

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GRAND / SAKWA OF NORTHFIELD,
LLC., ROBERT D. LELAND, MARSHA
S. LELAND and DENNIS W. LELAND,
Jointly and Severally,

Plaintiffs,

Case No. 04-1105-CH
Honorable David S. Swartz

v.

TOWNSHIP OF NORTHFIELD,

Defendant.

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OPINION AND ORDER GRANTING JUDGMENT FOR DEFENDANT

At a Session of Court held in the
Washtenaw County Trial Court
City of Ann Arbor, on July 22, 2011.

PRESENT: HONORABLE DAVID S. SWARTZ, Circuit Court Judge

Plaintiffs' complaint states claims for regulatory taking, violation of substantive due process and equal protection rights, and seeks declaratory and injunctive relief. After the conclusion of a bench trial, the parties submitted findings of fact and conclusions of law regarding their respective positions. The salient facts are not disputed.

Plaintiffs Robert, Marcia and Dennis Leland (Lelands) owned about 300 acres of farmland in Northfield Township located at North Territorial and Five Mile roads. In 1996, approximately 120 acres of the farmland appraised at a value of \$3,500.00 per acre. In 1998, Lelands sold 77 acres located to the east to Whitmore Lakes Public Schools for \$770,000. The remaining parcels at issue consist of approximately 213 acres located on the west side of US 23 (the Property).

The Property has been designated farmland for over a hundred years. The vast majority of the surrounding land is rural in nature with open fields and single family homes located to the south, west and north. Additional large-lot residences, a church, and Whitmore Lake High School are located to the east. Vacant commercial buildings are on the northeast side of the Property. Commercial retail and mixed land use are nearby or across from the Property including a Meijer supermarket and a Tractor Supply store. Under Defendant's 1998 Growth Management Plan (GMP), the Property was zoned AR (agricultural) and is not within the sewer district. AR permits single family residences but limits the density to one dwelling per five (5) acres.

In 2002, Plaintiff, Grand / Sakwa (Plaintiff), acquired rights in the Property under an assignment of a purchase agreement and, on September 19, 2002, executed a First Amendment of Real Estate Purchase Agreement with Lelands. Notwithstanding the

zoning, historical market value, and sewer access issues, Plaintiff agreed to pay Lelands \$30,000.00 per acre at an estimated total purchase price of \$6,569,400.00.

Defendant's Exhibit 13.

On June 30, 2003, Plaintiff applied to rezone the Property from AR to SR-1. The SR-1 zoning classification offers the highest density up to a maximum of four (4) dwellings per acre with sewer service, and one (1) dwelling per acre without sewer service. On November 25, 2003, Defendant's zoning board unanimously approved the rezoning to SR-1 but limited the density to 450 residential units on ¼ acre lots.

In response to the rezoning to SR-1, a group of residents referred to as the "Northfield Neighbors" organized a successful referendum that returned the Property to its former AR zoning classification. Plaintiff's application for a variance was subsequently denied on the ground that the Defendant's zoning board lacked authority under the applicable ordinance to grant the variance.

On April 6, 2004, Plaintiff and Lelands executed a Third Amendment of Purchase Agreement. Under the terms of the amendment, in the event that Plaintiff initiated litigation with Defendant that "continues for more than two years from the date the original Complaint was filed", Plaintiff agreed to make "extension payments" and pay "a one-time increase in the Purchase Price" based on a described calculation.

Defendant's Exhibit 15. Plaintiffs filed suit against Defendant on October 22, 2004.

In 2005, a new zoning board composed primarily of members of the "Northfield Neighbors" was elected and commenced a zoning initiative to update Defendant's GMP. Pursuant to recommendations from a newly hired land use planner and the Defendant's Planning Commission, and, in part, in response to the pending litigation,

Defendant's zoning board approved the rezoning of the Property from AR to LR. The LR zoning classification allows suburban residential use at a density of one (1) dwelling unit per two (2) acres. Defendant's GMP was amended to reflect that the LR zoning permits "limited residential development while preserving significant areas of agriculture, open space, and natural features", and preserves "a predominantly rural character", while providing "certain residential and public uses ... compatible with the principal use" **Defendant's Exhibit 4.**

Subsequently, Plaintiffs amended their complaint to include a claim that Defendant's successful rezoning of the Property to LR was done in bad faith solely as a defense to the pending legal action. In their motion for summary disposition, Plaintiffs argued that the LR rezoning should be rendered null and void, and, for purposes of the pending litigation, the AR classification should be determined the operative and relevant zoning law. Defendant argued that the change to LR was accomplished as part of a rezoning initiative to update the GMP and that the pending litigation was merely a factor.

After hearing, the Court held against Plaintiffs and determined that the rezoning to LR was not done solely as an attempt to improve the Defendant's position at trial. Thus, LR is the appropriate zoning law of the case. Notwithstanding that determination, the Court allowed evidence regarding both the LR and AR zoning classifications at trial.

Further, because the issue of ripeness was not raised by either party, the Court did not engage in an analysis of whether Plaintiff's action, as an "applied" challenge to Defendant's LR zoning regulation, was subject to the rule of finality. *Paragon Properties Co v. Novi*, 452 Mich. 568 (1996).

As a preliminary matter, it is undisputed that Lelands have legal and equitable interest in the property. However, Defendant argues that Plaintiff has only an option to purchase, and, therefore, no legal or equitable interest in the Property. In contract law, an option is a continuing offer by which the owner of property agrees with another that the latter may buy the property at a fixed price within a specified period. *BilGel Co. v. Thoma*, 345 Mich. 698, 708 (1956). An option is composed of two elements: the offer to sell, and the agreement to leave the offer open for a time certain. *Id.* Strict compliance with the terms of an option is the rule in Michigan. *Rapanos v. Plumer*, 41 Mich.App. 586, 588 (1972).

For the reasons stated by Plaintiff, the Court is persuaded that, as the purchaser by assignment, Plaintiff has sufficient legal and equitable interest in the Property to support standing. The assignment identifies the underlying purchase agreement as the Real Estate Purchase and Sale Agreement executed on January 14, 2002 between the Buyer, Plaintiff's assignor, and Lelands, the Sellers. **Defendant's Exhibit 12.** Article II, Transaction Terms, Section 2.1 states that, "Buyer hereby agrees to purchase the Property from the Seller, and Seller hereby agrees to sell and convey the property to Buyer, upon the terms and conditions specified in this Agreement." **Defendant's Exhibit 11.** Therefore, based on the mutual obligations contained in Section 2.1, and the parties' further agreements to alter the price and time period, the Court finds that Plaintiff's interest cannot be deemed a mere option.

The parties agree that Michigan courts apply the same test in evaluating the rational basis for a referendum-created ordinance as for one created through the legislative body. *Albright v. Portage*, 188 Mich.App. 342 (1991). Under applicable law,

a referendum vote may not sanction and legitimize an unconstitutional zoning classification. *Mohave Plantations, Inc. v. Rose Twp.*, 23 Mich.App. 232 (1970). Accordingly, the Court concludes that the referendum vote that invalidated the SR-1 classification and returned the zoning classification to AR does not preclude a potential finding by the Court that the AR zoning classification was unconstitutional and resulted in a taking requiring compensation. *Poirier v. Grand Blanc Twp.*, 167 Mich.App. 770, 777 (1988).

Plaintiffs' position is that Defendant's zoning regulations, AR and LR, render the Property "dead land" without value. Relying on the "overwhelming evidence", including Defendant's unanimous approval to rezone the Property SR-1, Plaintiff argues that the SR-1 zoning is "more appropriate" because it allows for "economically feasible development" of the Property, whereas AR and LR zoning do not. Specifically, Plaintiff states that the only reasonable and feasible zoning regulation for the Property is SR-1 and that the lack of demand for, and excess supply of, designated agricultural or farmland renders the AR regulation unconstitutional on its face and as applied.

Plaintiff's challenge of the LR regulation is primarily driven by the imposed density restrictions. Plaintiffs argue that LR zoning is unconstitutional as applied because it imposes density restrictions that prohibit "what was established as the minimum number of lots necessary, being 450, ¼ acre lots under SR-1 zoning." Because the density restrictions prevent "the use of the Property for any purpose for which it was reasonably adapted", Plaintiff asserts that it "cannot obtain a return on its investment-backed expectation under such zoning."

Plaintiffs' experts generally opined that Plaintiff cannot obtain a return on investment-backed expectations under zoning other than SR-1 because development of the site in conformance with AR or LR zoning is not economically feasible, and none of the ancillary or conditional uses available provide for reasonable uses for the Property. In support, Plaintiff's agricultural expert, James Mulvany, testified that changes in the area where the Property is located "caused the land to become non-viable farmland", and consequently rendered AR zoning "an unreasonable zoning pattern." **Plaintiff's Exhibit 2.** Plaintiff's expert, John Widmer, testified that the low "yield" to a developer makes limited-density residential development under AR zoning "economically infeasible." Plaintiff submitted that over \$1,900,000.00 was spent pursuing zoning approvals for SR-1, funding development costs, and making payments under the purchase agreement. Notably, there was no evidence that Plaintiff had ordered building plans, paid for building permits, or had commenced construction on the Property.

Defendant argues that the AR and LR zoning are presumed valid and that Plaintiffs have failed to show that the regulations have no real or substantial relation to the legitimate goal of promoting the public health, safety, or general welfare. Defendant asserts that the evidence demonstrated that the Property has significant retained value as zoned, and that, under either AR or LR, substantial opportunity exists for residential development of the land while preserving the aesthetics of the area.

Defendant's planning witness, Richard Carlisle, testified that, in his opinion, the AR zoning of the Property was reasonable and appropriate based on the historical use of the Property and the rural nature of the area. Through several expert witnesses,

including Carlisle, Defendant presented feasible options for residential development in compliance with AR zoning, and at least a potential concept plan under LR zoning that utilized the maximum permissible number of land divisions. **Defendant's Exhibits 19, 20, 21 and 22.**

Zoning laws are a classic example of land-use regulations that are generally upheld when challenged even when they destroy or adversely affect recognized real property interests but promote the health, safety, morals or general welfare of the community. *Bevan v. Brandon Twp.*, 438 Mich. 385, 390 (1991), *amended* 439 Mich. 1202 (1991). A zoning regulation is presumed valid and will be upheld so long as it is supported by "any set of facts either known or which could reasonably be assumed, even if such facts may be debatable." *Crego v. Coleman*, 463 Mich. 248, 260 (2000). Therefore, a challenger is required to negate every conceivable basis supporting the ordinance, or show that it is based solely on reasons completely unrelated to regulation of the land. *Id.* As the Court recognized in *Kyser v. Kasson Twp.*, 486 Mich. 514, 520-522 (2010) (citations and emphasis omitted):

Zoning constitutes a legislative function. The Legislature has empowered local governments to zone for the broad purposes identified in MCL 125.3201(1). This Court has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development. Because local governments have been invested with a broad grant of power to zone, it should not be artificially limited. Recognizing that zoning is a legislative function, this Court has repeatedly stated that it does not sit as a superzoning commission. Instead, the people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. We reaffirm these propositions.

However, the local power to zone is not absolute. When the government exercises its police power in a way that affects individual constitutional rights, a citizen is entitled to due process of law. However, the test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.

Starting with such a presumption that a zoning ordinance is reasonable, the burden is upon the person challenging such an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance. Stated another way, the challenger must demonstrate that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property. Under this standard, a zoning ordinance will be struck down only if it constitutes an arbitrary fiat, a whimsical *ipse dixit*, and ... there is no room for a legitimate difference of opinion concerning its unreasonableness.

The United States and Michigan Constitutions both prohibit governmental taking of private property without just compensation. U.S. Const, Am V; Const 1963, art 10, § 2. A compensable taking may occur where a governmental entity exercises its police power through a land use regulation that restricts the use of property. *Electro-Tech, Inc. v. HF Campbell Co.*, 433 Mich. 57, 68 (1989). Zoning regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485, 107 S. Ct. 1232, 1242 (1987).

Under a claim that a regulation does not substantially advance a legitimate state interest, the Court is required to conduct an analysis pursuant to the traditional balancing test established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978); *Kirk v. Tyrone Township*, 398 Mich. 429 (1976). The balancing test requires an inquiry centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, *supra* at 124; See, *Cummins v. Robinson Twp.*, 283 Mich.App. 677, 707-708 (2009).

Applying the balancing test, the Court finds that Plaintiff's evidence merely demonstrated its desire or intention to develop the Property differently than it is currently zoned. Specifically, Plaintiff's claim for "\$1,900,000.00 spent pursuing zoning approvals for SR-1, funding development costs, and making payments under the purchase agreement", although significant, is not the kind of expenditure that meets and satisfies the *Penn Central* factor. In Michigan, in order to demonstrate a "distinct investment-backed expectation" a party needs to show that a building permit for construction was secured, and that substantial investment was made in performing the construction necessary under the zoning regulation. *Gackler Land Co, Inc v. Yankee Springs Twp*, 427 Mich. 562 (1986) and *City of Lansing v. Dawley*, 247 Mich. 394, 396 (1929).

The Court finds that Plaintiff's evidence falls short of fulfilling the required elements including interference with investment-backed expectations. Plaintiff was aware of the AR zoning classification and the lack of access to municipal sewers when it purchased the Property. *K & K Construction v. DEQ*, 267 Mich.App. 523, 555-556 (2005) (notice is a factor in the reasonableness of a party's expectations). Plaintiff presented no evidence that it engaged in, or made significant expenditures for, planning, development or construction of the site. There was no evidence of prospective buyers or users for the proposed residential development, or that Plaintiff received any permits from the Defendant or any other governmental entity in support of the proposed residential development. Further, Plaintiff's decision to pay an inflated purchase price (3 to 8.5 times market value) is not persuasive evidence of the reasonableness of its profit expectation.

Whether a regulation denies the owner economically viable use of his land necessarily requires a comparison of the value removed as a result of the regulation, with the value of the property that remains. *Keystone, supra*. Property owners are not guaranteed an economic profit from the use of their land. *Sun Oil Co. v. Madison Heights*, 41 Mich. App. 47, 56 (1972). As a general rule, a mere diminution in value does not constitute a taking. *Penn Central, supra*, at 131 and *Bevan, supra*, at 402-403. Even a significant diminution of property value by application of regulations does not amount to an unconstitutional taking. See, *Euclid v. Ambler Realty, Co.*, 272 U.S. 365, 47 S Ct 114 (1926) (75% diminution in value) and *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S Ct 143 (1915) (87.5 % diminution in value). “[A] showing of confiscation will not be justified by showing a disparity in value between uses.” *Bevan, supra*, at 405.

A plaintiff who alleges an unconstitutional taking as a result of a zoning ordinance may also challenge the validity of the zoning ordinance as a violation of substantive due process or equal protection. *Dorman v. Clinton Twp.*, 269 Mich.App 638, 650 (2006). State and federal constitutions guarantee that no person will be deprived of life, liberty, or property without due process of law. U.S. Const., Am XIV; Michigan Const. 1963, art. 1, § 17; *Marlin v. Detroit (After Remand)*, 205 Mich App. 335, 339 (1994). To prove a claim for violation of substantive due process a party must demonstrate that the ordinance is an arbitrary fiat, a whimsical *ipse dixit*, and there is no room for a legitimate difference of opinion concerning its reasonableness. *A & B Enterprises v. Madison Twp.*, 197 Mich.App. 160, 162 (1992).

Zoning law provides that a governmental interest in maintaining compatibility of surrounding areas, protecting and preserving natural resources, and ensuring adequate infrastructure such as roads, water supply, and, most importantly, sewage disposal systems, is a legitimate one. *Frericks v. Highland Twp.*, 228 Mich.App. 575, 608–609 (1998). The imposition of density restrictions to avoiding overcrowding and preserve open space is also a legitimate zoning goal. *Conlin v. Scio Twp.*, 262 Mich.App. 379, 383 (2004). Contrary to Plaintiffs' argument, improving and protecting the aesthetics of an area of land may also legitimately be advanced by a governmental entity through zoning. *Gackler, supra*, at 572; *Norman Corp., v. City of East Tawas*, 263 Mich.App.194, 200-201 (2004).

The Court is mindful that it cannot attempt to sit as a “superzoning commission.” *Kyser, supra*. As our Supreme Court has held, a zoning regulation succeeds against a constitutional challenge “if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable.” *Muskegon Area Rental Ass'n v. City of Muskegon*, 465 Mich. 456, 464 (2001). While the evidence presented by Plaintiffs demonstrated that SR-1 zoning would most likely provide Plaintiff with the most profitable use of the land, and that the land has diminished value under AR or LR, the following evidence supports Defendant’s position that the Property is not “dead land” and remains economically viable under Defendant’s zoning regulations: (1) Lelands sold a portion of the original 300 acres zoned AR for about \$10,000 per acre; (2) 120 acres of the Property zoned AR appraised at \$3,500.00 per acre; (3) Plaintiff agreed to pay \$30,000.00 per acre of the Property under AR zoning and agreed to later increases in the purchase price per acre;

(4) Ronald Steinke testified that at least 15 acres of the Property currently zoned as LR has a value of \$43,000.00 per acre; (5) Donald Helser testified that a viable market exists for two-acre parcels under either AR or LR zoning, and that the Property has a value of \$11,000.00 per acre. In addition, Plaintiff's witness, Scott Bohlen, verified the reliability and credibility of Defendant's evidence. Bohlen testified that he had purchased nearby land in 2003 for approximately \$10,000.000 per acre. Pursuant to the Land Division Act, Bohlen developed the land, divided it, and sold all of the lots for approximately \$20,000.00 per acre.

Based on the totality of the circumstances, the Court is not persuaded that LR zoning is arbitrary and/or unreasonable, or that Plaintiffs' land was rendered worthless. A zoning regulation is not unreasonable simply because the Property remains vacant or is otherwise preserved or underused for many years. In addition, preservation of land for agricultural uses is a legitimate governmental interest and not necessarily an indictment of a zoning scheme such that it renders the regulation arbitrary and/or unreasonable.

Defendant's evidence demonstrated that LR zoning is based on the legitimate governmental interest in meshing the historically agricultural nature of the Property with transitional residential development. The credible evidence supports Defendant's position that LR zoning is "uniquely suited" for development of an "odd-shaped" Property that "straddles" a number of uses and densities, and is not an arbitrary or unreasonable restriction upon Plaintiff's use of the Property.

Plaintiffs also argued at trial that the zoning regulations violated Plaintiff's substantive due process and equal protections rights. Specifically Plaintiff alleged that

the regulations were directed toward Plaintiff and driven by Defendant's impermissible desire to preserve "non-viable" farmland, and the unsupportable premise that large acre lots preserve farming and other agricultural activities, even when those activities lack material economic value. (pursuant to the holding in *Scots Ventures, Inc.*, 212 Mich.App. 530, 533 (1995)).

In contrast to *Scott Ventures*, the Property here had been used as farmland in the past and was zoned accordingly. Additionally, in *Scotts Ventures*, the plaintiff sought to develop 5 acre residential sites in a district requiring 10 acre minimum lot sizes. Plaintiff here desired to drastically increase the potential residential density. Moreover, as the majority opinion in *Scots Ventures* recognized, "preservation of farmland and the area's rural character" are legitimate governmental interests. *Id.* See, also, *Whitmore Lake 23/LLC v. Ann Arbor Charter Tp.* 2011 WL 1600507, 9 (Mich.App. 2011).

The evidence showed that while Defendant's zoning scheme may not be the best plan, or may not allow the most profitable or wise use of the land, it is a reasonable plan based on defined zoning goals and objectives. The LR zoning demonstrates Defendant's legitimate interest in limiting dense residential development in order to preserve the agricultural aesthetics of the area now and in the future. Further, the Court was not convinced that Plaintiff or its Property was "singled out" under the regulations.

As the battle of the parties' respective property experts aptly demonstrated, the reasonableness of Defendant's regulations is at least debatable. Plaintiffs' own expert witness, Brad Strader, stated that 5-acre parcels are not "per se" unreasonable. In

addition, Strader testified that the current utility service level on the Property is designed for low-density, agricultural use and agreed that residential densities must be planned in light of available utilities. Further, Strader acknowledged that protecting the consistency of existing land uses, avoiding increased stress on crowded road systems, and preserving rural aesthetics, are all legitimate governmental interests.

Plaintiffs' evidence and arguments relate primarily to the wisdom of Defendant's zoning. While Plaintiff's evidence showed that farming is probably not the best use for the Property, and that denser residential use would not only be more profitable but also would serve a growing nearby urban community, the wisdom of Defendant's zoning choices does not affect the constitutionality of the challenged ordinance. *Kyser*, 486 Mich. 522, note 2, quoting *TIG Ins. Co., Inc. v. Dep't of Treasury*, 464 Mich. 548, 557–558 (2001). “Rational basis review does not test the wisdom, need, or appropriateness of the legislation but tests only whether the legislation is reasonably related to a legitimate governmental purpose.” *Id.*

The Court finds that Plaintiffs' evidence regarding the constitutionality of Defendant's zoning ordinance failed to overcome the presumption of validity. Both the AR and LR legislation pass “constitutional muster” because there is at least one set of facts, either known or which could reasonably be assumed, even though debatable, that supports the conclusion that Defendant's regulations are reasonably related to legitimate governmental interests. The AR and LR zoning ordinances are rationally related to preventing overcrowding and stress on road systems, preserving farmland, preserving the rural character of the area, preserving and promoting the aesthetics of the area, and ensuring that adequate infrastructure and public services are available to

support any increase in density of the population. The LR zoning is also rationally related to Defendant's legitimate interest in addressing and reconciling competing zoning goals and interests in the area.

Accordingly, Plaintiffs failed to show that Defendant's regulations are an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning reasonableness. *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036-1037 (C.A.6, 1992). In addition, Plaintiffs failed to demonstrate that they were "singled out" or otherwise treated differently from similarly-situated individuals or entities regarding zoning decisions. *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*, 486 Mich. 311, 323 (2010).

The Court finds Plaintiffs' claims of regulatory taking, violation of due process and equal protection, and their additional claims for declaratory judgment and injunctive relief, without merit. Plaintiffs' complaint, in its entirety, is DISMISSED WITH PREJUDICE.

This is a final Order which disposes of all pending claims and closes the case.
IT IS SO ORDERED.

PROOF OF SERVICE

The undersigned certifies that the foregoing judgment was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses

disclosed on the pleadings on 7-22-2011
by U.S. Mail Express Mail
 Hand Delivered Fax Inter Office
Signature [Signature]

[Signature]
David S. Swartz,
Circuit Court Judge