Id.* Until ordinary processes have been followed, it is not known whether a regulatory taking has been established. *Id.* As explained in *Paragon Properties*, 452 Mich at 578-579:

The finality requirement aids in the determination whether a taking has occurred by addressing the actual economic effect of a regulation on the property owner's investment-backed expectations. As noted . . . , factors affecting a property owner's investment-backed expectations “simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.”

In *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 190-191; 105 S Ct 3108; 87 L Ed 2d 126 (1985), the United States Supreme Court observed:

Our reluctance to examine taking claims until . . . a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. . . . [T]his Court consistently has indicated that among the factors of particular significance in the inquiry [of what constitutes a taking under *Penn Central*] are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. [Citations omitted.]

A takings claim is not ripe until the governmental entity charged with implementing a zoning scheme has taken a final, conclusive position. *Id.* at 186. The Michigan Supreme Court adopted the finality principles from *Williamson Co* in *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 81-91; 445 NW2d 61 (1989). Recently, in *Hendee*, 486 Mich at 578, our Supreme Court found that the plaintiffs never submitted an application for rezoning or a variance to construct a mobile home park; therefore, the Court held that the plaintiffs’ constitutional claims were not ripe for judicial review under the rule of finality.

Finally, we note the following passage in *Bayou Des Familles Dev Corp v United States*, 130 F3d 1034, 1038 (Fed 1997), wherein the United States Court of Appeals for the Federal Circuit stated:

The determination of when in the permit application process the point of sufficient finality is reached so as to effect a taking can be problematic. Courts must be sensitive to the constitutional and prudential concerns reflected in the ripeness doctrine, while at the same time being aware that purposeful bureaucratic delay and obfuscation is not a valid basis for denial of judicial relief. [Citations omitted.]

Turning to the case at bar, BSC broadly argues that the circuit court erred in summarily dismissing BSC’s temporary takings claim, where the county engaged in an extraordinary four-

year delay before providing a land use application procedure for construction of the vehicular bridge.

BSC initially complains that the county abused its municipal authority by attempting to interfere with BSC's application to the MDEQ for a bridge permit. The record reflects that Edmonds simply informed the MDEQ by letter that BSC had not yet submitted development plans for a bridge, and he voiced concerns regarding boat traffic and environmental impact. We see no bad faith, obfuscation, or intentional stalling on Edmonds' part. Regardless, the MDEQ granted BSC a permit and no delay resulted in the bridge project relative to the issuance of the MDEQ permit and anything Edmonds did or said regarding the permit.

Next, BSC recounts some of the case's history. Specifically, BSC faults Edmonds who first advised that a special use permit was necessary, that Edmonds then changed position by asserting that a plat amendment or variance was required, that Edmonds next issued the stop-work order and then cited BSC, and that finally the ZBA and planning commission approved construction of a bridge and the associated site plan on the basis of zoning ordinance provisions never even mentioned by Edmonds. Edmonds' actions, according to BSC, stalled the bridge project and caused an extraordinary delay in constructing the bridge.

First, we conclude that this case does not entail purposeful bureaucratic delay, bad faith, intentional stalling, or obfuscation by Edmonds or the county. It is abundantly clear that both parties, as well as other persons and county bodies associated with this case, genuinely struggled with how to properly address a property owner's desire to build a bridge under the zoning ordinance; it was not an everyday request. Edmonds conceded that he mistakenly directed BSC to obtain a special use permit, but he soon altered his position and advised BSC to apply for a variance or to seek a plat amendment changing the EF 2 non-buildable lots to a roadway. Ultimately, and assuming that the ZBA's position was legally sound under the zoning ordinance, which position BSC does not challenge, Edmonds' stance that a variance was necessary was incorrect. However, Edmonds' position certainly did not reflect bad faith and an attempt to stall BSC, especially considering that when BSC finally submitted an application to the ZBA, it was an application for a variance and a positive result was obtained. BSC's cooperation came only after the evidentiary hearing in which there was significant testimony concerning potential reliance on Otsego County Zoning Ordinance (hereafter "OCZO") 7.2.11<sup>3</sup> and 18.44<sup>4</sup> as avenues

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<sup>3</sup> OCZO 7.2.11 (part of Article 7) concerned "permitted uses subject to special conditions" relative to RR property and would potentially allow "[u]nlisted property uses if authorized under Article 18.44."

<sup>4</sup> OCZO 18.44, which is titled "UNLISTED PROPERTY USE," provided:

The County Zoning Board of Appeals shall have power on written request of a property owner in any Zoning District to *classify a use not listed* with a comparable permitted use in the District giving due consideration to the provisions of Article 16 of this Ordinance [Permitted Uses Subject to Special Conditions] when declaring whether it is a use permitted by right or by special permit. If there is a comparable use, then the procedures established in this

by which to obtain permission to construct the bridge, not a variance. Additionally, the circuit court held that the OCZO applied to construction of a bridge, and we cannot conclude that the finding was clearly erroneous in light of the evidence presented and the text of the ordinances. *Krol*, 256 Mich App at 512. Indeed, the ZBA utilized the procedures in OCZO 7.2.11 and 18.44, as well as OCZO 17.5 (right to reasonable access to a roadway), in order to grant permission for bridge construction, despite the fact that a variance application was mistakenly submitted. It is worthy and important to note that, despite Edmonds' mistaken advice to pursue a special use permit and variance, BSC refused to take either step and embedded itself in the stance that the MDEQ, road commission, and soil erosion permits were the only permits necessary to commence construction and that the OCZO required absolutely nothing in addition to those permits. BSC's position was wrong, as borne out by the ZBA's ruling; OCZO 18.44 required a written request to the ZBA in order to classify "a use not listed" as being acceptable. Additionally, no one associated with the county ever prevented BSC from proceeding under OCZO 7.2.11 and 18.44; BSC, which was represented by counsel, had the ability and ample opportunity to examine the OCZO and discover these provisions. The delay that occurred here, and any destruction of investment-backed expectations were the result of BSC's own obstinate position throughout the proceedings.

Additionally, aside from Edmonds' communications regarding a special use permit and variance, he was all along adamant that BSC had to request and obtain permits under Article 15 of the OCZO for purposes of placing structures within a shoreland-greenbelt, OCZO 15.4, cutting trees within such an area, OCZO 15.5, and doing excavation work within a shoreland-greenbelt, OCZO 15.6. Even assuming that BSC was allowed to construct a bridge and engage in the excavation and timbering work without going through OCZO 7.2.11 and 18.44, a permit following site plan approval was still necessary for these activities under Article 15, and BSC never pursued such permits nor submitted a site plan for the time period at issue. With respect to the stop-work notice and citation, it was the tree clearing and excavation work that caused the issuance of these documents. Also, as found by the circuit court, a bridge is most certainly a "structure" for purposes of Article 15. See OCZO 2.2 and 15.4.

BSC next complains that the county "singled out" the BSC parcels. We are unsure of what point BSC is attempting to make with this argument. The only property at issue or relevant was EF 2 and 4. There was no evidence that the county allowed bridges to be built elsewhere within its jurisdiction, let alone being built without application of the OCZO.

BSC claims that granting a dismissal in favor of the county sends a message that municipalities can prohibit all economically beneficial use of land without just compensation. We disagree. First, it was never established that there was no economically beneficial use of EF

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ordinance for approval of a permit for that use must next be initiated in order for the applicant to apply for the necessary permit(s). If there is no comparable use then the applicant shall be so informed and an amendment to the text of the ordinance or a rezoning would be necessary prior to establishing requested use on the property. [Emphasis added.]

4 absent a bridge, as the proofs and documentary evidence were not focused on that question. Second, the county did not prohibit the construction of a bridge. Third, and finally, the only message that was communicated in dismissing BSC's action is that a landowner must pursue the various avenues available under a zoning scheme before proceeding to the courthouse and filing suit.

BSC further complains about the divergent views held by Edmonds, Joseph Ferrigan (zoning administrator following Edmonds' departure), and the various attorneys representing the county with respect to the proper zoning approach concerning bridge construction. Again, the bridge issue was novel and mixed opinions would be expected. Moreover, while there was an initial focus on a variance approach, there was ultimately agreement by Edmonds, Ferrigan, and county counsel that the bridge project could be pursued under OCZO 7.2.11 and 18.44. And if BSC, instead of remaining unrelenting in its position that the OCZO had no application, would have simply made a variance request in the beginning, it is reasonable to believe that the ZBA would have taken the same course of action as it did a few years later when first presented with BSC's variance request. Moreover, regardless of their positions, Edmonds, Ferrigan, and county attorneys did nothing to prevent BSC from appealing bridge matters to the ZBA.

BSC argues that the circuit court's opinion, without authority, "shifted the burden of obtaining zoning approval from the government to the land owner." Contrary to BSC's argument, the circuit court simply ruled that BSC had to fully pursue remedies under the OCZO before its constitutional claims became ripe and tenable. Also, BSC fails to cite any authorities for its proposition that the government and not the landowner has the burden of obtaining zoning approval. Indeed, the proposition is nonsensical. Moreover, consistent with the caselaw cited above regarding the rule of finality, the property owner is the one responsible for pursuing remedies under a zoning ordinance.

BSC next argues that the ZBA determined in 2008 "that bridges are a Principal Use Permitted and that a variance was not required." BSC continues the argument by stating that site plan approval for the bridge project could have been granted by the zoning administrator, Edmonds; therefore, the county "had no legal basis to delay [BSC] from 2005 to 2009 where a bridge is a Principle Use permitted requiring only site plan approval by the Zoning Administrator." First, BSC never even submitted nor attempted to submit a site plan to Edmonds. Regardless, the ZBA did not find that bridges are a principal permitted use under Article 7 of the OCZO governing RR-zoned property. OCZO 7.1 *et seq.*, lists "PRINCIPAL USES PERMITTED," while OCZO 7.2 *et seq.*, lists "PERMITTED USES SUBJECT TO SPECIAL CONDITIONS." The ZBA analyzed the case under OCZO 7.2.11, making the use subject to special conditions and, moreover, OCZO 7.2.11 incorporates OCZO 18.44, which required the submission of a written request to the ZBA relative to unlisted property uses such as a bridge. BSC wholly mischaracterizes the record in suggesting that all that was ever needed was for Edmonds to approve a site plan.

BSC contends that "[d]uring the 4 year delay there was a substantial decline in the value of the property and an increase in construction costs." This argument is irrelevant in relationship to the circuit court's basis for dismissing the case. Furthermore, there was no evidence submitted supporting this claim.

BSC next maintains that the county “did not act diligently and in good faith,” and that a “delay lasting more than [sic] 1 year should be viewed with special skepticism.” We first note that there is no indication or suggestion whatsoever that the ZBA or planning commission acted in bad faith or with a lack of diligence. BSC’s grievance was primarily with Edmonds, and that narrow approach is what is problematic with BSC’s argument; it viewed and views this whole case through a lens focused on Edmonds’ actions, but Edmonds was just the zoning administrator and the first person in the line of authority with whom BSC had to contend. BSC neglects the fact that the ZBA and planning commission are also part of the “county” and part of the zoning process and that the ZBA could reverse decisions made by Edmonds. During the period in which BSC claimed that the county was responsible for the bridge construction delay, BSC failed to apply for any permits or submit any site plan under Article 15 of the OCZO, failed to seek relief in the ZBA,<sup>5</sup> failed to submit a site plan to the planning commission under OCZO 7.2 *et seq.*, failed to even present an argument under OCZO 7.2.11 and 18.44, and failed to pursue rezoning through the planning commission and county board as an alternate mechanism to build the bridge. Although BSC complains about the extraordinary delay, there was no significant delay attributable to the county; rather, BSC decided to litigate the matter in court rather than take advantage of administrative avenues. Moreover, our recitation of BSC’s failures to pursue matters beyond corresponding with Edmonds prior to suit, fully supports the circuit court’s ruling that BSC’s counterclaim was not ripe and violated the rule of finality.

BSC’s appellate arguments do not broach the chief basis of the circuit court’s ruling, i.e., ripeness and the rule of finality. BSC does not even mention, let alone analyze, the rule of finality. Only in its reply brief does BSC acknowledge the rule of finality, and this is because the county’s brief devoted almost its entirety to analyzing the rule of finality, given that it was the central basis of the circuit court’s decision. “Reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal.” *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). When an appellant fails to dispute the basis of the trial court’s ruling, we need not even consider granting the relief sought by the appellant. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).<sup>6</sup>

In its reply brief, BSC argues that “[f]or 4 years [the county] blocked [BSC’s] bridge before conceding a Special Use Permit or a variance were not required.” BSC apparently equates blocking the building of a bridge with Edmonds’ decisions and directions on the proper approach to take under the OCZO. However, Edmonds did not prohibit BSC from building a bridge, he simply set forth the steps that he believed were necessary to obtain permission to

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<sup>5</sup> OCZO 23.5.1 provides that the ZBA has the authority to “hear and decide appeals where it is alleged there is error of law in any order, requirement, decision or determination made by the Zoning Administrator in the enforcement of this Ordinance.”

<sup>6</sup> The circuit court’s opinion could be viewed as providing two bases for the ruling. One, the rule of finality barred BSC’s constitutional claims, including the takings claim. And two, there was no unconstitutional taking because any delay was attributable to BSC’s unjustified failure to pursue matters in the ZBA. The two grounds are overlapping by nature.

construct a bridge. Again, nothing prevented BSC from taking an alternative path under the OCZO. Most importantly, for purposes of the rule of finality, once BSC found itself in disagreement with Edmonds' decisions and determinations, there was a zoning mechanism available to timely challenge those conclusions in the ZBA, yet BSC decided not to take advantage of its rights under the OCZO and instead raised its constitutional claims in a court of law. Edmonds did not "block" BSC from going to the ZBA and arguing that Edmonds' take on the bridge project was legally wrong.

Although this case presents a situation in which BSC did in fact eventually obtain a final administrative decision by the ZBA and planning commission, the decision was in BSC's favor, allowing the construction of a bridge. However, BSC's counterclaim was filed at a time that the ZBA and planning commission had not yet acted, which was solely BSC's fault, and the temporary takings claim only related to the period before the ZBA and planning commission took action. Accordingly, the rule of finality was applicable here, and BSC did not satisfy the rule. We note that BSC does not argue the futility exception to the rule of finality, and the exception would not even be applicable in this case because there was not even one meaningful application submitted to the ZBA. See *Hendee*, 486 Mich at 574-575.

Affirmed. Having fully prevailed on appeal, taxable costs are awarded to the county under MCR 7.219.

/s/ Jane M. Beckering  
/s/ Karen M. Fort Hood  
/s/ Cynthia Diane Stephens