

STATE OF MICHIGAN
COURT OF APPEALS

GORDON BARLOW, CHARLES ADAMS,
KAREN NICHOLSON, ROBERT NICHOLSON,
CAROL SCHNIERR, PAUL FRIDDLE,
KIMBERLY SUTTON, and STEWART GROSS,

UNPUBLISHED
August 1, 2006

Plaintiffs-Appellants,

v

CITY OF HASTINGS,

No. 267089
Barry Circuit Court
LC No. 05-000127-PZ

Defendant-Appellee.

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's November 23, 2005, final order granting summary disposition to defendant on all but one of plaintiffs' claims.¹ We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Plaintiffs first argue that the trial court erred in granting summary disposition to defendant on plaintiffs' claim that defendant's adoption of Hastings Zoning Ordinance (HZO) Article VII-A, creating the Court Street Planned Unit Development District (PUD), was invalid under defendant's own ordinances and state statutes. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651

¹ Plaintiffs prevailed in the trial court on their claim that defendant failed to properly resolve their individual requests for rezoning and the trial court ordered defendant to process those requests in conformity with applicable ordinances. Defendant is not challenging that decision. Thus, although plaintiffs continue to assert on appeal that defendant's actions in processing their rezoning requests were deficient, plaintiffs received the relief they sought on this issue below and there is no need for this Court to address that issue further.

NW2d 188 (2002). We also review a trial court's interpretation of a zoning ordinance de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 605-606; 692 NW2d 728 (2004).

Initially, we note that it is undisputed that: several of the plaintiffs applied for rezoning of their property; defendant's planning commission suspended action on those requests; defendant has the authority, pursuant to HZO§ 90-5 to initiate a zoning amendment; defendant initiated a zoning amendment creating the Court Street PUD District as set forth in HZO Article VII-A; and plaintiffs' property was within the Court Street PUD District. Plaintiffs assert that, because defendant acted as the applicant for the Court Street PUD, it was required to comply with HZO Article VII, which sets forth detailed requirements governing the application, site plans, review and approval process for PUDs. Defendant argues, and the trial court agreed, that in creating the Court Street PUD District, it did not act as an applicant for an actual PUD, but rather it initiated a zoning amendment to create a zoning district in which future rezoning and development must be undertaken in accordance with the specific requirements set forth in Article VII-A. Therefore, HZO Article VII is not applicable to its actions in creating a new zoning district. We agree with defendant.

A review of Article VII-A demonstrates that defendant did not itself seek to create a PUD; rather, defendant created a zoning district, which it called a PUD District. Those wishing to seek rezoning, or to develop or redevelop property in that district after enactment of Article VII-A, are required to follow specified requirements applicable to properties within the PUD District. Therefore, defendant was not required to adhere to the requirements set forth in HZO Article VII.

The relevant question before us, then, is whether creation of the Court Street District PUD was within defendant's authority and, if so, whether defendant complied with applicable procedural requirements in creating the District. We agree with the trial court that defendant properly enacted the PUD.

Michigan municipalities derive their authority to zone the property within their boundaries from the zoning enabling act, MCL 125.581 *et seq.*,² which provides municipalities, such as defendant, with the authority to

regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreations, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; and to promote public health, safety, and welfare, and for those purposes may divide a city or

² The City and Village Zoning Act, MCL 125.581 *et seq.*, was repealed effective July 1, 2006. See MCL 125.3702(1)(a), but MCL 125.581 *et seq.* still controls this case. MCL 125.3702(2).

village into districts of the number, shape, and area considered best suited to carry out this section. For each of those districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations. [MCL 125.581(1).]

As our Supreme Court explained in *Paragon Properties Co v Novi*, 452 Mich 568, 573-575; 550 NW2d 772 (1996):

The zoning of land is a reasonable exercise of government police power. . . . [M]odern pressures on land use have created sufficient public interest in the segregation of incompatible land uses to justify a diminution in property values. The Michigan zoning enabling act establishes procedures for the enactment, amendment, and administration of zoning ordinances. . . . The discretionary authority to enact a zoning ordinance and to adopt a zoning map rests with the legislative body of a city or village. The legislative body may amend a zoning ordinance by a text change or alter a zoning map through a rezoning. The legislative body of a city or village may also have the discretionary authority to temper the effect of a zoning ordinance through special land use permits.

* * *

Zoning ordinances, combined with mechanisms like land use variances, enable local governments to more adeptly manage land within their jurisdictions. [Citations omitted.]

More particular to PUD's, MCL 125.584b(2) grants cities the authority to establish planned unit development requirements within a zoning ordinance:

A city or village may establish in a zoning ordinance planned unit development requirements which permit flexibility in the regulation of land development; encourage innovation in land use and variety in design, layout, and type of structures constructed; achieve economy and efficiency in the use of land, natural resources, energy, and the providing of public services and utilities; encourage useful open space; and provide better housing, employment, and shopping opportunities particularly suited to the needs of the residents of the state. The review and approval of planned unit developments shall be by the commission appointed to formulate and subsequently administer the zoning ordinance, an official charged with administration of the ordinance, or the legislative body.

Other subsections detail the requirements for inclusion within each ordinance, including approval procedures to be used once the ordinance is adopted and applications are submitted. See MCL 125.584b(3)-(8). HZO § 90.5 also specifically affords defendant's planning commission with the authority to initiate zoning amendments to change the boundaries of districts or regulations set forth in the HZO.

Thus, there is no question that the planning commission acted within its authority in initiating consideration of an amendment to create the Court Street PUD District, so long as it acted in conformance with HZO § 90.5(b) in doing so. That section requires that zoning amendments initiated by the planning commission, as this one was, be the subject of a public hearing before action by the city council. The chairman of defendant's planning commission testified that at least two public hearings were held to consider establishment of the Court Street PUD District before the commission sent its recommendation for approval to the city council. He also testified that the city council considered the ordinance amendment creating the District at two different meetings, including the one at which it was adopted. Thus, the record establishes that defendant acted in conformance with HZO § 90.5 in adopting the amendment establishing the Court Street PUD District.

Additionally, as this Court recently noted, "preserving the residential nature of a neighborhood and limiting traffic for the safety of local residents are both legitimate interests that may be advanced by a zoning regulation. Moreover, a basic goal of land use regulation is to segregate incompatible uses." *Dorman v Clinton Twp*, 269 Mich App 638, 651-652; 714 NW2d 350 (2006). See, also, MCL 125.584b(1)-(3). The ordinance creating the Court Street PUD District was adopted to further each of these purposes, for as explained in HZO § 90.725.1, "[t]he purpose of the Court Street PUD is [to] preserve the residential character, privacy, property values and safety of the neighborhood south of Court Street while allowing for the expansion of the central business district to meet the demand for additional commercial growth in the City of Hastings," and the intent of the PUD District is to achieve a particular use and appearance, while providing for traffic control and traffic calming and walkability. Such intents and purposes are appropriate goals of land regulation. *Dorman, supra* at 651-652. Therefore, we conclude that defendant acted within its authority, and complied with applicable procedural requirements, when it created the Court Street PUD District as set forth in HZO Article VII-A.

In light of this conclusion, we affirm the trial court's conclusion that defendant validly enacted the Court Street PUD. Because the trial court was correct in reaching that conclusion, we also affirm the dismissal of plaintiffs' claim that defendant violated city ordinances by including their property within the PUD. Plaintiffs' property was included within the district because it fell within the boundaries created for the district, and because the PUD district was validly enacted, plaintiffs' challenge-which essentially goes to the location of the PUD district-cannot succeed.

Nevertheless, we agree with plaintiff that the trial court erred in granting defendant summary disposition on plaintiffs' takings claims, as we hold that the record before the trial court was insufficient to allow it to determine that plaintiffs' takings claims failed as a matter of law. Regulations affecting land use may effect a taking "if they deny an owner an economically viable use of the regulated land." *Frericks v Highland Twp*, 228 Mich App 575, 596; 579 NW2d 441 (1998), citing *Lucas v South Carolina Coastal Council*, 505 US 1003, 1016 n 6; 112 S Ct 2886; 120 L Ed 2d 798 (1992). The takings clause "does not guarantee property owners an economic profit from use of their land. . . . [and] the mere diminution of property value by application of regulations without more does not amount to an unconstitutional taking." *Paragon Properties, supra* at 579 n 13. However, a compensable taking may result if property is effectively taken by being overburdened with regulations and: (1) the regulations do not substantially advance a legitimate state interest; or (2) the regulations deny an owner all

economically beneficial or productive use of their land. A taking may also be found based on a balancing test focusing on the character of the government's action, the economic effect of the regulation on the property and the extent to which the regulation has interfered with distinct, investment-backed expectations. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130-131; 680 NW2d 485 (2004); *Frericks, supra* at 596.

In granting summary disposition to defendant on the takings claim, the trial court noted simply that plaintiffs could continue the current use of their property and therefore, their takings claims lacked merit. However, neither party placed this issue before the trial court as it was neither addressed in the motion for summary disposition or the response,³ nor did the parties present evidence on the issue. For these reasons, we find that the trial court's dismissal of plaintiffs' takings claims was premature, for it could not have evaluated whether genuine issues of material fact existed.

Plaintiffs next argue that the trial court abused its discretion in setting aside a default against defendant resulting from defendant's untimely filing of an answer to plaintiffs' second amended complaint. The decision whether to grant a motion to set aside default is entrusted to the discretion of the trial court and, therefore, this Court's review of that decision is sharply limited. A trial court's decision will not be reversed unless it constitutes a clear abuse of discretion, which occurs only "when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999) (citation omitted).

MCR 2.603(D)(1) provides that a motion to set aside a default or default judgment, on grounds other than a lack of jurisdiction, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. The trial court granted defendant's motion to set aside the default, noting that it previously determined that defendant's pleadings raised a meritorious defense and that defendant established good cause based on excusable neglect, given that there had already been two answers filed and that the answer to a third was a few days late based on the attorney's mistake in calculating the filing deadline.

Good cause warranting the setting aside of a default can be shown by: (1) a procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default. *Alken-Ziegler, supra* at 233. In addition, the trial court must also consider whether its failure to set aside the default would result in manifest injustice. *Id.* Manifest injustice is "the result that would occur if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule." *Id.* This Court has held that under certain circumstances, the negligence of an attorney in failing to respond is not good cause. *Kuikstra v Cheers Good Times Saloons, Inc*, 187 Mich App 699, 703; 468 NW2d 533 (1991), rev'd in part on other grounds, 441 Mich 851 (1992). It also has explained, however, that the existence of negligence does not preclude a finding of good cause if

³ We also note that defendant has not addressed on appeal the propriety of the trial court's dismissal of plaintiffs' taking claim.

circumstances otherwise support such a finding. *Huggins v MIC General Ins Corp*, 228 Mich App 84, 87; 578 NW2d 326 (1998); *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989).

Given that defendant had timely answered two prior complaints and continued to defend this action at all relevant times, that plaintiff moved for entry of default immediately following expiration of the period for filing an answer, and that defendant was entitled to summary disposition on a large portion of plaintiffs' complaint, we agree with the trial court that good cause existed to set aside the default despite counsel's negligence in calculating the due date for the answer. Manifest injustice would otherwise have resulted.

We also agree with the trial court that defendant's affidavit of meritorious defense was sufficient to allow the trial court to determine that defendant had meritorious defenses to the instant action. The purpose of an affidavit of meritorious defense is to inform the trial court whether the defaulted defendant has a meritorious defense to the action against it. *Cramer v Metropolitan Savings Ass'n*, 136 Mich App 387, 398; 357 NW2d 51 (1983). Defendant's affidavit of meritorious defense advised the court that defendant would continue to assert the same defenses previously pleaded in its responses to plaintiffs' prior complaints. And, the trial court previously determined that those defenses were valid and sufficient to survive summary disposition under MCR 2.116(C)(9) (failure to state a valid defense).

Because defendant established good cause to set aside the default and apprised the trial court that it had a meritorious defense, the trial court did not abuse its discretion in setting aside the default.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray