

STATE OF MICHIGAN
COURT OF APPEALS

LEDUC INC., and WINDMILL POINTE INC.,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF LYON,

Defendant-Appellee.

UNPUBLISHED
December 23, 2008

No. 280921
Oakland Circuit Court
LC No. 2006-072901-CH

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Plaintiffs Leduc Inc. and Windmill Pointe Inc. appeal by right the trial court's grant of summary disposition for defendant Lyon Township. We affirm.

I. Facts and Procedure

Plaintiff Leduc, Inc. (Leduc) is engaged in real estate development. Plaintiff Windmill Pointe, Inc. (Windmill Pointe) is the fee simple owner of certain disputed property located in Lyon Township. The property, a nearly 202 acre parcel utilized as the Coyote Golf Course, is zoned R-1.0, which allows for low-density exurban housing developments and agricultural endeavors.¹ When Windmill Pointe purchased the property it had the same R-1.0 classification.

Due to recent increased competition in the area, Windmill Pointe sought an alternative use for the property. Windmill Pointe and Leduc entered into an option contract for the sale of

¹ The township's zoning ordinance states the purpose of this classification as follows:

The Residential-Agricultural District is intended primarily to accommodate residential development at a low density for residents who prefer exurban, estate living and are willing to assume the costs and effort of providing many of their own services and amenities. It is intended that the principal use of the land be for single family dwellings, although agricultural uses are permitted, recognizing the rural character of many areas zoned R-1.0. The standards in this district are intended to assure that the residential and agricultural uses peacefully coexist.

the land contingent upon a rezoning of the property to R-0.3, which would permit the development of single-family residences and other high-density uses, but would not permit agricultural pursuits. At the time this suit was filed, none of the surrounding property had a similar classification. The land to the north is zoned for industrial purposes and is undeveloped; the land to the south and the east is zoned R-1.0, a portion of which is zoned for “planned development,” and is either vacant or used for residential purposes; and, the land to the west is subject to a consent judgment² under which a mixed-use high-density residential development has been created. This development, known as Mill River, spans 200 acres, and, despite its high-density use, is zoned R-1.0. Mill River did not exist when Windmill Pointe purchased the property.

Plaintiffs began developing plans to construct single-family residences on the property. Such a development would entail substantial overhead costs because plaintiffs would have to comply with the township’s tree ordinance, which requires replacement of or payment for trees removed during residential development, and because plaintiffs would have to pay fees to hook-in to the township’s sewer system. In July 2005, Leduc filed an application to rezone the property as R-0.3. Leduc’s application contended that rezoning was appropriate because a R-0.3 classification is more consistent with surrounding land uses and because the recent change in permitted uses and densities on properties under the consent judgment has negatively impacted the subject parcel.

In November 2005, defendant’s planning commission held a public hearing, at which it recommended against rezoning the property. In making this determination, the planning commission considered the township planner’s recommendation, the public’s opinion, Leduc’s failure to offer a compelling reason why the township should move the line dividing high and low density developments in his favor, and Leduc’s refusal to consider a higher residential density within the confines of the current zoning plan, by clustering homes for example. Notably, the township’s planner, Mr. Doozan, offered a number of detailed reasons why denying the rezoning request was appropriate. Specifically, Mr. Doozan found that the proposed rezoning was not consistent with the township’s Master Plan for future land use or with the intent and purpose of the zoning ordinance, would permit development at a much higher density than permitted by current zoning on surrounding properties and would set an inappropriate precedent, would result in a lack of sewer capacity for other areas of the township and could result in overwhelming the township’s infrastructure capacity, and would significantly increase traffic volumes.

² The consent judgment is a settlement agreement entered into as the result of a dispute between the property owner and the township and embodied their eventual agreement with respect to the Mill River property. In that dispute, the property owner alleged that he could not develop the property because the land’s high water table precluded him from constructing homes with basements. Under the judgment, the township permitted the construction of a higher density development in exchange for other concessions.

In January 2006, defendant adopted the planning commission's recommendation and denied Leduc's rezoning request. Leduc appealed this decision before the township's Zoning Board of Appeals. The appeal was denied.

Plaintiffs then filed a three count complaint, alleging that plaintiffs were entitled to a rezoning of the property as a matter of law and therefore injunctive relief was appropriate, that defendant's refusal to rezone the disputed property deprived plaintiffs of procedural and substantive due process, and that this denial, in conjunction with the tree ordinance and the requirements for hooking-in to the sewer system, constituted an unconstitutional regulatory taking. After the close of discovery, the parties cross-motivated for summary disposition under MCR 2.116(C)(10) and the trial court found in favor of defendant. In the trial court's view, the township's regulations at issue did not constitute a regulatory taking because plaintiffs' claim was analogous to the claim raised in *K & K Construction, Inc v Department of Environmental Quality*, 267 Mich App 523; 705 NW2d 365 (2005). Further, the trial court found that plaintiffs' substantive due process rights were not violated because defendant continues to adhere to the goals of its Master Plan. This appeal followed.³

II. Standards of Review

We review de novo the lower court's decision on a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Summary disposition under MCR 2.116(C)(10) is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁴ *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In conducting this review, we view all the documentary evidence, including the pleadings, affidavits, depositions, admissions, and all inferences to be drawn therefrom, in a light most favorable to the nonmoving party. *Id.*; *Houdek v Centerville Twp*, 276 Mich App 568, 572-573; 741 NW2d 587 (2007). Lastly, a trial court's determination that a zoning ordinance is constitutional is reviewed de novo on appeal. *Houdek, supra* at 573.

³ Plaintiffs note in their appeal brief that the trial court did not address plaintiffs' claims regarding injunctive and declaratory relief, and procedural due process. While this is true, plaintiffs have not given any treatment to these issues on appeal, and therefore, we deem these matters abandoned. See *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

⁴ The parties also cross-motivated for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(9) (failure to state a defense). The trial court granted summary disposition without specifying which subrule it relied upon. However, it appears that the trial court decided the motion under the standards of MCR 2.116(C)(10) because it considered material outside the parties' pleadings. Thus, we will consider the trial court's decision as based on a lack of material factual dispute. See *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

III. Substantive Due Process

Plaintiffs argue that they produced sufficient evidence showing that defendant's refusal to rezone the property violated their substantive due process rights and that, therefore, the trial court erred when it dismissed plaintiffs' claim. We disagree.

Regardless of whether a plaintiff is challenging a zoning decision facially or as applied, the plaintiff must show that "(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 other types of legitimate land use from the area in question." *Dorman v Clinton Twp*, 269 Mich App 638, 650-651; 714 NW2d 350, lv den 477 Mich 955 (2006), citing *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Plaintiffs must also show that defendant's decision bears no "rational relation to the public health, safety, welfare and prosperity of the community" *Dorman*, *supra* at 651 (citation and quotation marks omitted). Three basic rules apply to such inquiries:

(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 owners 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*, *supra* at 594, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992) (emphasis added).]

Because the trial court decided this matter on a motion for summary disposition the third rule does not apply. Rather, we must determine whether reasonable minds could differ with respect to whether defendant's rezoning decision was arbitrary and unreasonable, or unrelated to the advancement of a legitimate government purpose. There must be no possibility of a legitimate difference of opinion concerning reasonableness. *Frericks*, *supra* at 594.

In support of their argument, plaintiffs cite to numerous inconsistencies within defendant's Master Plan, including the Miller River development and plaintiffs' expert's testimony that current zoning is not aligned with the township's goals, as evidence that defendant's decision not to rezone the property was arbitrary and unreasonable. However, this evidence does not establish that defendant's decision was indisputably unreasonable or arbitrary. Rather, plaintiffs' proffered evidence merely highlights the existence of a legitimate difference of opinion regarding the township's goals for future development. Indeed, defendant produced evidence indicating the opposite, i.e., Mr. Doozan's analysis stated that the proposed rezoning would not be in accord with the township's goal of "preserving and enhancing" the township's rural environment because it would result in a higher population density than envisioned. Further, we fail to see how inconsistencies within the Master Plan, including the Mill River development, make defendant's decision necessarily unreasonable. There is no evidence, for example, that defendant has completely abandoned or lacks commitment to the goals set forth in its Master Plan. Plaintiffs also rely on affidavits submitted by plaintiffs' expert that tend to show that rezoning the land from R-1.0 to R-0.3 would result in a more economical use of the subject property. Regardless of whether this is true, this evidence does not unequivocally mean that rezoning is the only reasonable outcome. Plaintiffs' tax returns indicate that the Coyote Golf

Course remains profitable, although perhaps not as profitable as plaintiffs would like. Plaintiffs have failed to show that there is “not room for a legitimate difference of opinion concerning . . . [the] reasonableness” of defendant’s decision. See *id.*

Plaintiffs also argue that defendant’s justification for denying their application—maintaining a “buffer” of land between high and low density areas—is not a legitimate and reasonable government interest advanced by the denial. We disagree. Defendant articulated numerous reasons in support of its decision not to rezone the property, including: preserving the area’s rural character, maintaining consistency with the character of surrounding lands, preventing an increase in traffic volumes, avoiding undue stress on the city’s sanitary system, setting an appropriate precedent, and remaining in accordance with the Master Plan and the intent and purpose of its zoning ordinance. This Court has recognized that separating inconsistent uses, as well as preserving the character of an area and limiting traffic, are legitimate interests advanced by a zoning ordinance. *Dorman, supra* at 651-652. Thus, contrary to plaintiffs’ argument, the township’s decision to deny rezoning did raise a reasonable government interest.

Plaintiffs further assert, however, that defendant’s decision is not “rationally related” to its legitimate government purpose because R-1.0 zoning is not “in keeping” with the district’s character. Again, we find plaintiffs’ argument unavailing. Under the rationale basis test, plaintiffs are required to show that the township’s decision was not reasonably related to a legitimate government interest. See *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 177; 667 NW2d 93 (2003). A law or regulation will be upheld if supported by any facts, known or reasonably assumed. *Id.* After considering the uses of the surrounding property, we find it reasonable that defendant adhered to its Master Plan in order to advance its interests. Although plaintiffs produced affidavits asserting that R-0.3 zoning would be more in sync with the surrounding areas, this evidence does not compel us to conclude that the township’s decision to adhere to its Master Plan was not reasonably related to its stated interest.

Plaintiffs have failed to meet the burden required to establish a violation of due process. No genuine issues of material fact remain. Summary disposition for defendant was appropriate.⁵

⁵ We note in passing that plaintiffs’ argument makes much ado about defendant’s failure to produce evidence rebutting plaintiffs’ affidavits. According to plaintiffs, defendant’s failure to produce contrary proofs makes summary disposition appropriate for plaintiffs, or alternatively creates an issue of fact. This argument, however, does not provide us with a basis on which to conclude that summary disposition for defendant was improper. Rather, plaintiffs merely confuse the burden of proof relevant to MCR 2.116(C)(10) motions. As a moving party defendant was required to support its motion for summary disposition with documentary evidence showing that no genuine issue of material fact exists. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). After a review of the record evidence, we conclude that defendant met its evidentiary burden in this case.

IV. Regulatory Taking

Plaintiffs also sought compensation for an allegedly unconstitutional regulatory taking under the Fifth Amendment. US Const, Am V; 1963 Const, Art 10, § 2. Specifically, plaintiffs argue that defendant's refusal to rezone the property in light of the Mill River development, and in conjunction with the overhead costs associated with the sewer system and tree ordinance, has a negative economic impact on plaintiffs' property. We disagree.

In determining whether a regulatory taking claim is compensable, we must consider the following balancing test:

'[1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, or course relevant considerations. So, too, is [3] the character of the governmental action.' [*K & K Constr, Inc, supra* at 552, citing *Penn Central Transp Co v New York*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978) (alterations by *K & K Constr* Court).]

With respect to the third factor, if the regulation serves a public interest and is ubiquitous, then a plaintiff must show that the regulation's economic impact and its effect on investment-backed expectations is the equivalent of a physical invasion upon the property. *K & K Constr, Inc, supra* at 553.

When all the evidence is viewed in the light most favorable to plaintiffs, plaintiffs cannot prevail under this test as a matter of law. First, zoning regulations are ubiquitous in nature and all property owners bear some burden and some benefit under these schemes. See *id.* at 527 n 3. We therefore find unavailing plaintiffs' argument that defendant's decision has singled-out its property to uniquely bear the burden of maintaining a buffer between the high-density Mill River development and the surrounding low-density areas. Nothing in the record indicates that other property owners in the area would be permitted to rezone to R-0.3, or would not have to pay for sewer hook-up nor comply with the tree ordinance should any of these owners decide to develop residential units.

Accordingly, in order to prevail on their claim, plaintiffs were required to show that defendant's decision not to rezone property had an economic impact and effect on plaintiffs' investment-backed expectations that was the functional equivalent of a physical invasion upon the property. See *id.* at 553. Plaintiffs made no such showing. Instead, plaintiffs merely demonstrated that its golf course is no longer as profitable, not as the result of the zoning classification or defendant's refusal to rezone the property, but as the result of competing golf courses. Further, we note that Windmill Pointe was aware that the property was zoned R-1.0 when it acquired the property in 2004. Thus, the uses plaintiffs could reasonably expect to make out of the property were those consistent with the R-1.0 zoning classification. At the time of purchase, plaintiffs had absolutely no expectation that the township would rezone their property for higher density uses. Neither the development of Mill River, nor the sanitary sewer system, nor the tree ordinances has had a significant negative impact on plaintiffs' investment expectations.

Plaintiffs finally argue that the trial court improperly weighed facts and made factual inferences. Plaintiffs' argument is without merit. The court's analysis reflects a careful consideration of the evidence presented and a conclusion based on that evidence alone.

Plaintiffs have not sustained their burden to show a regulatory taking. Accordingly, we conclude, after our review of all the evidence in a light most favorable to plaintiffs, that summary disposition for defendant was appropriate.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray