UNPUBLISHED CASES

326 Land Co., LLC v. City of Traverse

United States District Court for the Western District of Michigan, Southern Division

April 21, 2023, Decided; April 21, 2023, Filed

No. 1:22-cv-45

Reporter
2023 U.S. Dist. LEXIS 70351 *; 2023 WL 3033175

326 LAND COMPANY, LLC, Plaintiff, -v- CITY OF TRAVERSE CITY and SHAWN WINTER, Defendants.

Subsequent History: Appeal filed, 05/17/2023

Prior History: *326 Land Co., LLC v. City of Traverse City, 2018 Mich. App. LEXIS 3230, 2018 WL 4658932 (Mich. Ct. App., Sept. 27, 2018)*

Counsel: **[*1]** For 326 Land Company, LLC, a Michigan limited liability company, plaintiff: Ross A. Leisman, Mika Meyers PLC, Grand Rapids, MI.

For Traverse City, City of, a Michigan Home Rule City, Shawn Winter, City Planning Director, defendants: Peter B. Worden, Jr., Garan Lucow Miller PC (Traverse City), Traverse City, MI.

For Save Our Downtown, Albert T Quick, intervenor-defendant: Gerald B. Zelenock, Jr., Jay Zelenock Law Firm PLC, Traverse City, MI.

Judges: Honorable Paul L. Maloney, United States District Judge.

Opinion by: Paul L. Maloney

Opinion

OPINION AND ORDER DENYING PROPOSED SETTLEMENT AGREEMENT

The parties submitted a proposed settlement of this lawsuit and seek Court approval (ECF No. 35). Concerned about possible collusion, the Court ordered the parties to provide additional information (ECF No. 36). The parties filed a lengthy brief summarizing the facts and the law (ECF No. 38 Joint Brief). The parties also discuss their motivations for settling the dispute. The parties have not persuaded the Court that the proposed settlement is fair, reasonable, adequate and in the best interest of the public. The Court declines to approve the settlement.

I.

In the November 2016 general election, the voters of the City of Traverse **[*2]** City approved Proposition 3, which became part of City's Charter, Chapter IV, Section 28. The amendment (Section 28) requires voter approval of any proposed construction of a building with a height above 60 feet. Only after a majority of the voters approves a proposed building can the City issue a final approval. Section 28 does not, however, provide guidelines for measuring the height of a building. In April 2017, the City Commission adopted an Implementation Policy for § 28, which established a method for measuring the height of a building (ECF No. 38-3).

Interested parties have filed several lawsuits following voter approval of § 28. Plaintiff 326 Land Company had plans to build a 10-story residential building and filed a lawsuit in state court in January 2017 challenging the amendment. An organization called Save Our Downtown requested to intervene arguing that Defendant City would not adequately protect its interests because the City disagreed with § 28. Judge Thomas Power granted the motion to intervene. Judge Power eventually dismissed the lawsuit after concluding that 326 Land Company did not have a ripe claim.

The Michigan Court of Appeals affirmed the decision permitting intervention and the decision **[*3]** to dismiss the lawsuit. *See* *326 Land Co., LLC v. City of Traverse City, No. 339755, 2018 Mich. App. LEXIS 3230, 2018 WL 4658932 (Mich. Ct. App. Sept. 27, 2018)* (per curiam). Concerning the motion to intervene, the court concluded that the record contained evidence that "supported a complete lack of adversarial tension between plaintiff and defendants[.]" *2018 Mich. App. LEXIS 3230, [WL] at *3*. In particular, "city commissioners had campaigned against Prop 3 and records obtained under the Freedom of Information Act revealed that a city attorney may have assisted 326 in preparing this lawsuit." *Id.*

326 Land Company then proceeded to follow the

requirements to get its 10-story project approved. Although the City recommended approval, the voters rejected the proposed building in the November 6, 2018, election. 326 Land Company returned to the state court and again challenged § 28. Judge Power resolved the dispute against 326 Land Company and upheld the amendment.[1] 326 Land Company did not file any appeal.

326 Land Company contends it next decided to revise its plans and construct a five-story residential building that did not require voter approval. On July 20, 2021, Plaintiff obtained several permits from Defendant for its project at 326 E. State Street, including a land-use permit (ECF No. 38-11 PageID.435), a ground-water protection and storm-water runoff construction permit (ECF **[*4]** No. 38-12 PageID.437), and a soil erosion and sedimentation control permit (ECF No. 38-12 PageID.438). Plaintiff also obtained from Grand Traverse County a demolition permit (ECF No. 38-13 PageID.456). On November 12, 2021, Grand Traverse County issued 326 Land Company a commercial building permit for new construction at 326 E. State Street (ECF No. 38-14 PageID.460).[2]

Plaintiff was not the only construction company with projects in Traverse City. In February 2021, Traverse City considered a construction proposal from Innovo TC. The proposed building contained appendages on the roof that would exceed 60 feet. After receiving legal advice, the City concluded that methods for measuring the height of a building set forth in the Implementation Policy allowed approval of the construction proposal and gave final approval for the project without a vote under § 28.

On July 21, 2021, Save Our Downtown filed a lawsuit in the state courts challenging the City's final approval of the Innovo project. In an oral decision, on Wednesday, November 10, 2021, Judge Power addressed cross motions for summary disposition and resolved the lawsuit in favor of Save Our Downtown.[3] Judge Power issued a "Judgment Order" **[*5]** on Thursday, November 18, 2021.[4] The next day, November 19, 2021, Traverse City emailed a stop-work order to 326 Land Company (ECF No. 38-8 PageID.417-18). The order states, in part: "Therefore, the structural and foundation work approved under Land Use Permit PLU21-0112 is no longer valid and all associated work under that permit must cease and desist until revised building plans consistent with Section 28 and the Judgement Order has been submitted and approved" (*id.* PageID.417). The City appealed Judge Power's decision.

326 Land Company filed this lawsuit on January 18, 2022. Plaintiff advances six causes of action. In Count I, Plaintiff pleads that the stop-work order violates procedural due process under the *Fourteenth Amendment* and violates the *just compensation clause of the Fifth Amendment*. Plaintiff contends it had vested property rights in constructing the proposed building. Count II alleges that § 28 violates substantive due process under the *Fourteenth Amendment*. Count III alleges that § 28 violates the *Equal Protection clause of the federal* and *state constitutions*. Count IV alleges that the stop-work order violates the due process clause because the land-use permit was properly issued and Judge Power's order did not extend to previously issued permits. As part of Count V, Plaintiff **[*6]** pleads that § 28 conflicts with provisions of the Traverse City Zoning Ordinances. Plaintiff reasons that the stop-work order relied on an invalid provision of the Township Charter and therefore violates Plaintiff's due process rights. Count VI alleges a takings claim. Plaintiff reasons that § 28 deprives it of a reasonable investment-backed expectation for use of the property.

After the City filed its answer, the Magistrate Judge held

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[1] The parties have not provided the Court with Judge Power's opinion, which is not accessible through the County's website. The Court believes the number assigned to the case is 2018-34701. The Court accepts the parties' description of the outcome (Joint Br. at 5 PageID.324).

[2] The land-use permit and the construction permit were issued for the same address but for different parcel numbers. The land-use permit describes a 5-story building (PageID.435). The building permit describes a 6-story building (PageID.459). The parties offer no explanation for these differences.

[3] The parties' brief contains a block quote from Judge Power's ruling (Joint Br. at 6 PageID.325) in *Save Our Downtown v. City of Traverse City Planning Commission*, No. 21-35862 (13th Cir. Ct. of Mich.). The parties did not attach any transcript or other exhibit relevant to the block quote. The docket sheets for civil cases in the Grand Traverse Circuit Court are accessible through the County's website. The docket sheet for the case indicates Judge Power issued an oral decision on November 10.

[4] The parties attach as an exhibit an unsigned, undated document that appears to be Judge Power's Judgment Order (ECF No. 38-8 PageID.420-21). The docket sheet indicates that the Judgment Order entered on November 18.

a Rule 16 scheduling conference and issued a case management order (ECF Nos. 20 and 21). The parties began discovery and noticed several depositions. On May 26, 2022, the parties filed a stipulation to extend the deadlines for summary judgment motions from June 3 to June 17 (ECF No. 33) which was approved (ECF No. 34).

As this lawsuit progressed, Save Our Downtown (SOD) filed a motion to intervene (ECF No. 10). SOD raised the same concerns about the City that it raised in the lawsuit before Judge Power. SOD complained that the City would not adequately defend § 28. The Court denied the motion after concluding that SOD did not have a legal interest in the dispute, among other things (ECF No. 19).

On June 21, 2022, the parties filed the pending stipulation and proposed settlement **[*7]** agreement (ECF No. 35). The parties propose that the City will recognize 326 Land Company's vested rights in the land-use permit and will lift the stop-work order. 326 Land Company will resume work on the project and will dismiss all other causes of action in this lawsuit with prejudice and without costs. The parties agree that 326 Land Company may complete work on the project. The parties submitted a proposed order (*id.* PageID.309-10).

On June 28, 2022, the Court ordered the parties to provide additional information (ECF No. 36). The Court analogized the proposed agreement to a consent decree and expressed concern that approving the agreement would violate the rights of voters granted by § 28. The Court also expressed concern that the parties were not truly adversarial and filed this lawsuit in federal court after finding the state courts inhospitable to similar challenges. The Court identified the four topics that the parties needed to address: (1) the law concerning vested rights, (2) a summary of the facts supporting Plaintiff's vested right, (3) evidence supporting the summary of facts, and (4) an explanation for why vested rights obviate the voting requirement in § 28 (*id.* PageID.317). **[*8]**

On October 13, 2022, the Michigan Court of Appeals issued an opinion affirming in part and reversing in part Judge Power's resolution of the cross motions for summary disposition. *Save Our Downtown v. City of Traverse City, —N.W.2d—, 2022 Mich. App. LEXIS 6164, 2022 WL 7724317 (Mich. Ct. App. Oct. 13, 2022)*. The court concluded that Traverse City's Zoning Ordinance, § 1320.07(g), provides a method for measuring the height of a building. The method "excludes rooftop equipment such as air conditioning units, elevator shafts, and parapet walls from the measurement." *2022 Mich. App. LEXIS 6164, [WL] at *4*. The court reversed the portions of Judge Power's decision providing declaratory and injunctive relief concerning the method of measuring building height. *2022 Mich. App. LEXIS 6164, [WL] at *6*.

The court, however, found no error in the decision to grant summary disposition to Save Our Downtown because the building's height exceeded 60 feet. The plaintiffs submitted an affidavit from an engineer who attested that the top of the roof deck was 60 feet above the average grade. *2022 Mich. App. LEXIS 6164, [WL] at *2*. The covering placed on top of the roof deck extended the height of the building by another 2 feet and 2 3/4 inches, which made "the height of the building 62 feet, 2 3/4 inches. *Id.* The court found no error Judge Power's decision that including the roof covering when measuring the height of the building "comports **[*9]** with the plain language of the zoning ordinance[.]" *2022 Mich. App. LEXIS 6164, [WL] at *7*.

Save Our Downtown filed an application for leave to appeal with the Michigan Supreme Court on November 28, 2022. The application remains pending as of April 20, 2023.

This Court ordered the parties to file supplemental briefs after the opinion issued by the Michigan Court of Appeals. (ECF No. 41). The Court anticipated that the October 13 opinion rendered moot at least part of this dispute. Plaintiff timely filed a supplemental brief (ECF No. 43).

Plaintiff argues the October 13 Opinion did not render any part of this lawsuit moot. First, Plaintiff accurately notes that the decision does not become binding until the Michigan Supreme Court denies leave to appeal or affirms the decision.[5] *See Mich. R. Ct. 7.215(F)(1)*. Plaintiff identifies a second problem, one that was not apparent in the prior record. Plaintiff acknowledges that the plans for its building include a covering on top of the roof structure. If the covering is included when measuring the height of the building, the building measures 61 feet and 6 inches.

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[5] Plaintiff reasons that because the October 13 opinion is not effective, the effective ruling is the trial court's November 2021 decision. But, a trial court's decision is subject to the same stay of effectiveness as an appellate court's decision. *See Mich. R. Ct. 7.114(C)*.

With this context and background, the Court considers the proposed settlement.

II.

A.

First, the Court considers the nature of the proposed **[*10]** agreement between the parties. If the proposal is a private settlement, the parties may simply reach an agreement (without the need to disclose the terms) and dismiss the action through a Rule 41(a)(2) stipulation. If the agreement is something else, the Court would likely need to approve it. The Sixth Circuit has identified some differences between private settlements and consent decrees.

> "A consent decree is essentially a settlement agreement subject to continued judicial policing." Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983). Consent decrees typically have two key attributes that make them different from private settlements. First, when a court enters a consent decree, it retains jurisdiction to enforce the decree. *Id.* In contrast, the parties to a private settlement typically must bring another suit (for breach of contract) to enforce it. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Second, a consent decree puts "the power and prestige of the court behind the compromise struck by the parties." Williams, 720 F.2d at 920. The same is not true of a dismissal order that does not incorporate the parties' terms.

Pedreira v. Sunrise Children's Servs., Inc., 802 F.3d 865, 871 (6th Cir. 2015). Once approved, any prospective provisions of the agreement function as an injunction. *See* Williams, 720 F.2d at 920.

Before approving a consent decree, a district court must determine if the agreement is fair, adequate **[*11]** and reasonable. Pedreira, 802 F.3d at 872. A court may not approve an agreement "which is illegal, a product of collusion, or contrary to the public's interest." Williams, 720 F.2d at 920. And, "the court must allow anyone affected by the decree to 'present evidence and have its objections heard[.]" Pedreira, 802 F.3d at 871 (alterations in Pedreira; quoting Tennessee Ass'n of Health Maint. Orgs. v. Grier, 262 F.3d 559, 566-67 (6th Cir. 2001)).

The Court concludes that the parties have submitted an agreement that functions as a consent decree. The parties submitted a proposed order that includes various judicial declarations and injunctive relief in the form of future acts by the City. In relevant part, the proposed order contains the following declarations:

> (1) Plaintiff 326 Land Company has acquired vested rights to complete its project as permitted by Land Use Permit No. PLU21-0112, issued on July 20, 2021;
> (2) the November 18, 2021 stop-work order is lifted with immediate effect;
> (3) 326 Land Company has the right to immediately resume work and to complete its project as permitted by Land Use Permit No. PLU21-0112, "including all rooftop structures depicted on the July 1, 2021 Plans;" and
>
> (4) "Defendants shall without unreasonable delay issue any additional approvals or permits as may reasonably be needed to effectuate the terms of this Order and **[*12]** that the City's Land Use Permit PLU21-0173, issued November 21, 2021 is withdrawn and of no further force and effect[.]"

(PageID.309-10). The declarations implicate the rights of third parties. The agreement permits Plaintiff to complete construction of its building without obtaining approval from a majority of the voters as required by § 28. Plaintiff has acknowledged that the building that underlies this lawsuit exceeds 60 feet in height.

The Court is mindful that the parties have not filed a motion to dismiss or a motion for summary judgment. The Court is not making factual determinations or conclusions of law. The Court merely summarizes the information in the current record and applies that information to the law for the purpose of deciding whether the settlement is fair, adequate, reasonable and in the public's interest.

B.

The parties justify the proposed settlement on their conclusion that Plaintiff acquired vested rights in a land-use permit.[6] Those vested rights serve as the property

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[6] The Joint Brief contains sections setting forth facts and law with which both parties agree (*see, e.g.*, Joint Br. at § III.A. at 11-12 PageID.330-31). The Joint Brief also contains sections that describe the position of only one of the parties (*see, e.g., id.* § III.B Plaintiff's Position on Vested Rights at 12-22 PageID.331-42; § IV.A Defendant's Position on Vested Rights at 28-34 PageID.347-53). The Court has endeavored to identify the parties' positions when considering each argument.

right underlying Plaintiff's constitutional claims. Property rights and interests are typically found with reference to state law. *See* EJS Props., LLC v. City of Toledo, 698 F.3d 845, 855 (6th Cir. 2012). In Michigan, vested rights ordinarily arise in situations where **[*13]** the use of real property does not comply with current zoning restrictions but the nonconforming use "is protected because it lawfully existed before the zoning regulation's effective date." Heath Twp. v. Sall, 442 Mich. 434, 502 N.W.2d 627, 629 (Mich. 1993). "Once the nonconforming use is established, a subsequently enacted zoning restriction, although reasonable, will not divest the property owner of the vested right." Id. at 630.

Michigan has recognized vested property rights in building permits for nearly one hundred years. *See* City of Lansing v. Dawley, 247 Mich. 394, 225 N.W. 500, 501 (Mich. 1929). The Sixth Circuit succinctly described vested rights under Michigan law: "it is well established that possession of a valid building permit coupled with substantial reliance thereon, including actual construction, will bestow vested property rights to a non-conforming structure." Dorr v. City of Ecorse, 305 F. App'x 270, 275 (6th Cir. 2008). The facial simplicity of this century-old, well-established "test" is belied by the Michigan Supreme Court's acknowledgment that, for vested rights, "[w]e cannot state a comprehensive formula." Sall, 502 N.W.2d at 633; Bloomfield Twp. v. Beardslee, 349 Mich. 296, 84 N.W2d 537, 542 (Mich. 1957).

> Each case must stand on its own facts. It is recognized that every zoning regulation involves some impairment of rights. Whether the rights have attained a status so sacred, so inviolate, that they rise above legislative command, i.e., **[*14]** that the owner has a 'vested' right in some particular use, involves a balancing of factors, a determination as to whether the owner's interest is so substantial that its destruction cannot reasonably be justified in light of the accomplishment of the objectives of the ordinance. It is not a matter susceptible to precise quantitative measurement, so many feet excavated, so many trucks ordered, or so many men hired.

Beardslee, 84 N.W.at 542-43.

1. Land-Use Permit

The well-established law in Michigan holds that a party may have vested rights in a building permit or something equivalent. Schubiner v. West Bloomfield Twp, 133 Mich. App. 490, 351 N.W.2d 214, 219 (Mich. 1984) ("Under all of the cases cited herein a building permit, or its counterpart, a permit to commence operations, is the sine qua non for obtaining a 'vested rights.' An approved site plan is not a permit to build."); *see, e.g.,* Dingeman Advert., Inc. v. Algoma Twp., Kent Cty., 393 Mich. 89, 223 N.W.2d 689, 692 (Mich. 1974) (involving a building permit for billboard issued on May 15, 1970); De Mull v. City of Lowell, 368 Mich. 242, 118 N.W.2d 232, (Mich. 1962) (where the township board passed a resolution directing the township building inspector to grant the plaintiff a permit to a operate a junkyard); Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W.707, 708 (Mich. 1930) (where the defendant obtained a "permit to construct a gasoline filling station"). The parties have not identified any legal authority where a court found that a party had vested rights in a land-use **[*15]** permit.

While Michigan courts have not expressly considered vested rights in a land-use permit, they have rejected the vesting of construction or use rights in pre-construction permits. Under Michigan law, a site plan "merely signifies that the proposed use complies with local ordinances and federal statutes." Schubiner, 351 N.W.2d at 219. The Michigan Supreme Court held that "[t]he features of reliance and estoppel which may give rise to vested rights under a building permit do not necessarily arise under an approved site plan[.]" *Id.* Quoting the holding in Schubiner, the Michigan Court of Appeals declined to find vested rights in a zoning permit. Devlon Props. Inc. v. City of Boyne City, No. 279188, 2008 Mich. App. LEXIS 2522, 2008 WL 5273513, at *3 (Mich. Ct. App. Dec. 18, 2008) ("This passage clearly indicates that the Court was willing to entertain a reliance argument only after a landowner had acquired a building permit. Here, plaintiff never acquired a building permit. Plaintiff did not perform substantial work in utilizing the property in accordance with the zoning permits."). Plaintiff's description of a land-use permit appears analogous to a site plan and a zoning permit.[7]

Plaintiff has not offered any analysis to persuade this Court that vested rights could arise from its land-use permit. *See* EJS Props., 698 F.3d at 859 (finding that an "early start permit" authorized **[*16]** by the Toledo Municipal Code could not create a property interest

[7] Plaintiff offer a short description of the differences between a land-use permit and a building permit. "The land use permits issued by the City signify compliance with zoning requirements. The building permits issued by the County signify approval for compliance with the building codes" (Joint Br. at 15-16 PageID.334-35).

beyond "initial renovations" because the permit only allowed work up to the "rough-in-stage" which was "performed at the applicant's risk"). The Traverse City Ordinance Code includes a provision for land-use permits. Traverse City Ordinance § 1322.01. The City requires a land-use permit, in part, before a building or structure is built, rebuilt, converted, enlarged, demolished or structurally altered when such activity requires a building permit. *Id.* § 1322.01(a)(1). The Court makes two observations from this language. First, Plaintiff would need a land-use permit to demolish the structure that existed at the site regardless of the height of the proposed building that would replace the demolished structure. Second, a land-use permit is distinct from a permit to build because the Township requires a land-use permit only when the activity also requires a building permit.

The Court does not conclude that 326 Land Company could never prove that it obtained vested rights in its land-use permit. The Court concludes only that the combination of case law, the current record and the arguments advanced by the parties does not support the conclusion **[*17]** that the land-use permit issued to 326 Land Company provides a basis for finding vested rights regardless of what activities occurred after the permit issued.

2. Construction

Over the years, the Michigan courts have provided some guidance for the sort of construction activity necessary to acquire vested rights in a nonconforming structure. To establish vested rights, the moving party must show "work of a substantial character done by way of preparation for an actual use of the premises." *Beardslee, 84 N.W.2d at 542*. Preliminary operations such as "ordering plans, surveying the land, [and the] removal of old buildings, are not sufficient." *Id.* "Michigan case law is clear that there must be construction beyond preliminary preparation to establish a prior nonconforming use." *Sall, 502 N.W.2d at 632*.

Furthermore, not all construction activities will lead to the creation of a vested right. The construction must be for an actual use that is nonconforming, which "must be apparent and manifested by a tangible change in the land, as opposed to intended or contemplated by the property owner." *Gackler Land Co. v. Yankee Springs Twp., 427 Mich. 562, 398 N.W.2d 393, 398 (Mich. 1986)*. Where the construction improves a property in a manner consistent with both conforming and nonconforming uses, the construction does not create vested **[*18]** rights in the nonconforming use. *See Sall, 502 N.W.2d at 630* (quoting *Gackler, 398 N.W.2d at 399*); *see, e.g., Belvidere Twp. v. Heinze, 241 Mich. App. 324, 615 N.W.2d 250, 253 (Mich. Ct. App. 2000)* (per curiam) (concluding that the construction of a manure pit and sewer system that would support a thousand pigs would be "equally useful for a lawful, conforming use, such as the operation of a hog farm that does not qualify as a concentrated livestock operation").

Sall and *Gacker* illustrate when construction does not create a vested right. In Gackler, the plaintiff platted a 20-acre tract that abutted the shore of a lake. The local township approved the plat, which included fifty-four lots. At the time, the zoning regulations permitted mobile, prefabricated, and site-built homes on the lots. Restrictions were recorded on the twelve lake-front lots to exclude mobile homes. By 1972, eleven single-wide mobile homes occupied back lots in the plat. In 1972, the township enacted a zoning ordinance that restricted mobile homes to mobile home parks. The township then amended its zoning ordinances to allow mobile homes that met the definition of "dwelling" to exist where site-built or modular single-family residences were allowed. As a result, single-wide mobile homes could not be placed on plaintiff's plat, unless the units met the **[*19]** definition of "dwelling."

The plaintiff alleged, in part, that it had a vested right to a nonconforming use. *Gackler, 398 N.W.2d at 398*. The plaintiff identified several factors that weighed in favor of finding vested rights: (1) a road had been constructed, (2) the plat had been surveyed and monuments were erected, (3) grading and excavation work had been completed, and (4) eleven mobile homes had been placed on lots. The Michigan Supreme Court held that the construction that occurred prior to change to the zoning ordinances did not establish a prior nonconforming use sufficient to vest rights.

> In this case, the improvements to the land by way of the road construction, surveying, setting of monuments, grading, and excavation work have rendered the lots in the plat equally suitable for the placement of single-wide mobile homes and conventional dwellings. These improvements, therefore, do not constitute work of a substantial character which makes apparent an actual use of the plat as a single-wide mobile home plat.

Id. "[I]t is indisputable that the improvements to the property have made the lots as suitable for 'dwellings' under the ordinance as they are for single-wide mobile

homes." *Id.*

Sall also involved a plat **[*20]** for a mobile home park. The defendants purchased a 16-acre plot with the intention of building a mobile home park. At the time, the zoning regulations did not permit mobile home parks where the land was located. In October 1986, the township board approved the defendants' request to rezone the property. The defendants then began preparing the site by obtaining a topographical survey and detailed construction plans, obtaining permits for excavating and plumbing, purchasing sewer pipe, drilling a water well, constructing a wellhouse, installing four test wells, excavating roads, removing topsoil and clearing trees. At the same time, local residents petitioned for a referendum to return the site to its previous zoning classification. The referendum passed. The defendants continued to work on the site based on an oral statement by the state that the state intended to issue a mobile home license. The township notified the defendants they had to stop work and defendants refused. The township then sued.

The Michigan Supreme Court considered whether the work done on the site supported a finding of vested rights. The Court examined each activity to determine if it supported the creation of a **[*21]** vested right. The Court concluded that the topographical survey, clearing trees and removing topsoil all constituted preliminary preparation. *Sall, 502 N.W.2d at 631*. The four test wells were also preliminary preparation because their only purpose was to determine the direction of water flow which was necessary to identify where to place a sewage system. *Id.* On the record before the Court, the work performed for road excavation was also preparatory and was insufficiently substantial to constitute a prior nonconforming use. *Id. at 632*. None of that work was of a substantial character for an actual nonconforming use. The Court found that only the water well and wellhouse were pertinent to answering the question of whether the work was of a substantial character. *Id.* The Court then concluded that "[n]either of these activities, in light of the total construction a mobile home park requires, is sufficiently substantial to satisfy defendants' burden." *Id.*

Plaintiff sets forth the various construction activities that it has undertaken: (1) construction of the foundation, (2) delivery of specialized materials, and (3) demolition of the prior building. Plaintiff also argues that the costs incurred thus far should be considered. **[*22]**

a. Foundation

Plaintiff contends that the proposed building has a unique foundation system required by the soil conditions on the site. In particular, the foundation rests on pile caps, which are placed at precise locations based on the size, height and shape of the particular building. Excavations for the pile caps began on November 9, 2021. Plaintiff argues that visual evidence shows that material and tangible alterations to the land have occurred.

The record establishes only that some excavation for the foundation occurred prior to the stop-work order. Excavation for some of the pile caps had occurred at the site. But, the "screw auger" that creates the "pile" underneath the "cap" had not yet been deployed and the holes for the piles had not been created. (ECF No. 38-17 Laureto Dep. at 33-34 PageID.480-81; ECF No. 38-27 Moore Dep. at 11 PageID.530). This sort of excavation might be considered "construction" within the industry. For the purpose of vested rights, the Michigan courts consider this sort of activity to be preliminary preparations, activities that will not provide a basis for a prior nonconforming use.[8] The Court must acknowledge that the *Sandenburgh* opinion likely provides some support **[*23]** for finding vested rights here. In that opinion, the Court found vested rights and identified the construction activities as "the concrete steps of the dwelling house were removed, the private walk taken up, and excavation for the building walls started."[9] *Sandenburgh, 228 N.W. at 708*. The Court, however, struggles to reconcile *Sandenburgh* with the more recent opinions involving excavation efforts in which the Michigan Supreme Court declined to find vested rights. *See Sall, 502 N.W.2d at 632* ("Therefore, because defendants had not yet commenced the more cumbersome and conclusive stages of construction, their road excavation work was insufficiently substantial to constitute a prior nonconforming use."); *Gackler, 398 N.W.2d at 399* ("In this case, development of the plat is virtually complete save for sewer and water hookups on the back lots which have no bearing on whether the land will be used for 'dwellings' ....").

More problematic for Plaintiff, the excavation activities that occurred before the stop-work order issued did not

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[8] In a different section of brief, Plaintiff points to other construction activities (ECF No. 38 at 20 PageID.339). The other construction activities identified in the brief are similarly preparatory activities that do not provide a basis for finding vested rights.

[9] [ILLEGIBLE FOOTNOTE]

make apparent a nonconforming use. The record contains evidence that the foundation plans could be used for a shorter building, one that would not require a vote under § 28 (ECF No. 38-16 McIntyre Dep. at 43-44 PageID.471; ECF No. 38-17 Laureto Dep. **[*24]** at 58-61 PageID.487). Because the construction activity that occurred before November 19 would be equally useful to a conforming use, the activity will not support a finding of vested rights.[10]

Defendant acknowledges both of these concerns (preparation is not construction; activity did not manifest in a nonconforming use) as potential problems for Plaintiff.[11]

b. Specialized Materials

Plaintiff argues that the delivery of specialized materials provides a basis for finding vested rights. After excavation, pile cap construction requires specialized equipment which must be reserved well in advance. Plaintiff contends it paid a non-refundable deposit in excess of $130,000 for the equipment, the equipment arrived on site and ready to be used on November 18. Plaintiff also argues that the deposit covered the cost of the rebar used to reinforce the concrete pilings. The contractor prepared the rebar to the specifications of this particular project and the rebar was on the site when the stop-work order issued.

Under these facts, the reservation and delivery of construction equipment does not establish a basis for vested rights. Reserving and delivering construction equipment falls into the category **[*25]** of preparatory activities that do not give rise to vested rights. *See, e.g., City of Ann Arbor, Michigan v. Northwest Park Const. Corp., 280 F.2d 212, 215-16 (6th Cir. 1960)* (finding no vested rights after the City changed the zoning from commercial to residential where the defendant had already "removed many trees and stumps from the land in question in preparation for use as commercial property; that it demolished the foundations and retaining walls of a former greenhouse; that it secured a building permit for a construction shack on the premises and built such a shack; and that it moved construction equipment onto the property; and that it graded the land"). The same or similar specialized equipment would likely be necessary for the construction of a foundation that would support a conforming structure.

On this record, off-site preparation of rebar does not constitute the sort of work of a substantial character that would provide a basis for vested rights. Again, the foundation in which the rebar is used could also support a conforming structure. Plaintiff has not persuaded the Court that custom preparation of rebar is factually analogous to the facts in *Dingeman Advertising*. In *Dingeman*, the plaintiff obtained a permit for a billboard but before the billboard went up, the township **[*26]** board amended the zoning ordinance to preclude outdoor advertising. The Michigan Supreme Court found that the plaintiff had a vested right in part because the plaintiff completed "a large portion of the frame structure of the billboard" before the township changed the ordinance. *Id. at 691*. Thus, the "substantial character of the preparatory construction work" was the nonconforming structure itself. The Court does not find that preparing rebar for the foundation provides a basis for vested rights.

c. Demolition of a Valuable Building

Plaintiff acknowledges that the demolition of old buildings cannot by itself create a vested right to new construction. Plaintiff urges the Court to consider that a valuable and usable building was demolished as one of other factors.

Michigan law does not consider demolition of the structures on the land as a factor weighing in favor of finding vested rights. Plaintiff obtained a building permit to demolish the building at 326 E. State Street (ECF No. 38-13 PageID.456-57). Plaintiff completed that project without interference. To the extent demolition of the prior structure was necessary for the new building, Michigan law considers the demolition to be preparation. **[*27]** And, demolition does not establish a prior nonconforming use. Demolition of the prior structure would be equally consistent with construction of a conforming structure.

d. Total Costs Incurred

Plaintiff argues it has expended considerable money, about $480,000 from the commencement of demolition through the date of the stop-work order.

The Michigan Supreme Court rejected a similar argument in *Dawley*. The Court quoted an opinion from a state court in New York. "Evidently the test in each

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[10] Plaintiff references a foundation that was laid or reinforced in 2017 when a building on an adjoining lot was constructed (ECF No. 38 at 20 PageID.339). Plaintiff did not obtain the land-use permit for another approximately four years. And, the parties have not established that the foundation could not be used for a conforming structure.

[11] Joint Brief at 31-34 PageID.350-53.

case as to whether a holder of a permit has acquired vested rights is, not whether he has spent much or little in reliance upon it, but rather whether there has been any tangible change in the land itself by excavation and construction." *Dawley, 225 N.W. at 501* (quoting *Rice v. Van Vranken, 132 Misc. 82, 84, 229 N.Y.S. 32 (Sup. Ct. Schenectady Cty. 1928)*; *see. e.g., Soss v. Whiteford Twp., Nos. 278914 and 278915, 2007 Mich. App. LEXIS 2287, 2007 WL 2892974, at *1-*2 (Mich. Ct. App. Oct. 4, 2007)* (per curiam) (finding "numerous preparatory activities" did not establish that the work was of a substantial character for vested rights where the property owner had entered into a purchase agreement for the property, obtained financing, closed on the sale, contracted for engineering and architectural services with respect to constructing a building for retail fireworks sales: obtained a site-plan approval; entered into a contract for construction of **[*28]** the building; acquired various required permits; had a construction company make a prefabricated 5,000 square foot building offsite; commenced some preliminary grading, fencing, curbing and excavation work; obtained surveys and well-drilling services; and "put approximately $1.4 million into the project"). And, again, the construction work at the site that incurred these expenses did not create any nonconforming use.

3. Reliance

The permit itself does not create vested rights, rather the permit holder must have substantially relied on the permit before the law will recognize vested rights. *See Dingeman Advert., 223 N.W.2d at 691*. The parties do not separately address the reliance element in the Joint Brief.

The record contains evidence that calls into question whether Plaintiff began construction in reliance on the land-use permit. Plaintiff obtained the land-use permit in July 2021. The excavation work for the foundation did not begin until November 2021 (ECF No. 38-17 Laureto Dep. at 44 PageID.483). Excavation began at that point not because of the land-use permit but in anticipation of the building permit, which Plaintiff obtained on November 12, 2021. The parties took the deposition of Jonathan Laureto with REI Construction, **[*29]** the construction manager for the project. Laureto was asked about when the excavation of the pile caps began. He testified that "we knew the building permit was about to be issued. So we had them working about the same day. You can do that work prior to a permit -- a building permit being issued, so I don't remember if we had them a day or two ahead, a day or two behind the permit being issued" (*id.* at 44-45 PageID.483).

C. Estoppel

Plaintiff argues that Defendant should be equitably estopped from requiring a § 28 vote on the building. Plaintiff contends it reasonably relied on the Implementation Policy and the permits issued by Defendant. Plaintiff argues it would be prejudiced because it has already sold units the building and because it has expended a considerable amount of money through the design and preconstruction processes. Plaintiff asserts that its efforts meet the test for exceptional circumstances. Defendant identifies a number of problems with Plaintiff's use of equitable estoppel (Joint Br. at 34-35 PageID.353-54).

Michigan courts do not recognize equitable estoppel as an independent cause of action. *New Prods. Corp. v. Harbor Shores BHBT Land Dev., LLC, 331 Mich. App. 614, 953 N.W.2d 476, 484 (Mich. Ct. App. 2019)* (quoting *Conagra, Inc. v. Farmers State Bank, 237 Mich. App. 109, 602 N.W.2d 390, 405 (Mich. Ct. App. 1999)*); *Casey v. Auto Owners Ins. Co., 273 Mich. App. 388, 729 N.W.2d 277, 285 (Mich. Ct. App. 2006)*; *Charter Twp. of Harrison v. Calisi, 121 Mich. App. 777, 329 N.W.2d 488, 493 (Mich. Ct. App. 1982)* (citing *Dickerson v. Colgrove, 100 U.S. 578, 25 L. Ed. 618 (1880)*). Rather, the doctrine of equitable estoppel may "assist **[*30]** a party by precluding the opposing party from asserting or denying the existence of a particular fact." *Conagra, Inc., 602 N.W.2d at 405*; *see, e.g., Hughes v. Almena Twp., 284 Mich. App. 50, 771 N.W.2d 453, 469-70 (Mich. Ct. App. 2009)*.

Many of the opinions in which Michigan courts discuss equitable estoppel in the context of a zoning dispute involve municipalities seeking to enforce an ordinance. *See, e.g., Pittsfield Twp. v. Malcolm, 375 Mich. 135, 134 N.W.2d 166, 172 (Mich. 1965)*; *Howard Twp. Bd. of Trustees v. Waldo, 168 Mich. App. 565, 425 N.W.2d 180, 185 (Mich. Ct. App. 1988)* (per curiam); *Lyon Charter Twp. v. Petty, 317 Mich. App. 482, 896 N.W.2d 477, 482 (Mich. Ct. App. 2016)*. "In the context of property rights, 'estoppel may be invoked as an equitable defense where the plaintiff has observed the defendant dealing with his property in a manner inconsistent with his rights and makes no objection, while the defendant changes his position in reliance on the plaintiff's silence.'" *New Prods. Corp., 953 N.W.2d at 485* (quoting *Thiel v. Goyings, 504 Mich. 484, 939 N.W.2d 152, 172 n.37 (Mich. 2019)* (Viviano, J. concurring)).

The general rule in Michigan is that municipalities will not be estopped from enforcing their zoning ordinances absent exceptional circumstances. *See* Fass v. City of Highland Park, 326 Mich. 19, 39 N.W.2d 336, 340-41 (Mich. 1949) (where the plaintiff sought injunctive relief to compel the city to grant a license and sought to estop the defendant from "insist[ing] that the building ordinance does not permit the sale of live poultry at the location in question").

> Every person is presumed to know the nature and extent of the powers of municipal officers. The rule extends when the parties labor under a mistake of fact as **[*31]** well as law, and has been held to apply even when the ordinance violator acts in good faith, expending money or incurring obligations, in reliance upon the official's acts.

Grand Haven Twp. v. Brummel, 87 Mich. App. 442, 274 N.W.2d 814, 816 (Mich. Ct. App. 1978) (all citations omitted). When a municipality files a lawsuit seeking an injunction to enforce its ordinance, a defendant can plead equitable estoppel and prove exceptional circumstances to defeat the injunctive relief sought. *See, e.g,* Malcolm, 134 N.W.2d at 171-73; Brummel, 274 N.W.2d at 816-17.

The Court need not consider Plaintiff's equitable estoppel claim in any more detail. Defendant has not filed any counterclaim. Defendant has not sought to enforce the stop-work order in this proceeding. Plaintiff has not identified the fact that Defendant should be estopped from asserting or denying. Nor has Plaintiff connected that fact to one of its claims or an element of one of its claims. At this point, the Court need not consider whether the factual situation meets the test for exceptional circumstances.

D. Fair, Adequate, Reasonable, and in the Public's Interest

Plaintiff offers several reasons that the proposed settlement would be in the public's interest. First, Plaintiff argues that public policy supports a presumption in favor of voluntary settlement of lawsuits. *See* United States v. Lexington-Fayette Urban Cty. Gov't, 591 F.3d 484, 490 (6th Cir. 2010) **[*32]** . Second, Plaintiff argues that should it prevail, it could receive substantial damages and attorney fees. Third, Plaintiff has doubts that § 28 is valid and the settlement would eliminate an as-applied challenge. Finally, Plaintiff contends that "any negative public impact of the settlement is nearly negligible" (Joint Br. at 37 PageID.357).

Defendants argue that they made a reasonable choice to settle after conducting discovery and assessing the strengths and weaknesses of its legal positions. Defendants suggest that this Court could find that Plaintiff has vested rights, a decision that would have financial consequences for Defendants. Defendants also note that even if they prevailed on the vested rights issue, Plaintiff would still pursue its challenge to § 28, which would necessarily incur additional litigation costs. Defendants reason that a settlement in this case would eliminate the challenge to § 28, which would support the public's interest in § 28.

The Court declines on this record to conclude that the proposed settlement is fair, adequate, reasonable and in the public's interest.

In the Court's assessment, the parties have understated the public's interest in this dispute. A majority of the **[*33]** voters approved an amendment to the City's charter. The citizenry now gets a say in the approval process for buildings that will exceed a certain height. Also, the proposed settlement provides no mechanism for the citizens to voice their concerns about this particular agreement. *See* Pedreira, 802 F.3d at 871. Plaintiff may well be correct that few people would know that the roof top structures on this building exceed 60 feet. Plaintiff's characterization mis-frames the proper inquiry. The public's interest is the right to participate in the approval process through a vote. At least part of Defendants' reasoning concerning § 28 is tenuous: by not enforcing § 28 for this project the City might enforce § 28 at some point in the future

The Court has no basis for evaluating Plaintiff's likelihood of success on any of its challenges to § 28. The parties have not addressed that issue with sufficient detail. And, the Court has no means of determining whether collateral estoppel or res judicata would apply because Judge Power's second opinion in 326 Land Company's challenge to § 28 in the state courts is not available to the Court.

The Court has reservations about whether the proposed settlement is fair. The Court continues to have concerns **[*34]** about the possibility of collusion, concerns that the parties' Joint Brief does not resolve. The Court views Defendants' willingness to settle in light of its concerns about the possibility of collusion. Judge Power permitted third parties to intervene because of his concern that the City would not adequately defend the requirements of § 28. This Court expressed the same concern when it ordered the parties to file

additional information about this settlement. Notably, Defendants did not file any *Rule 12* motion. Defendants of course are not required to do so, but the choice not to, in the Court's experience, is unusual.

The Court also has concerns about the reasonableness of the proposed settlement. The Court appreciates the importance of assessing the risks involved in any lawsuit, including the costs of continued litigation and possibility of damages. In most situations, the Court would be reluctant to interpose its own thoughts about the relative risks involved. But, in this situation, the Court must consider those risks to determine the reasonableness of the choice to settle. In the Court's view, based on the facts in the record and the Court's summary of state law, Defendants' position concerning **[*35]** vested rights appears much stronger than Plaintiff's position. While the potential cost of losing might be high, the relative risk of losing is low.

Finally, the Court identifies several issues with the language in the proposed settlement, issues that relate to its adequacy. First, the proposed settlement does not include any mechanism for the public to express its concerns about the manner in which the parties wish to resolve the dispute. Because the settlement would not permit the public to vote on the building, the public should be afforded an opportunity to weigh in on the proposed agreement. Second, at least on the Court's review of the law and ordinances, it does not follow from the conclusion that Plaintiff has a vested right in a land-use permit that Plaintiff also has the "right to immediately resume work and to complete its project...." Possession of a land-use permit does not allow the holder to begin construction. Third, Plaintiff does not have a cause of action and has not requested any relief that would require Defendant City to "without unreasonable delay issue any additional approvals or permits as may reasonably be needed...." Plaintiff challenged § 28 and the stop-work **[*36]** order. Prevailing on its claims would not entitle Plaintiff to any other permit that might be necessary for the project.

III.

The Court declines to approve the proposed settlement in this lawsuit. The Court concludes the proposed settlement is not fair, adequate, reasonable and in the public's best interest. In the Court's assessment of Michigan law, Plaintiff's claim to a vested right in a land-use permit will be difficult to establish. Michigan Courts have not addressed whether a party can have a vested right in the sort of permit Plaintiff possessed. The record suggests the excavation work at the site occurred not because of the land-use permit but in anticipation of a building permit. The work at the site was merely preparatory. And, the work did not amount to a non-conforming use because the foundation could be used for a conforming structure. The proposed settlement ignores the public's interest enshrined in § 28. The factual and legal concerns for Plaintiff's position on vested rights makes the City's decision to settle unreasonable.

ORDER

For the reasons provided in the accompanying Opinion, the Court **DENIES** the proposed settlement agreement (ECF No. 35). **IT IS SO ORDERED**.

Date: April **[*37]** 21, 2023

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge

ORDER DENYING MOTIONS FOR STATUS CONFERENCE

In June 2022, the parties filed a proposed settlement that would resolve this dispute. While the proposal was under consideration, in December 2022 the parties filed a motion for a status conference (ECF Nos. 40). Plaintiff then filed another motion asking the Court to issue an order concerning the proposed settlement or hold a scheduling conference (ECF No. 44).

Contemporaneous with this order, the Court issues an Opinion and Order declining to approve the proposed settlement. Accordingly, the Court **DISMISSES** the two motions for a status conference as moot (ECF Nos. 40 and 44).

IT IS SO ORDERED.

Date: April 21, 2023

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge

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Baum Research & Dev. Co. v. Univ. of Mass. at Lowell

United States District Court for the Western District of Michigan, Southern Division

February 24, 2006, Decided

Case No. 1:02-cv-674

Reporter
2006 U.S. Dist. LEXIS 9193 *; 2006 WL 461224

BAUM RESEARCH AND DEVELOPMENT CO., INC., et al., Plaintiff, v. UNIVERSITY OF MASSACHUSETTS AT LOWELL, Defendant.

Subsequent History: Appeal dismissed by, Motion denied by, Motion granted by *Baum Research & Dev. Co. v. Univ. of Mass. at Lowell, 188 Fed. Appx. 979, 2006 U.S. App. LEXIS 17516 (Fed. Cir., June 27, 2006)*

Affirmed by *Baum Research & Dev. Co. v. Univ. of Mass., 503 F.3d 1367, 2007 U.S. App. LEXIS 23737 (Fed. Cir., Oct. 10, 2007)*

Reconsideration denied by *Baum Research & Dev. Co. v. Univ. of Mass. at Lowell, 2008 U.S. Dist. LEXIS 136455 (W.D. Mich., June 4, 2008)*

Motion granted by, in part, Motion denied by, in part *Baum Research & Dev. Co. v. Univ. of Mass. at Lowell, 2009 U.S. Dist. LEXIS 146451 (W.D. Mich., Feb. 25, 2009)*

Motion granted by, in part, Motion denied by, Without prejudice, in part *Baum Research & Dev. Co. v. Univ. of Mass. at Lowell, 2009 U.S. Dist. LEXIS 146259 (W.D. Mich., Mar. 2, 2009)*

Counsel: **[*1]** For Baum Research and Development Company, Inc., a Michigan Corporation, Charles S. Baum, an individual, plaintiffs: John M. Grogan, Joseph C. Fisher, Brandt Fisher Alward & Roy PC, Traverse City, MI; Patrick B. McCauley, Andrew Jack Kochanowski, Sommers Schwartz PC, Southfield, MI.

For University of Massachusetts at Lowell, a non-profit school, defendant: Stephen S. Muhich, Sarah E. Heineman, Dykema Gossett PLLC, Grand Rapids, MI; Adam B. Strauss, Dykema Gossett PLLC, Bloomfield Hills, MI.

Judges: ELLEN S. CARMODY, United States Magistrate Judge.

Opinion by: ELLEN S. CARMODY

Opinion

This matter is before the Court on Defendant's Renewed Motion for Judgment as a Matter of Law and, Alternatively, for a New Trial, (dkt. # 192), and Defendant's Motion to Dismiss Plaintiffs' Patent Claims, (dkt. # 215). As discussed herein, Defendant's renewed motion for judgment as a matter of law and/or new trial is **granted in part and denied in part,** and Defendant's motion to dismiss Plaintiffs' patent claims is **denied.**

In its renewed motion for judgment as a matter of law and/or new trial, Defendant has asserted three bases for relief: (1) *Eleventh Amendment* immunity, (2) Failure by Plaintiffs **[*2]** to Prove that it suffered a breach of the Licensing Agreement, and (3) Failure by Plaintiff to establish with sufficient certainty its damages. In its motion to dismiss Plaintiffs' patent claims, Defendant again asserts that it enjoys *Eleventh Amendment* immunity in this matter.

On February 3, 2006, the Court conducted a hearing on Defendant's motion for judgment as a matter of law and/or new trial. Because the argument asserted by Defendant in its motion to dismiss Plaintiffs' patent claims is identical to the immunity argument asserted in its renewed motion for judgment as a matter of law and/or new trial, an issue explored in depth at hearing, the Court discerns no need for oral argument on this particular motion.

I. Defendant has Waived its *Eleventh Amendment* Immunity

Defendant asserts that Plaintiffs' action must be dismissed on the grounds that the University of Massachusetts enjoys immunity (under the *Eleventh Amendment*) from suit in federal court. The *Eleventh Amendment* provides that

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

> commenced or prosecuted against one of the United States by Citizens of another **[*3]** State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI.

This bar to federal jurisdiction also extends to suits against a state by its own citizens. *See* *Hood v. Tennessee Student Assistance Corporation, 319 F.3d 755, 760 (6th Cir. 2003)* (citing *Hans v. Louisiana, 134 U.S. 1, 10, 10 S. Ct. 504, 33 L. Ed. 842 (1890)*). The immunity afforded by the *Eleventh Amendment* protects the state, as well as its departments and agencies. *See* *Thiokol Corp. v. Dept. of Treasury, State of Michigan, Revenue Division, 987 F.2d 376, 381-82 (6th Cir. 1993)*. This immunity also extends to individuals representing the state (or its departments or agencies) to the extent that they are acting in their official capacities. *See* *Hafer v. Melo, 502 U.S. 21, 24-25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)*.

The parties do not appear to dispute that pursuant to Massachusetts law, the University of Massachusetts is an arm of the State for *Eleventh Amendment* purposes. The parties' position in this respect is consistent with the conclusions reached by other courts. *See, e.g.,* *Orell v. Umass Memorial Medical Center, Inc., 203 F.Supp.2d 52, 60 (D. Mass. 2002)*. Accordingly, **[*4]** unless there exists an exception thereto, the immunity afforded by the *Eleventh Amendment* precludes Plaintiff from pursuing this action in federal court.

There exist three exceptions to *Eleventh Amendment* immunity: (1) a state may waive its immunity by consenting to be sued in federal court, (2) Congress may abrogate the sovereign immunity of the states through statute, and (3) a federal court may entertain a suit seeking prospective injunctive relief against a state official (the *Ex Parte Young* exception). *See* *Lawson v. Shelby County, Tennessee, 211 F.3d 331, 334-35 (6th Cir. 2000)*. As the parties recognize, the latter two exceptions do not apply in this matter. Thus, the relevant question is whether Defendant has waived its *Eleventh Amendment* sovereign immunity.

Pursuant to Massachusetts law, the University of Massachusetts is authorized to "enter into contracts" and resolve "any and all disagreements involving the same." *Mass. Gen. Laws ch. 75, § 14A*. In support of their position that Defendant has waived its *Eleventh Amendment* immunity, Plaintiffs point to a provision in the Confidential License Agreement (the "contract") into which **[*5]** the parties entered. The provision upon which Plaintiffs rely provides as follows:

> III-3. Governing Law. This Agreement will be construed, interpreted and applied according to the laws of the State of Michigan and all parties agree to proper venue and hereby submit to jurisdiction in the appropriate State or Federal Courts of Record sitting in the State of Michigan.

It is well accepted that a state's sovereign immunity is "a personal privilege which it may waive at its pleasure." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 675, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)*. The standard by which a state's alleged waiver is judged, however, is "a stringent one." In general, a state will be deemed to have waived its *Eleventh Amendment* immunity only where it (a) voluntarily invokes the jurisdiction of the federal courts, or (b) makes a "clear declaration" that it intends to submit itself to the jurisdiction of the federal courts.

Accordingly, the following actions have been held to not constitute a sufficiently clear declaration of intent and, therefore, to **not** constitute a waiver of sovereign immunity: (1) where a state consents to "suit in **[*6]** the courts of its own creation" (i.e., state courts), (2) where a state articulates its agreement to "sue and be sued," and (3) where state authorized suits against it "in any court of competent jurisdiction." *Id.* Instead, to effectuate a waiver, the state must articulate its "intention to subject itself to suit in *federal* court." *Metz v. Supreme Court of Ohio, 46 Fed. Appx. 228, 2002 WL 1941012 at *8 (6th Cir. 2002)* (citing *Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)*). In other words, waiver of a state's sovereign immunity cannot be implied or construed from the circumstances, but rather must be clearly evidenced by affirmative acts. *See* *College Savings Bank, 527 U.S. at 676-77*.

Accordingly, the notion that waiver of a state's sovereign immunity must be clearly demonstrated through affirmative conduct is well established. Thus, the question becomes precisely what sort of action constitutes an affirmative declaration by the state that it waives its right to not be subject to suit in federal court. While there is a dearth of authority on this issue, there does exist authority which, in the Court's estimation, leads to **[*7]** the conclusion that the University has waived its *Eleventh Amendment* immunity in this matter.

In *Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed.*

2d 806 (2002), the Court was presented with the question whether a state's act of removing an action from state court to federal court constitutes a waiver of its Eleventh Amendment immunity. Id. at 616. There, the plaintiff initiated action in state court against various defendants (entities and individuals all of whom enjoyed immunity under the Eleventh Amendment), who subsequently removed the matter to federal court. *Id.* After removing the matter to federal court, all the defendants sought to have the matter dismissed on the grounds that the Eleventh Amendment prevented them from being sued in federal court. Id. at 616-17.

The Court observed that while the state "was brought involuntarily into the case as a defendant," it had "voluntarily agreed to remove the case to federal court." Id. at 620. In so doing, the state "voluntarily invoked the federal court's jurisdiction." Drawing a distinction between states which voluntarily invoke the jurisdiction **[*8]** of the federal courts and those which are involuntarily made a defendant in a federal court action, the Court concluded that, in this particular circumstance, the state had waived its sovereign immunity. *Id.* The Court observed that a contrary rule of law would create "inconsistency and unfairness." Id. 622-23. As the present matter does not involve removal, *Lapides* does not, by itself, definitively resolve the present question. At least one court has, however, extended *Lapides* to a circumstance analogous to that presently before the Court.

In Board of Trustees Sabis International School v. Montgomery, 205 F.Supp.2d 835 (S.D. Ohio 2002), the court found that sovereign immunity could be waived via contract. In that case, the plaintiff had entered into an agreement with the state board of education to establish a community school. Id. at 839-40. The agreement contained the following provision:

> Any dispute involving [SABIS] and the SPONSOR regarding this contract, shall be resolved in the following manner: The parties shall mutually agree upon a fair and impartial arbitrator in an effort to resolve the dispute and **[*9]** reach an amicable agreement. If the parties are unable to agree upon an arbitrator, the Superintendent of Public Instruction shall appoint one; If an agreement cannot be reached within sixty (60) days from the date the arbitrator is appointed, the arbitrator shall render a decision that shall be binding upon both parties and such decision shall be final and nonappealable.

Id. at 840.

When disputes later arose between the parties to the agreement, the state refused to abide by the agreement's arbitration clause, asserting that such would constitute a waiver of its sovereign immunity. Id. at 841-42. The plaintiff subsequently initiated legal action in federal district court, in part, because the state refused to submit the matter to binding arbitration. *Id.* The district court concluded that inclusion in the contract of the binding arbitration clause constituted a waiver of the state's sovereign immunity. Id. at 845-46. Relying on *Lapides,* the court specifically found that:

> the State's insertion of a binding arbitration clause into the Sponsorship Contract waives the State's Eleventh Amendment immunity, and constitutes **[*10]** consent to be sued in federal court. Similar to the act of removal, which is litigation conduct, the insertion of the binding arbitration clause into the contract constitutes pre-litigation conduct, or action undertaken in anticipation of future disputes that might result in litigation. As the Supreme Court stated with respect to certain litigation conduct, an interpretation of the Eleventh Amendment that would allow the State to engage in the pre-litigation act of drafting a binding arbitration clause into a contract without waiving sovereign immunity would rest upon the State's mere 'preference or desire.' Such an interpretation of the Eleventh Amendment would allow the State selectively to hide behind the cloak of sovereign immunity when doing so would serve its litigation objectives. In other words, an interpretation of the Eleventh Amendment that allows the State selectively to waive sovereign immunity encourages forum shopping by the State, and fails to produce consistent and fair results, which is precisely the opposite of what the Supreme Court mandated in *Lapides.* Therefore, the Court concludes that the State's pre-litigation act of inserting a binding arbitration provision **[*11]** into the contract constitutes a waiver of the State's Eleventh Amendment immunity.

Id. at 846.

Unfortunately, the *Sabis* court did not articulate the basis for its conclusion. Presumably, it is premised upon the primary role that the federal courts play in arbitration matters. Pursuant to the Federal Arbitration Act, the federal district courts have jurisdiction over claims that a party to an agreement refuses to abide by an agreement

to arbitrate a particular dispute. *See* 9 U.S.C. § 4; *United States Fire Ins. Co. v. National Gypsum Co., 101 F.3d 813, 816 (2d Cir. 1996)*. To the extent, therefore, that the plaintiffs were seeking to enforce the arbitration clause, jurisdiction rested in the federal court. Thus, the *Sabis* court seems to have concluded that inherent in the agreement to arbitrate was the notion that any disputes regarding the enforceability thereof fell within the jurisdiction of the federal courts, therefore, by agreeing to the arbitration clause the state was agreeing to litigate in a federal forum (at least with respect to certain issue relating to arbitration).

While it can perhaps be argued **[*12]** that the result the *Sabis* court reached relies upon inference and conjecture (rather than an unequivocal statement of intent), the concern underlying the court's decision (quoted above) appears to be valid and applicable in the present matter. Moreover, unlike the arbitration provision in *Sabis,* the provision presently at issue is unequivocal. The "governing law" provision quoted above provides that "all parties agree to proper venue and hereby submit to jurisdiction in the appropriate State or Federal Courts of Record sitting in the State of Michigan."

Just as the arbitration clause in *Sabis* constituted a "pre-litigation" tactic on the state's part, inclusion of the governing law provision in this matter is no different. By agreeing to this provision, Defendant affirmatively agreed to resolve in federal court any disputes that may arise. Permitting Defendant to now invoke sovereign immunity would permit it to "selectively to hide behind the cloak of sovereign immunity when doing so would serve its litigation objectives," the very concern expressed by the *Lapides* and *Sabis* courts.

Accordingly, the Court finds that Defendant has waived its *Eleventh Amendment* immunity **[*13]** in this matter.

II. Did Plaintiff Establish that Defendant Breached the Licensing Agreement

In their First Amended Complaint, Plaintiffs asserted a claim for breach of contract based on the following allegations: (1) Defendant used the Baum Hitting Machine to perform unlicensed testing, (2) Defendant improperly modified the protocol used by the Baum Hitting Machine, and (3) Defendant improperly modified the Baum Hitting Machine itself. (Dkt. # 153). Defendant asserts that Plaintiff failed to establish (under any of these three theories) that Defendant breached the license agreement. Accordingly, Defendant moves for judgment as a matter of law (pursuant to *Fed. R. Civ. P. 50*) as well as a new trial (pursuant to *Fed. R. Civ. P. 59(a)*).

The standard for judgment as a matter of law under *Rule 50* "mirrors" the *Rule 56* standard for summary judgment "such that 'the inquiry under each is the same.'" *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*.

When evaluating a motion for new trial under *Rule 59*, the Court "should indulge all presumptions in favor of the validity **[*14]** of the jury's verdict." *Tezak v. Montgomery Ward & Co., Inc., 33 Fed. Appx. 172, 176 (6th Cir., Mar. 28, 2002)*. Moreover, "the simple fact that the grant of a new trial might result in a different outcome is not a valid basis for disturbing a jury's verdict which is otherwise based upon legally sufficient evidence." *Id.* As is well recognized, the "jury's verdict should be accepted if it is one which could reasonably have been reached." *Rush v. Illinois Cent. R. Co., 399 F.3d 705, 727 (6th Cir. 2005)*.

When evaluated pursuant to the appropriate standards, the Court concludes that Plaintiff introduced sufficient evidence to permit a reasonable juror to find that Defendant used the Baum Hitting Machine to perform unlicensed testing and improperly modified the protocol used with the Baum Hitting Machine. The Court also finds that Plaintiff introduced sufficient evidence to permit a reasonable juror to find that Defendant did not cure its breach of the license agreement. However, the Court concludes that Plaintiff failed to introduce sufficient evidence to permit a reasonable juror to find that Defendant improperly modified the Baum Hitting Machine **[*15]** itself.

III. Remittitur

Defendant alternatively argues that if it is not entitled to a new trial on the issue of liability it is entitled to a remittitur on the grounds that the jury's verdict was "wholly incomprehensible."

Since this is a diversity action, the first question that arises is what body of law governs Defendant's motion for remittitur. The parties have not briefed this question, but it appears that the Court must look to state law to assess the merits of Defendant's request. *See Imbrogno v. Chamberlin, 89 F.3d 87, 90 (2d Cir. 1996)* ("in

deciding remittitur motions in diversity cases, federal courts apply federal procedural standards and state substantive law"); *Jones v. Wittenberg University, 534 F.2d 1203, 1212 (6th Cir. 1976)* ("the appealability of an order of remittitur is determined by state law").

The license agreement at issue in this matter expressly states that it "will be construed, interpreted and applied according to the laws of the State of Michigan." The parties having agreed that Michigan substantive law shall be applied in this matter, the Court shall assess Defendant's motion for remittitur by reference to **[*16]** Michigan law.

To grant Defendant's motion the Court must conclude that the jury's verdict as to damages was "excessive." *Gilbert v. DaimlerChrysler Corp., 470 Mich. 749, 685 N.W.2d 391, 399 (Mich. 2004)*. The term "excessive" has been defined as "going beyond the usual, necessary, or proper limit or degree; characterized by excess." *Id.* In other words, the Court must determine "whether the jury verdict is for an amount greater than the evidence can support." *Seabrook v. Delta Financial Corp., 2000 Mich. App. LEXIS 1503, 2000 WL 33406658 at *13 (Mich. Ct. App., Oct. 3, 2000)* (quoting *McLemore v. Detroit Receiving Hosp. & Univ. Medical Center, 196 Mich. App. 391, 493 N.W.2d 441 (Mich. Ct. App. 1992))*.

In making this determination, the Court must "view the evidence in a light most favorable to the plaintiff and give the plaintiff the benefit of every reasonable inference." *Dockett v. Kramer Entertainment Agency, Inc., 2005 Mich. App. LEXIS 522, 2005 WL 433597 at *2 (Mich. Ct. App., Feb. 24, 2005)*. If a review of the evidence reveals that "reasonable people could differ, the question is properly left to the trier of fact," *id.,* because "the authority to measure damages. . .inheres in the jury's role **[*17]** as trier of fact." *Gilbert, 685 N.W.2d at 399*.

However, a party asserting a claim "has the burden of proving its damages with reasonable certainty" and "damages based on speculation or conjecture are not recoverable." *Metro Car Co. v. Hemker, 2005 Mich. App. LEXIS 3299, 2005 WL 3556115 at *2 (Mich. Ct. App., Dec. 29, 2005)* (quoting *Berrios v. Miles, Inc., 226 Mich. App. 470, 574 N.W.2d 677 (Mich. Ct. App. 1997))*. While absolute certainty is not required, Plaintiff must nonetheless establish a "reasonable basis" for its damages computation. *Dockett, 2005 Mich. App. LEXIS 522, 2005 WL 433597 at *3* (citing *Hoffman v. Auto Club Ins. Ass'n., 211 Mich. App. 55, 535 N.W.2d 529 (Mich. Ct. App. 1995))*.

After reviewing the relevant evidence pursuant to the above standard, the Court concludes that there does not exist a "reasonable basis" for the jury's damages award in this matter and, furthermore, that the jury awarded Plaintiffs an amount in excess of what the evidence supports.

Plaintiffs sought to recover damages for lost profits they claim to have suffered as a result of Defendant's improper use of the Baum Hitting Machine. Despite the complexity inherent in any such lost profits calculation, **[*18]** Plaintiffs estimated lost profits by employing an overly simplistic model. Plaintiffs asserted that they were entitled to five thousand dollars ($ 5,000) for each day that Defendant used the Baum Hitting Machine, regardless of the purpose for which the machine was used. This method of calculation is fatally flawed and fails to support the jury's damages award.

Plaintiffs' expert witness on the issue of damages, Paul Taylor, testified that after analyzing Plaintiffs' financial statements and "some Baum sales invoices" he concluded that Plaintiffs were charging five thousand dollars ($ 5,000) a day "for Baum Hitting Machine testing." (Trial Transcript, Sep. 9, 2005, 162, 177). Taylor testified that during the relevant time period Defendant had used the Baum Hitting Machine on 907 different days. *Id.* at 164-68. Taylor then multiplied the number of days which the machine was allegedly used (907) by five thousand, thus arriving at his estimate of Plaintiffs' lost revenue, 4.53 million dollars. *Id.* at 178, 182-83. From this amount, Taylor subtracted the estimated expenses which Plaintiffs would have incurred in order to generate such revenue. *Id.* at 178-83. Taylor estimated **[*19]** that Plaintiffs would have incurred $ 721,184 in such expenses, resulting in alleged lost profits of 3.8 million dollars. *Id.* at 183.

On cross-examination, Taylor acknowledged that certain types of testing which Defendant conducted with the Baum Hitting Machine (e.g., final certification testing) could not have deprived Plaintiffs of *any* profits because Plaintiffs were not authorized to perform such testing. (Trial Transcript, Sep. 13, 2005, 117-21, 125-26). Taylor further testified, however, that he made no attempt to determine whether the specific testing allegedly performed by Defendant in violation of the License Agreement was of a nature that may have deprived Plaintiffs of profits or was instead the type of testing which Plaintiffs were not even authorized to perform. *Id.* Instead, Taylor simply assumed that any testing which

Defendant conducted during the relevant time period was of a type which Plaintiffs could have performed, thus depriving Plaintiffs of profits. *Id.* at 125-26. This assumption enjoys no support in the record.

Taylor also acknowledged on cross-examination that he did not, as part of his "lost profits" estimation, make any attempt to determine **[*20]** whether any of the testing which Defendant performed during the relevant time period could have instead been performed by the bat manufacturers themselves. *Id.* at 94. Taylor simply assumed that any and all testing which Defendant performed would have instead been performed by Plaintiffs at the rate of five thousand dollars ($ 5,000) per day. This assumption likewise enjoys no support in the record.

As noted above, Taylor testified that Defendant used the hitting machine (in violation of the License Agreement) on 907 separate days. Taylor further testified that during these 907 days the hitting machine executed 37,500 bat swings. (Trial Testimony, Sep. 9, 2005, 165-68). In other words, on an "average" day the hitting machine executed more than 41 bat swings. However, as Taylor also acknowledged, on several of these days the hitting machine was used to perform only one or two bat swings. (Trial Testimony, Sep. 13, 2005, 114-17). Taylor offered no evidence that such "tests" were of a nature as to command a fee of five thousand dollars.

To put it quite simply, while Taylor claimed that his analysis was designed to calculate the revenue which Plaintiffs allegedly lost because of Defendant's **[*21]** breach of the License Agreement, Taylor, in fact, simply calculated Plaintiffs' alleged lost profits as if the License Agreement contained a liquidated damages provision which entitled Plaintiffs to receive five thousand dollars ($ 5,000) for each day that the hitting machine was used, regardless of the extent of the use or the purpose thereof. The License Agreement contains no such provision and the discussion above reveals the many deficiencies in Taylor's analysis.

Accordingly, for the reasons articulated herein, the Court finds that Plaintiffs have failed to establish their damages with reasonable certainty and that there does not exist a "reasonable basis" for the jury's damages award in this matter.

Having found that the damage award in this matter is excessive and not sufficiently supported, the Court must determine the appropriate remedy. Under Michigan law, "a grant of a new trial limited to the issue of damages is allowed where liability is clear." *Denha v. Jacob, 179 Mich. App. 545, 446 N.W.2d 303, 305-06 (Mich. Ct. App., 1989)*; *see also, Reddy v. Sweetland, 2001 Mich. App. LEXIS 1054, 2001 WL 704394 at *3 (Mich. Ct. App., Mar. 23, 2001)* (same).

As discussed above, Plaintiffs clearly **[*22]** introduced evidence from which a jury could conclude that Defendant breached the License Agreement. However, while the jury's damage award is not supported by the evidence, the Court is unable to determine what amount of damages is appropriate. Any attempt to discern Plaintiffs' damages would, at this juncture, constitute the very sort of speculation which is prohibited by Michigan law. Accordingly, the Court grants Defendant's motion for a new trial, but only as to the issue of the amount of damages (if any) Plaintiffs suffered as a result of Defendant's breach of the License Agreement.

CONCLUSION

For the reasons discussed herein, the Court finds that Defendant has waived its *Eleventh Amendment* immunity from suit in federal court. The Court finds that Plaintiffs presented sufficient evidence at trial to establish that Defendant used the Baum Hitting Machine to perform unlicensed testing and improperly modified the protocol used with the Baum Hitting Machine. The Court also finds that Plaintiffs introduced sufficient evidence to permit a reasonable juror to find that Defendant did not cure its breach of the license agreement. The Court further finds that Plaintiffs failed to **[*23]** introduce sufficient evidence to permit a reasonable juror to find that Defendant improperly modified the Baum Hitting Machine. Finally, the Court finds that Plaintiffs have failed to establish their damages with reasonable certainty and that there does not exist a "reasonable basis" for the jury's damages award.

Accordingly, Defendant University of Massachusetts at Lowell's Renewed Motion for Judgment as a Matter of Law and, Alternatively, for a New Trial, (dkt. # 192), is **granted in part and denied in part,** and Defendant University of Massachusetts at Lowell's Motion to Dismiss Plaintiffs' Patent Claims, (dkt. # 215), is **denied.** Accordingly, Defendant is entitled to a new trial limited to the issue of the amount of damages (if any) to which Plaintiffs are entitled as a result of Defendant's breach of the License Agreement at issue in this matter. An Order consistent with this Opinion will enter.

Date: February 24, 2006

ELLEN S. CARMODY

United States Magistrate Judge

ORDER

Consistent with the Opinion filed this day, Defendant University of Massachusetts at Lowell's Renewed Motion for Judgment as a Matter of Law and, Alternatively, for a New **[*24]** Trial, (dkt. # 192), is **granted in part and denied in part,** and Defendant University of Massachusetts at Lowell's Motion to Dismiss Plaintiffs' Patent Claims, (dkt. # 215), is **denied.**

Accordingly, the Court shall conduct a new trial limited to the issue of the amount of damages (if any) to which Plaintiffs are entitled as a result of Defendant's breach of the License Agreement at issue in this matter.

IT IS SO ORDERED.

Date: February 24, 2006

ELLEN S. CARMODY

United States Magistrate Judge

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Fredonia Farms, LLC v. Enbridge Energy Partners, L.P.

United States District Court for the Western District of Michigan, Southern Division

July 18, 2014, Decided; July 18, 2014, Filed

Case No. 1:12-CV-1005

Reporter
2014 U.S. Dist. LEXIS 97677 *; 2014 WL 3573723

FREDONIA FARMS, LLC, a Michigan limited liability company; FRANK K. ZINN, KARL ZINN, DONALD ZINN; SUSAN EISINGER; and MARK FALANGA, individually and as joint venturers, Plaintiffs, v. ENBRIDGE ENERGY PARTNERS, L.P., et al., Defendants.

Subsequent History: Summary judgment granted by *Fredonia Farms, LLC v. Enbridge Energy Partners, L.P., 2014 U.S. Dist. LEXIS 140623 (W.D. Mich., Oct. 3, 2014)*

Prior History: *Fredonia Farms, LLC v. Enbridge Energy Partners, L.P., 2013 U.S. Dist. LEXIS 191875 (W.D. Mich., Nov. 1, 2013)*

Counsel: **[*1]** For Fredonia Farms, LLC, a Michigan limited liability company, plaintiff: David Scott Ludington, James Moskal, Jeffrey O. Birkhold, Roosevelt Thomas, Scott R. Carvo, Richard A. Kay, Warner Norcross & Judd LLP (Grand Rapids), Grand Rapids, MI.

For Frank K. Zinn, individually and as joint venturers, Karl Zinn, individually and as joint venturers, Donald Zinn, individually and as joint venturers, Susan Eisinger, individually and as joint venturers, Mark Falanga, individually and as joint venturers, plaintiffs: David Scott Ludington, James Moskal, Jeffrey O. Birkhold, Scott R. Carvo, Richard A. Kay, Warner Norcross & Judd LLP (Grand Rapids), Grand Rapids, MI.

For Enbridge Energy Partners, L.P., a Delaware limited partnership, Enbridge Pipelines (Lakehead), L.L.C., a Delaware LLC, Enbridge Pipelines (Wisconsin), Inc., a Wisconsin corporation, defendants: Edward H. Pappas, Dickinson Wright PLLC (Troy), Troy, MI; Geoffrey A. Fields, Dickinson Wright PLLC (Grand Rapids), Grand Rapids, MI; K. Scott Hamilton, Kathleen A. Lang, Kathryn S. Wood, Michelle L. Alamo, Dickinson Wright PLLC (Detroit), Detroit, MI.

For PII (Canada), Limited, a foreign corporation, defendant: Gary K. August, Matthew G.
[*2] McNaughton, Zausmer Kaufman August Caldwell & Tayler PC, Farmington Hills, MI.

For Enbridge Pipelines, Inc., a foreign corporation, defendant: K. Scott Hamilton, Kathleen A. Lang, Kathryn S. Wood, Michelle L. Alamo, Dickinson Wright PLLC (Detroit), Detroit, MI.

For Facilitative Mediator, mediator: William W. Jack , Jr., LEAD ATTORNEY, Smith Haughey Rice & Roegge PC (Grand Rapids), Grand Rapids, MI.

Judges: HON. GORDON J. QUIST, UNITED STATES DISTRICT JUDGE.

Opinion by: GORDON J. QUIST

Opinion

This case arises from an oil pipeline leak that resulted in the release of crude oil into Talmadge Creek and the Kalamazoo River. The named defendants are various entities in the Enbridge corporate structure that owned, operated, controlled, or maintained the pipeline (collectively, Enbridge) , and PII (Canada), a company that inspected the pipeline. The plaintiffs are Fredonia Farms, LLC (Fredonia Farms), members of the Zinn family (the Zinn Plaintiffs), who are also members of Fredonia Farms, and Mark Falanga, a businessman involved in a land development project with the other plaintiffs. Plaintiffs have asserted the following claims against Enbridge: (1) negligence; (2) gross negligence; (3) nuisance; (4) strict liability **[*3]** for abnormally dangerous activity; (5) strict liability under the Oil Protection Act (OPA), *33 U.S.C. § 2701 et seq.*; (6) conversion; and (7) unjust enrichment.[1] Plaintiffs seek compensatory damages, consequential damages, property damages, economic damages, exemplary damages, and lost profits.

Enbridge has moved for summary judgment on

[1] Plaintiffs have asserted a negligence claim against PII, and PII has moved for summary judgment. PII's motion will be handled in a separate opinion.

Plaintiffs' claims for lost profits and exemplary damages, as well as Plaintiffs' claims for conversion, unjust enrichment, and strict liability under state law. Plaintiffs have moved for summary judgment on their claim under the OPA. The Court has reviewed the parties' extensive briefing and has held oral argument. For the reasons that follow, the Court will grant Plaintiffs' motion as to Enbridge's liability under the OPA. The Court will also grant Enbridge's motion as to loft profits and exemplary damages, but deny the motion as to Plaintiff's conversion, unjust enrichment, and strict liability claims.

I. Background

A. The Enbridge Oil Spill

On July 25, 2010, Line 6B, a pipeline owned and operated by one **[*4]** or more of the Enbridge entities, ruptured near Marshall, Michigan, and began to leak. (Dkt. #322-1 at Page ID #6341.) The alarms associated with the leak were not recognized as a line-break, and the leak was not addressed for 17 hours. (*Id.*) During that time, Enbridge twice tried to restart the pipeline, pumping thousands of barrels of oil into the line in the process. (*Id.*) The accident resulted in the release of over 20,000 barrels of diluted bitumen, or heavy crude oil. (*Id.*) The oil flowed into Talmadge Creek, which runs across the northeast side of property that was previously owned by the Zinn Plaintiffs' parents (the Zinn Property). (*Id.*)

B. The Zinnyard

The Zinn Property is a 420-acre piece of under-developed property located near Marshall, Michigan that was owned by members of the Zinn family for 80 years. (Dkt. #349-2 at Page ID #7564.) The Zinn Property was previously held in trust for the Zinn Plaintiffs (the Zinn Trust). (Dkt. #364-5 at Page ID #7287-89.) In 1998, Frank K. Zinn, the trustee for the Zinn Trust, executed a quit-claim deed to Fredonia Farms, an entity that the Zinn Plaintiffs created to develop the Zinn Property. (*Id.*; dkt. #348-5 at Page ID #7460.)

In September **[*5]** 2007, Falanga, a friend of the Zinn family, presented the Zinn Plaintiffs with a proposal to develop the Zinn Property as a community vineyard, to be known as the Zinnyard. (Dkt. #364-4.) Falanga is the previous president of the Chicago-based Merchandise Mart, and has extensive experience in real estate. (*Id.* at Page ID #8421.) Falanga drafted a business plan that contemplated that the property would be divided into 200 one-acre lots, which would sell for an average of $100,000 each. (*Id.* at Page ID #8423.) Owners would be able to grow grapes and make their own wine, which would "open up vineyard ownership to many more people." (*Id.*) The development would include a winery, event space, a retail space, a resort, and a restaurant. (*Id.*)

Falanga's plan was structured to "impose[] minimal financial burden and risk on the Zinn family." (*Id.* at Page ID #8424.) As such, the plan anticipated that "capital improvements [would] be drawn from the development proceeds rather than from existing Zinn family reserves" so that there would be a "minimal cash outlay" from the Zinn family. (*Id.*) The plan acknowledged that the biggest obstacle was that interested buyers would be unwilling to commit to **[*6]** purchasing a lot before grapes were planted or infrastructure was built. (*Id.* at Page ID ##8447-8448.) The Zinn Plaintiffs and Falanga agreed that Falanga would receive a 20 percent interest in the project once lots were sold and the project was a "go." (Dkt. #327-3 at Page ID #6548.)

Over the next year, Plaintiffs assembled a team to pursue the Zinnyard project. (Dkt. #348-2 at Page ID ##7405-06.) They hired Peter Gamble, a viticulture consultant, to evaluate the Zinn Property for its suitability to grow wine grapes. (Dkt. #350-4 at Page ID #7608.) Gamble estimated that vinifera grapes, which are associated with premium wines, could be grown on roughly one-third of the property. (*Id.* at Page ID #7612.) Plaintiffs also brought in a community planning firm, an architectural firm, and a real estate broker. (Dkt. #348-3 at Page ID #7419.) Fredonia Farms paid those and other consultants over $129,000 from its bank account. (Dkt. #349-2 at Page ID #7565.)

Plaintiffs took other steps to further the project. They met with Fredonia Township officials to discuss a zoning change, communicated with the City of Marshall's economic development director, and completed a site plan. (Dkt. #348-5 at **[*7]** Page ID #7459.) Plaintiffs also made changes to the original development plan. They decided that lots should be 3/4 acre and sell for an average of $150,000. (Dkt. #329-2 at Page ID #6648; dkt. #327-2 at Page ID #6537.) They also decided that, rather than financing infrastructure construction through the sale of lots, they would obtain reservations for lots from buyers, which they would use to obtain financing from banks. (Dkt. #348-2 at Page ID #7413; dkt. #348-3 at Page ID #7425.) If they were unable to obtain such financing, Falanga had a "prospective pool of private investors" that he could have approached. (Dkt. #348-2

at Page ID #7414.) Members of the Zinn family also would have been willing to invest up to $2.5 million in personal funds. (Dkt. #351-4 at Page ID #7674; dkt. #349-4 at Page ID #7580; dkt. #348-5 at Page ID #7467.) Although Falanga had significant personal funds, there is no evidence that he would have been willing to invest in the project personally. (Dkt. #364-3 at Page ID #8415.)

In late 2008, Plaintiffs decided to postpone bringing the project to market due to the downturn in the economy. (Dkt. #348-2 at Page ID ##7406-07.) Two months before the oil spill, Falanga **[*8]** confirmed to the Zinnyard team that he advised maintaining a "holding pattern" until the marketplace regained confidence, and that he "tentatively" planned to begin a marketing campaign in February 2011, although he would "continue to monitor market conditions closely." (Dkt. #329-5 at Page ID #6662.)

When the spill occurred, Plaintiffs had not begun marketing the Zinnyard concept and did not have a set date to begin marketing. (*Id.*) They had not begun construction and had not planted a single grape. (Dkt. #327-2 at Page ID ##6519, 6529.) They had not completed the necessary zoning changes or submitted applications for water and sewer. (*Id.* at Page ID #6521; dkt. #351-4 at Page ID #7673; dkt. #309-5 at Page ID ##6011-13.) They did not have any financing commitments and had not sold a single lot. (Dkt. #327-2 at Page ID #6528.) Plaintiffs and other members of the Zinnyard team believe that such developments were likely to occur if the oil spill had not happened. Following the spill, however, Plaintiffs abandoned the idea of developing the Zinn Property because they believed they could not attract buyers or obtain financing due to the stigma of the oil spill.

II. Legal Standard

Summary **[*9]** judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are facts which are defined by substantive law and are necessary to apply the law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. A dispute is genuine if a reasonable jury could return judgment for the non-moving party. *Id.*

The court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Agristor Fin. Corp. v. Van Sickle, 967 F.2d 233, 236 (6th Cir. 1992)* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*).

III. Enbridge's Motion for Summary Judgment

A. Damages

Plaintiffs seek compensatory and consequential damages, including lost profits, for their state and federal claims. Enbridge has moved for summary judgment on Plaintiffs' claim for lost profits, arguing that such damages are speculative both as to their fact and their amount.[2] The Court will grant Enbridge's **[*10]** motion.

In determining the damages recoverable in an action for negligent destruction of property, Michigan follows the rule set forth in *O'Donnell v. Oliver Iron Mining Co., 262 Mich. 470, 247 N.W. 720 (1933)*. *Price v. High Pointe Oil Co., 493 Mich. 238, 244, 828 N.W.2d 660, 664 (2013)*. That rule provides:

> If injury to property caused by negligence is permanent or irreparable, [the] measure of damages is [the] difference in its market value before and **[*11]** after said injury, but if [the] injury is reparable, and [the] expense of making repairs is less than [the] value of the [the] property, [the] measure of damages is [the] cost of making repairs.

Id. (alteration in original). A plaintiff whose property is damaged may also be entitled to damages for lost profits related to a business on the property. *See Murray v. Wolverine Pipe Line Co., No. 257121, 2005 Mich. App. LEXIS 3302, 2005 WL 3556148 (Mich. Ct. App.*

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[2] Enbridge asserts that the OPA similarly prohibits awarding lost profits that are speculative. Plaintiffs have not disputed that assertion. Moreover, although there is no case law directly on point, cases interpreting other federal statutes have held that lost profits must be reasonably certain. *See Thompson v. Haynes, 305 F.3d 1369, 1382 (Fed. Cir. 2002)* (rejecting district court's award of lost profits under the Lanham Act because it was speculative). Under federal law, proof of the fact of damages must be established with reasonable certainty, although the amount of damages may be estimated, provided it is not merely speculative. *Id.* Accordingly, the Court's analysis of lost profits applies to Plaintiffs' federal and state law claims.

Dec. 29, 2005) (per curiam).

As an initial matter, there is some confusion as to whether Plaintiffs are claiming damages for lost profits, or damages to the "Zinnyard Asset." Plaintiffs rely on an expert report from Charles Hewlett, who concluded that the value of the "Zinnyard Asset" was roughly $14 million.[3] In concluding his valuation of this "unique" community, Hewlett assumed that the Zinnyard would have obtained the necessary zoning changes, complied with all environmental requirements, obtained financing for infrastructure, planned and completed the necessary infrastructure (including streets and utilities), successfully marketed the development to wine lovers, obtained financing sources for purchasers of the lots, planted a vineyard, produced a quality **[*12]** wine that would be consumed and sold, built a successful retail shop, and opened a profitable restaurant, among other things. Furthermore, Hewlett anticipates that the lots would not be all sold until 2016, when no one could predict the economy. Hewlett then valued the damage to the 400 acres of property not as damage to the land itself, but as the projected financial loss incurred because Plaintiffs cannot realize their dream of building a unique community of vineyards with a successful wine producing facility, retail space, and restaurant. Although Hewlett's report purports to value an asset, he essentially projects lost profits for the Zinnyard, a business that has never existed. Thus, regardless of what label is used, Plaintiffs' claim is essentially one for lost profits from the Zinnyard, a development that had not yet begun construction or gone to market.[4]

Under Michigan law, "[f]or a plaintiff to be entitled to damages for lost profits, the losses must be subject to a reasonable degree of certainty and cannot be based solely on mere conjecture or speculation." Bonelli v. Volkswagen of Am., 166 Mich. App. 483, 511, 421 N.W.2d 213, 226 (1988). However, courts do not require mathematical certainty. *Id.* On the contrary, lost profits are permitted even where they "are difficult to calculate and are speculative to some degree." *Id.* "The type of uncertainty which will bar recovery of damages is 'uncertainty as to the fact of the damage and not as to its amount . . . [since] where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.'" *Id.* (quoting Wolverine Upholstery Co. v. Ammerman, 1 Mich. App. 235, 244, 135 N.W.2d 572, 576 (1965) **[*14]** (alteration in original)).

Michigan allows lost profits for new businesses as long as they may be established with "reasonable certainty." Fera v. Vill. Plaza, Inc., 396 Mich. 639, 644, 242 N.W.2d 372, 374 (1976). Although Michigan courts have not explicitly listed the types of evidence that may be used to demonstrate lost profits for a new business, courts in other states have examined expert reports, market analyses, comparisons to similar businesses operating under similar market conditions, and economic and financial data. 11 Corbin on Contracts § 56.17 (2012). *See also* Andrew v. Power Mktg. Direct, Inc., 2012 Ohio 4371, 978 N.E.2d 974, 992 (Ohio Ct. App. 2012); Mrozek v. Intra Fin. Corp., 2005 WI 73, 281 Wis. 2d 448, 478, 699 N.W.2d 54, 68 (Wis. 2005); Kaech v. Lewis Cnty. Pub. Util. Dist. No. 1, 106 Wash. App. 260, 277, 23 P.3d 529, 539 (Wash. Ct. App. 2001). In general, a new business may recover lost profits "[w]here estimates of lost profits are based on objective facts or data and there are firm reasons to expect a business to yield a profit." 22 Am. Jur. 2d Damages § 459.

In support of their motion, Defendants rely primarily on the Michigan Court of Appeals' opinion in Murray v. Wolverine Pipe Line Co., 2005 Mich. App. LEXIS 3302, 2005 WL 3556148. **[*15]** In that case, a pipeline owned by the defendant burst onto property owned by the plaintiff. 2005 Mich. App. LEXIS 3302, [WL] at *1. At the time of the spill, the plaintiff was preparing to open a foster care facility on the property. *Id.* The lower court granted the defendant summary judgment on the plaintiff's claim for lost profits, and the court of appeals affirmed. 2005 Mich. App. LEXIS 3302, [WL] at *2. The court explained that the plaintiff had presented only his business plan and an affidavit from an accountant that the business would have been successful, and that such evidence was insufficient to show with reasonable certainty that the business lost profits of any amount due to the defendant's actions. *Id.* Morever, the court noted, the defendant had presented evidence that the

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[3] Hewlett, a real estate appraiser, identified "three common and acceptable approaches to real estate valuation: the Economic or Income Approach, the Comparable Sales or Sales Comparison Approach, and the Replacement Cost Approach." (Dkt. #455-2 at Page ID #11727.) For various reasons, including the "unique nature of the community," **[*13]** Hewlett rejected the Comparable Sales Approach and Replacement Cost Approach. He concluded that the income approach to valuation was the most appropriate, and used the "Discounted Cash Flow" method to determine the "Zinnyard Asset's" Net Present Value, assuming that the pipeline rupture did not occur.

[4] In briefing and at oral argument, Plaintiffs have identified this claim as one for lost profits.

business had not been profitable once it finally opened. *Id.*

Plaintiffs argue that *Murray* is not applicable because that court had evidence before it that the business was not profitable once it opened. Rather, Plaintiffs rely on the Michigan Supreme Court's decision in *Fera, 396 Mich. 639, 242 N.W.2d 372*. In that case, the plaintiff executed a lease for a "book and bottle" shop in the defendant's proposed shopping mall. *Id. at 641, 242 N.W.2d at 373*. The defendant **[*16]** later leased the same premises to another tenant, thereby preventing the plaintiff from opening his shop on the premises. *Id.* A jury awarded the plaintiff damages, and the Michigan Court of Appeals reversed the award because "the trial court erroneously permitted lost profits as the measure of damages for breach of the lease." *Id. at 642, 242 N.W.2d at 373* (internal quotations omitted). The Michigan Supreme Court reversed the Court of Appeals.

The Court explained that a new business may recover anticipated lost profits, but that "the plaintiff must lay a basis for a reasonable estimate of the extent of his harm." *Id. at 643, 242 N.W.2d at 373-74*. Future lost profits are allowed only if "they may be established with reasonable certainty." *Id. at 644, 242 N.W.2d at 374*. For an established business, "a reasonable prediction can often be made as to its future on the basis of its past history." *Id.* However, if the business "has not had such a history as to make it possible to prove with reasonable accuracy what its profits have been in fact, the profits prevented *are often but not necessarily too uncertain for recovery*." *Id.* (emphasis added). Thus, the question becomes whether the instant **[*17]** case falls into the "reasonably certain" category or the "too uncertain for recovery" category. In this Court's judgment, the instant case falls into the latter.

The *Fera* court explained that the key to determining whether profits are uncertain is the quality of the evidence:

> [T]he term 'speculative and uncertain profits' is not really a classification of profits, but is instead a characterization of the evidence that is introduced to prove that they would have been made if the defendant had not committed a breach of contract. The law requires that this evidence shall not be so meager or uncertain as to afford no reasonable basis for inference, leaving the damages to be determined by sympathy and feelings alone.

Id. at 644, 242 N.W.2d at 374. The court noted that, in that case, the parties had presented days of testimony on the issue of lost profits. *Id. at 645, 242 N.W.2d at 374*. The parties presented testimony from experts with experience in the liquor sales and book sales businesses, representatives from liquor distribution firms in the area, and owners of drug and book stores. *Id.* Those witnesses produced figures regarding sales for similar business in the same area. *Id. at 645, 242 N.W.2d at 374-75*. **[*18]** The plaintiff himself presented evidence from other bookstores that he owned at the time. *See Fera v. Vill. Plaza, Inc., 52 Mich. App. 532, 536, 218 N.W. 2d 155, 157 (1974)*. The court explained that such testimony took the issue of lost profits "from the category of speculation and conjecture" and "placed it in the position of those cases that hold that even though loss of profits is hard to prove, if proven they should be awarded by the jury." *Fera, 396 Mich. at 646, 242 N.W.2d at 375*.

Plaintiffs argue that *Fera* is directly applicable to the instant case because the bookstore owner in *Fera* had only a venue for his business and nothing else—no product to sell and no infrastructure for his store. However, there are important distinctions between the facts, as well as the evidence, in the two cases:

- In *Fera*, the real estate was actually ready for occupancy for its intended purpose. In fact, the landlord wrongfully leased the space to another tenant. In the instant case, Hewlett predicted that, if the oil spill had not occurred and everything else had gone perfectly, the Zinnyard would not have begun selling lots until 2013—three years after the oil spill.

- Although Plaintiffs owned the **[*19]** property where the Zinnyard was to be developed, they had not obtained the necessary zoning or infrastructure that would have allowed them to develop the property. In contrast, the plaintiff in *Fera* had a lease for a retail space that was ready to house his store. Although he did not have a liquor license, he had all the other necessities to open his business and make it a success.

- At the time of the oil spill, the Zinnyard project was on hold due to the economic downturn. In contrast, the plaintiff in *Fera* intended to, and had the ability to, open a store once he had a retail space.

- Plaintiffs cannot point to any other comparable business to provide a basis to demonstrate the Zinnyard's lost profits. Hewlett's report acknowledges that there are no "precise and exact comparables to the Zinnyard community." (Dkt.

#333-3 at Page ID #6810.) In fact, Hewlett could not find a single development in the United States in which property owners had their own small vineyard. (*Id.*) The closest analogue that he found was a community vineyard in Argentina, but the Argentine property did not include a residential component. (*Id.*) In contrast, the plaintiff in *Fera* had his own and other comparable **[*20]** businesses to use as a basis for projecting lost profits.

• Plaintiffs cannot provide testimony from witnesses that have expertise about community vineyards, since this is a business model that is unique in the world and has never been tested. The only other "experts" in this case are members of the Zinnyard team, who may have a genuine belief that the business would have been a great success, but no empirical basis for this belief. In contrast, the plaintiff in *Fera* presented testimony from experts in the book and liquor business.

Thus, the evidence that took *Fera* from the category of speculation and conjecture is simply not present in this case.

The uncertainty in this case does not go merely to the amount of lost profits, but to their very fact. Hewlett assumed that this "unique" development would be a success, and he bases his valuation on that assumption. As such, he never considered developments that have failed in his analysis. Whether Plaintiffs would have successfully completed all the steps necessary to open the Zinnyard and found buyers, let alone made the whole development profitable, is a matter of pure speculation. Even if Hewlett's report were probative as to the amount **[*21]** of damages, it does not provide insight into the fact of damages.[5]

Plaintiffs argue that several individuals, including members of the Zinnyard team, would testify that they believe that the Zinnyard would have been a success. However, those individuals have no experience with a development like the Zinnyard, since it was to be the first of its kind. The crux of Plaintiffs' argument seems to be that the Zinnyard had such an impressive team of individuals working on its behalf that it was guaranteed to succeed. Plaintiffs have particularly pointed to Falanga's history of success, painting him as a sort of King Midas of the business world, whose every project turns to gold. However, the Midas touch argument is simply not sufficient to take damages from the realm of speculation. The Court does not doubt that the Zinnyard team was impressive, or that Falanga has had an extensive history of success. However, even the most talented and successful among us experience failure, particularly upon entering uncharted **[*22]** territory, and especially again in the real estate development business.

Falanga has compared the Zinnyard project to "Apple creating the iPad before anyone knew what the iPad was or existed." (Dkt. # 306-3 at Page ID #5805.) However, the Zinnyard could just as easily be compared to "Lisa," a project that Steve Jobs undertook for Apple decades prior to the unveiling of the iPad. Lisa, one of the earliest personal computers, was regarded as an epic failure, and resulted in Jobs being ousted from Apple. *See* Nick Schulz, Steve Jobs: America's Greatest Failure, NATIONAL REVIEW ONLINE , Aug. 25, 2011, available at *http://www.nationalreview.com/articles/275528/steve-jobs-america-s-greatest-failure-nick-schulz*. Would the Zinnyard have been the next iPad, or the next Lisa? It is impossible to know. A jury could only speculate, and that the law prohibits.

Plaintiffs have failed to provide a single market study demonstrating that they would have been able to find buyers for the Zinnyard lots. When asked about the lack of market research, Falanga responded that it would have been a "waste of money and effort" because the Zinnyard was something entirely new that would have created new desires and **[*23]** habits in its intended market. In essence, a market study would have been worthless because people could not know whether they would want to travel to Marshall for vineyard living, since it was something that had never been done before or imagined. Even though Plaintiffs admit that their targeted purchasers could not know whether they would be willing to purchase lots, they argue that a jury could determine the marketability of the Zinnyard with reasonable certainty. That argument is untenable.

There is little evidence that the Zinnyard project would have ever gotten off the ground, let alone been a success. When the oil spill occurred, the development was in a "holding pattern," and it was unclear when Plaintiffs would take it to market. Plaintiffs were able to put the project on hold because there were no "carry costs to it," or "pressure from a group of investors pushing to move ahead." (Dkt. # 348-2 at Page ID #7403.) Those same factors mean that Plaintiffs could

[5] As will be discussed in a separate order, the Court will grant Enbridge's motion to exclude Hewlett's testimony because it is not relevant to the issues in this case and is not reliable.

have abandoned the project forever without consequences. Unlike the plaintiff in *Fera*, who had entered into a contract to lease a location for his bookstore, Plaintiffs had no contracts or commitments that would have obligated **[*24]** them to take the Zinnyard to market.

Furthermore, Plaintiffs did not have the financing necessary to begin construction on the Zinnyard. Plaintiffs have asserted that a number of factors indicate that the project was viable: it was to be built of an ideally suited piece of land, it had a solid business plan, it had a development team, the development team had undertaken efforts to prepare to go to market, and it had community support, among other things. Even assuming all those factors existed, Plaintiffs still needed the money to begin construction. Plaintiffs have asserted that financing was no problem—they would have found financing, and if all else failed, Falanga could have saved the day by financing the project himself. However, that assertion is not supported by the record. While Falanga has indicated that he *could* have financed the project himself, the Court is unaware of anything in the record indicating that he *would* have done so. In his deposition, Falanga stated: "You know, I could have invested a lot. Would I have done that is another question." (Dkt. #364-3 at Page ID#8416.) When pressed to state how much he would have invested Falanga stated: "I don't want to answer that **[*25]** so specifically." (*Id.*)

In the end, the Zinnyard was simply a novel concept that did not have the chance to develop. The Zinnyard had not obtained necessary permits, begun construction, planted a single grape, or made a single sale. The Court recognizes that Plaintiffs lost the opportunity to develop that concept through no fault of their own. However, even if Plaintiffs were "robbed of the opportunity forever to attain the profits that [they] would have made from selling parcels, selling homes, and running a series of operating businesses," as Falanga has asserted (dkt. #306-3 at Page ID #5807), that does not necessarily mean that they may be compensated for the loss of that opportunity. To obtain damages for their lost opportunity, Plaintiffs must demonstrate with reasonable certainty that the project would have gone to market, and that it would have been profitable. They have not done so.

Finally, the Court rejects Plaintiffs' argument that the issue of damages should go to a jury. As the Michigan Supreme Court has made clear, the Court—and not a jury—must determine whether the evidence presented regarding lost profits is speculative. From the case upon which Plaintiffs rely:

> The loss **[*26]** of profits are often speculative and conjectural on the part of witnesses. When this is true, *the Court should deny loss of profits because of the speculative nature of the testimony and the proofs.*

Fera, 396 Mich. at 646, 242 N.W.2d at 375 (emphasis added). As such, a Court should grant summary judgment if a plaintiff has not presented evidence to take the fact of lost profits beyond the realm of speculation. *See Murray, 2005 Mich. App. LEXIS 3302, 2005 WL 3556148, at *2*. Plaintiffs have not presented such evidence.

Plaintiffs are seeking damages for being "robbed" of their dream to create a new kind of residential development. They believe that this development would have been a tremendous success, but their only evidence is based on speculation and conjecture. Taking the evidence in the light most favorable to Plaintiffs, the Court concludes that a reasonable jury could not find the fact of lost profits with reasonable certainty. Accordingly, Plaintiffs may not pursue a claim for lost profits or damages to the so-called Zinnyard asset.

B. Real Party in Interest

Rule 17(a) requires an action to be prosecuted by the real party in interest. *Fed. R. Civ. P. 17(a)*. "[T]he real party in interest is the person who is **[*27]** entitled to enforce the right asserted under the governing substantive law." *Certain Interested Underwriters v. Layne, 26 F.3d 39, 42-43 (6th Cir. 1994)*. Enbridge argues that none of the plaintiffs is the real party in interest because none of the plaintiffs own the Zinn Property. *See Walgreen Co. v. Macomb Twp., 280 Mich. App. 58, 65, 760 N.W. 2d 594, 598 (2008)* (in cases involving real property, the owner of the property is the real party in interest).

It is undisputed that the Zinn Trust is the record owner of the Zinn Property, and that the Zinn Trust executed a quit-claim deed to Fredonia Farms that was never recorded. (Dkt. #346-5 at Page ID ##7288-90; dkt. #347-1 at Page ID ##7298-7300.) Enbridge argues that the deed did not effectively convey the property to Fredonia Farms because it did not contain a description of the property. However, Plaintiffs have provided a deed with an attached description of the property, along with an affidavit from Frank K. Zinn stating that he

prepared the description at the same time as the original deed. (Dkt. #347-1 at Page ID ##7295-96.) Enbridge has provided no evidence to the contrary. Accordingly, the Court finds that the deed was effective, **[*28]** and that Fredonia Farms owns the Zinn Property.

The individual plaintiffs argue that, although they do not own the Zinn property, they are parties in interest as joint venturers in the Zinnyard project. This argument cannot succeed in light of the Court's ruling that Plaintiffs may not seek lost profits or losses to the Zinnyard asset. Furthermore, the Zinn Plaintiffs' argument that they are real parties in interest based on their ownership of Fredonia Farms, LLC is at odds with Michigan law. *See* M.C. L. § 450.4510 (members of an LLC may not sue for claims of the LLC unless the LLC refuses to sue). The only party that may enforce the rights asserted in this case is the owner of the Zinn Property, Fredonia Farms. Accordingly, the individual plaintiffs will be dismissed from this case.

C. Conversion

Plaintiffs allege that Enbridge destroyed 400 trees on the Zinn Property during clean-up efforts following the oil spill, and is thus liable for conversion. *See* M.C.L. § 600.2919 (any person who "despoils or injures any trees on another's lands" without permission is liable for treble damages). Enbridge has moved for summary judgment on this claim, arguing that it is really a breach of contract **[*29]** claim recast as a tort claim.

"In Michigan, an action in tort requires a breach of duty separate and distinct from a breach of contract." *Haas v. Montgomery Ward & Co., 812 F.2d 1015, 1016 (6th Cir. 1987)*. Enbridge argues that Plaintiffs' claims are really claims that Enbridge breached two different contracts: (1) an access agreement allowing Enbridge to enter the Zinn Property to clean up from the oil spill; and (2) an amendment to the access agreement providing that Enbridge would pay Fredonia Farms $27,000 in consideration for the removal of up to 27 trees, and would not remove any other trees without consent. (Dkt. #313-3 at Page ID #6169; dkt. #313-4 at Page ID #6178.) However, Enbridge's duty not to destroy the trees did not arise from those contracts, but rather arose independently by virtue of common law and Michigan statute. *See* M.C.L. § 600.2919. Accordingly, Enbridge is not entitled to summary judgment on this claim.

D. Unjust Enrichment

Plaintiff alleges that Enbridge took water from lakes on the Zinn Property to pressure test Line 6B after the oil spill, and that Enbridge was unjustly enriched as a result. Enbridge has moved for summary judgment on this claim, arguing that **[*30]** it had contract rights to use the Zinn Property, the lakes have returned to their previous levels, and that there is no evidence that Enbridge was enriched by use of the water.

Under Michigan law, the elements of an unjust enrichment claim are "(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Barber v. SMH (US), Inc., 202 Mich. App. 366, 375, 509 N.W. 2d 791, 796 (1993)*. If those elements are satisfied, a court will find an implied contract if there is no express contract covering the same subject matter. *Id.*

The contract that Enbridge cites simply provides it with a right of ingress and egress to report and reconstruct Line 6B—it does not give Enbridge the right to take anything from the property. Furthermore, although the lakes eventually returned to their former levels, draining them without compensating Fredonia Farms was inequitable. Finally, Enbridge received a benefit in the form of water that allowed testing of Line 6B. Accordingly, Enbridge is not entitled to summary judgment on this claim.

E. Exemplary Damages

"Exemplary damages are recoverable only for intangible injuries **[*31]** or injuries to feelings, which are not quantifiable in monetary terms." *Unibar Maint. Servs., Inc. v. Saigh, 283 Mich. App. 609, 630, 769 N.W. 2d 911, 923 (2009)*. Exemplary damages are not recoverable if a party may be made whole through monetary compensation. *Id.* Although a corporation does not have "feelings," a corporation may recover exemplary damages based on harm to its reputation or a loss of goodwill. *Id. at 630-631, 769 N.W. 2d at 924*.

Fredonia Farms has not sustained harm to its reputation or loss of goodwill. Because it had not begun marketing the Zinnyard, it had no reputation to harm or good will to lose. Accordingly, the Court finds that Fredonia Farms can be made whole through monetary compensation and may not pursue exemplary damages.[6]

[6] The individual plaintiffs cannot assert a claim for exemplary damages. The only source of injury in this case was the oil spill on the Zinn Property. The individual plaintiffs did not own the property or have any rights to the property. Thus, they have no more claim to exemplary damages for injuries to that property than would a visitor to the property who was offended

F. Abnormally Dangerous Activity

Plaintiffs **[*32]** allege that Enbridge is strictly liable for the oil spill because it was carrying out an abnormally dangerous activity in transporting dilbit. *See Restatement (Second) of Torts § 520*. The Court is unaware of any other court that has previously addressed this precise issue. As discussed in the following section, the Court finds that Enbridge is strictly liable for the activities at issue under the OPA. As such, the Court concludes that it is unnecessary to determine whether Enbridge is also strictly liable under the "abnormally dangerous activity" doctrine at this time.

IV. Plaintiffs' Motion for Summary Judgment

Plaintiffs seek summary judgment on their claim that Enbridge is strictly liable under the OPA. The OPA provides that

> each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident.

33 U.S.C. § 2702(a). The damages specified in *subsection (b)* include:

> (B) Real or personal property
>
> Damages for injury **[*33]** to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases the property.

33 U.S.C. § 2702(b)(2)(B).[7]

Under the OPA, a claim for damages must be presented to the party responsible for the oil spill. *33 U.S.C. § 2713(a)*. If the responsible party denies liability or the claim is not settled within 90 days, the claimant may file an action against the responsible party. *33 U.S.C. § 2713(c)*. "The purpose of the claim presentation procedure is to promote settlement and avoid litigation." *Johnson v. Colonial Pipeline Co., 830 F. Supp. 309, 310 (E.D. Va. 1993)*.

Enbridge does not dispute that it was the "responsible party" for purposes of the OPA. Rather, it argues that any claim under the OPA is barred because the Zinn Property was not destroyed. Enbridge further argues that Fredonia Farms presented its claim only to Enbridge Energy, Limited Partnership (EELP), and thus may **[*34]** not assert a claim against the other Enbridge Defendants.[8]

A. Damages under *§ 2702(b)(2)(B)*

Under *§ 2702(b)(2)(B)*, an owner of real property may recover "[d]amages for injury to, or economic losses resulting from destruction of" such property. Enbridge argues that Fredonia Farms may not assert a claim for damages under that subsection because the Zinn Property was not destroyed.

As an initial matter, the Court notes that *§ 2702(b)(2)(B)* allows a property owner to recover damages for "injury to" the property. Fredonia Farms appears to be seeking such damages, as it asserted a claim for "all damages to the property" under the OPA in its complaint. Fredonia Farms may also seek "economic losses resulting from destruction" of the Zinn Property. Even if Enbridge is correct that only a small portion of the property was contaminated, it has provided no legal **[*35]** support for its proposition that the entire piece of property owned by an OPA plaintiff must be destroyed. In fact, the sparse case law that touches on the issue indicates the opposite. *See South Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 68 (1st Cir. 2000)* (upholding a jury award for economic losses including goodwill and business stress, although only a portion of the plaintiff's property was destroyed); *Seaboats, Inc. v. Alex C Corp., Nos. Civ.A. 01-12184-DPW, 01-12186-DPW, 00-12500-DPW, 2003 U.S. Dist. LEXIS 1301, 2003 WL 203078, at *5 (D. Mass. Jan. 30, 2003)* (noting that the "plain language" of the OPA was not so constrained as to prevent a plaintiff from seeking economic damages because its vessel was only temporarily prohibited from leaving port). Accordingly, the Court finds that Fredonia Farms may seek damages

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by the oil contamination.

[7] The OPA also allows "any claimant" to recover damages for lost profits due the injury of real property. *33 U.S.C. § 2702(b)(2)(E)*. As discussed previously in this Opinion, however, lost profits are not recoverable because they are speculative.

[8] In addressing Enbridge's motion for summary judgment, the Court ruled that Fredonia Farms owned the Zinn Property, that the individual plaintiffs may not pursue claims against Enbridge, and that lost profits are not recoverable. The Court will address only those arguments related to the OPA that are still standing in light of those rulings.

under § 2702(b)(2)(B).

B. Claims against Enbridge Entities other than EELP

Enbridge asserts that, even if Fredonia Farms had a valid OPA claim, it presented its claim to EELP only, and thus it may not assert a claim against the remaining Enbridge Defendants. However, Fredonia Farms' initial claim presentation letter stated that the claim was presented to "Enbridge Energy and its related **[*36]** affiliates and entities." (Dkt. #304-5 at Page ID #5600.) The fact that only EELP responded to the claim and engaged in settlement negotiations does not prevent Fredonia Farms from pursuing a claim against the other Enbridge entities. *See* 33 U.S.C. § 2713(c) (a claimant may file an action against a responsible party if the party denies liability or the claim is not settled). Accordingly, the Court finds that Fredonia Farms presented a claim to each of the Enbridge Defendants, and may pursue its OPA claim against those defendants.

V. Conclusion

The Court concludes that only Fredonia Farms, and not the individual plaintiffs, may proceed with this action. Fredonia Farms has established that Enbridge was liable for the oil spill under the OPA, and may present its claim for damages under § 2702(b)(2)(B) to a jury. However, Fredonia Farms may not seek lost profits from the Zinnyard or exemplary damages based on the spill. Fredonia Farms may proceed with its claims for conversion and unjust enrichment. The Court presumes that Fredonia Farms need not proceed with its claim for strict liability under the "abnormally dangerous activity" doctrine in light of the Court's ruling on the OPA claim.

An **[*37]** order consistent with this Opinion shall issue.

Dated: July 18, 2014

/s/ Gordon J. Quist

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

GRAND/SAKAWA MACOMB AIRPORT v. TOWNSHIP OF MACOMB

Court of Appeals of Michigan

June 7, 2005, Decided

No. 256013

Reporter
2005 Mich. App. LEXIS 1398 *; 2005 WL 1335428

GRAND/SAKAWA MACOMB AIRPORT, L.L.C. as Assignee of GRAND/SAKWA PROPERTIES, INC., and AVIATION INVESTMENT CORPORATION, Plaintiffs-Appellees, v TOWNSHIP OF MACOMB, Defendant-Appellant.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Macomb Circuit Court. LC No. 99-002514-CZ.

Judges: Before: Meter, P.J., Wilder and Schuette, JJ.

Opinion

PER CURIAM.

Defendant appeals of right from an order of voluntary dismissal in this land use and zoning action involving defendant's denial of plaintiffs' request to rezone three parcels of property owned by defendant. We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiffs' property is owned by plaintiff Aviation Investment Corporation (AIC) which leases the property to Milton Berz for an annual rental of approximately $ 33,000. AIC purchased the property for $ 1.1 million in 1970. In 1973, Berz, a principal and shareholder in AIC, began using the property as an airport for small planes and jets. The airport operated continuously until it closed in 2003. In 1999, Berz Macomb Airport had approximately 39,000 landings and take-offs.

In an August 1998 sale agreement, AIC agreed to sell the property to plaintiff Grand/Sakwa and the Berz Airport for a proposed purchase price of $ 14 **[*2]** million dollars. The agreement was contingent on plaintiffs' ability to have the property rezoned from its current industrial zoning classification to commercial and residential zoning.

Pursuant to the agreement contingency, in September 1998, plaintiffs submitted a request to the township planning commission to rezone the subject properties, located between 22 Mile Road and 24 Mile Road and also between Romeo Plank Road and Hayes Road as follows:

> Parcel 1: 24.11 acres from (M-1) Light Industrial to (C-3) Commercial Shopping Center -located on the northeast corner of 22 Mile Road and Hayes Road; Parcel No. 08-19-300-005 and 08-19-300-006.
> Parcel 2: 55.04 acres from (M-1) light Industrial to (C-3) Commercial Shopping Center -located on the southeast corner of 23 Mile Road and Hayes Road, Parcel No. 08-19-100-006.
> Parcel 3: 190.05 acres from (M-2) Heavy Industrial to (R-1) Residential Urban-One family- located north of 22 Mile Road and approximately 1200 feet east of Hayes Road, Parcel No. 08-19-200-009.

22 Mile Road is primarily a residential corridor with some scattered commercial development and institutional uses such as churches, schools and day care. On the **[*3]** south side of 22 Mile Road, immediately across from plaintiffs' property are several residential subdivisions. The township side of Hayes Road, between 22 Mile and 23 Mile Roads, is mostly vacant and unimproved land, with the exception of a few residential homes, industrial and commercial development. On the Shelby Township side of Hayes Road, between 22 mile and 23 Mile Road, is an industrial park that contains heavy industrial uses, a vacant industrial park with roads and utilities but no actual development, and construction for a new shopping center. 1,100,000 square feet of vacant industrial buildings are for sale or lease along the 23 Mile Road corridor in Shelby and Macomb townships. The corners of both 22 and 23 Mile Roads contain commercial uses. On the south side of 23 Mile Road,

abutting plaintiffs' property, is a developed industrial subdivision without any buildings. Defendant rezoned the north side of 23 Mile and Hayes from industrial to commercial use. The property immediately along the east of plaintiffs' property is zoned for agricultural use (AZ). One-acre single-family residential development is permitted in property zoned AZ.

The development of the township's land **[*4]** use plan began in 1969. In September 1969, an economic relations study was prepared by the planning commission in preparation of the 1973 master plan. Defendant's March 1970 land use plan recommended, *inter alia*, that all industrial activity be contained in the area at issue, in light of its proximity to the Berz Airport, with the airport situated as the nucleus of the entire area. In 1973, the township filed its first master land use plan, which adopted the recommendation to designate the subject property for industrial use. Based on the 1973 master plan, a 1973 zoning ordinance was prepared for the township. The township board adopted the zoning ordinance on November 10, 1973, and pursuant to this zoning ordinance, the subject property was zoned industrial. The township master plan was completely rewritten twice, in 1988 and 1993 - 1994. Four amendments to the 1993 - 1994 master plan were adopted in 1999, and the 1999 master plan was amended on October 19, 2000.

Minutes of the public hearing held on February 16, 1999 reflect that the planning commission recommended denial of plaintiffs' rezoning requests. A public hearing of the township board was held on May 26, 1999. According **[*5]** to the minutes of that meeting, plaintiffs' rezoning requests for Parcels 1 and 2 were denied on the basis that the properties' (1) current zoning was consistent with the township's master plan; (2) the requested rezoning would be inconsistent with the master plan; (3) plaintiffs failed to demonstrate that the current zoning of the properties is arbitrary, unreasonable and does not advance a legitimate governmental interest; (4) plaintiffs failed to demonstrate that the properties could not be used for any purpose under the current zoning classification; (5) there were no other areas in the township that could logically be planned for the same industrial use to replace the loss of the properties; and (6) that the rezoning of the properties would cause the elimination of the township's industrial base. The meeting minutes further show that the township board also articulated these six reasons in denying the request for rezoning of Parcel 3, the rezoning of Parcels 1 and 2, with the additional three reasons that (7) plaintiffs' rezoning request is inconsistent and incompatible with current and planned development of current industrial areas; (8) plaintiffs' residential rezoning request **[*6]** was incompatible with existing industrial development, creating spot zones inconsistent with current building patterns; and (9) plaintiffs' rezoning request would eliminate industrial development from the master plan because it would require that the properties between Parcel 3 and residential property located to the east which were currently planned for industrial development to be rezoned to residential. After discussions with the township's legal counsel, plaintiffs elected to initiate an action in circuit court challenging the denial of the three rezoning requests in lieu of seeking a use variance from the Township Zoning Board of Appeals.

Plaintiffs' amended complaint is seven counts. In Count I, plaintiffs asserted a substantive due process claim, alleging that the township's denial of the rezoning requests was capricious and arbitrary, and that no reasonable or legitimate governmental interest was advanced by limiting plaintiffs' properties to their current use. In Count II, plaintiffs' alleged the denial of the rezoning requests constituted a confiscatory restriction and a taking without just compensation contrary to the state constitution. Count III, a state equal protection **[*7]** claim, alleges that the industrial use zoning restriction precluded the property's use for any purposes for which it is reasonably adapted. In Count IV, plaintiffs requested mandamus, damages and declaratory relief, principally alleging the township breached its legal duties, which caused plaintiffs irreparable injury. Count V raised an exclusionary zoning claim, alleging that the township's actions effectively removed any appropriate locations suitable for plaintiffs' proposed development. Count VI alleged inverse condemnation and Count VII alleged that plaintiffs were entitled to damages under *42 USC § 1983* as the result of defendant's violation of their constitutional rights.

The trial court, Macomb County Visiting Circuit Judge Kenneth N. Sanborn, bifurcated the equitable/taking claims and the damages claims and the matter proceeded to trial on Count I (substantive due process), Count II (confiscatory taking), and Count VI (inverse condemnation). Plaintiffs dismissed, without prejudice, Count III (equal protection) and Count V (exclusionary zoning). Following trial on the equitable taking claims, the parties each submitted proposed findings of facts and **[*8]** conclusions of law. Judge Sanborn issued his findings of fact and conclusions of law on April 2, 2001, concluding that defendant's ordinance was arbitrary, capricious and excluded other types of legitimate land

use from plaintiffs' property, denied plaintiffs the economically viable use of their land; and deprived plaintiffs of their investmentbacked expectations. Judge Sanborn also found that plaintiffs' proposed commercial and residential uses of the property were reasonable. Judge Sanborn made 108 findings of fact, stating in relevant part:

> [FOF-2] (B) Grand/Sakwa's proposed uses are more compatible with the uses and development trends in the surrounding area.
>
> * * *
>
> [FOF-4] (D The development trends surrounding the property continue to reflect an extensive amount of vacant industrial buildings for sale or lease and significant vacant improved industrial lots and there appears to be an adequate supply of industrial property to meet the future demands of Macomb township without the Plaintiffs' property.
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> * * *
>
> [FOF-9] (D The original historical basis for Master Planning the BertzMacomb area has substantially changed as a result of the re-alignment **[*9]** of M-59 to Hal Road from 21-1/2 Mile Road as originally proposed.
>
> * * *
>
> [FOF-36] (A While the Township's desire to have an industrial tax base may be valid, the township's concern about losing some of its tax as a result of the proposed rezonings is unfounded since Grand/Sakwa's proposed mix-use will generate significantly more tax revenue for the Township than would be generated by the property under its current use.
>
> [FOF-37] (B Macomb Township does not and has not master planned land for commercial and agricultural uses. Essentially the Township has used and is using an ad hoc, case specific, approach with respect to the planning, zoning, and development of agricultural and commercial properties.
>
> * * *
>
> [FOF-40] (E The Township has not been diligent in updating its master plans to reflect changes in economic and development trends which show that the Township's industrial market is slow, industrial growth has occurred much slower that anticipated, and Macomb Township is the fastest growing municipality in the state . . . .
>
> * * *
>
> [FOF-53] (R The industrial master planning and zoning of the subject property is unreasonable given **[*10]** that the Township admitted that industrial development is incompatible with the residential development that occurred and continues to occur in the areas around the subject site.
>
> [FOF-54] (S The current zoning of the agricultural parcel abutting the subject property to the east allows, as a permitted use, the development of singlefamily residences on minimum one acre lots. However, according to the Township's planner, if the owner of that property were to submit an application to develop the property as single-family residences on minimum one acre lots, the Township would initiate proceedings to rezone the property to industrial in order to prevent the development.
>
> * * *
>
> [FOF-56] (B The 1999 Master Plan contained a change in the Township's commercial policy. The Township's 1999 policy still provides that the commercial development be supported by a demonstrated need for the proposed commercial use.
>
> [FOF-57] (C The timing of the 1999 change in the Township's commercial development policy is suspect. The 1999 Master plan was submitted and approved subsequent to commencement of this litigation. The update was submitted at that time as a result **[*11]** of issues raised in this current . . . civil action. [FOF-58] (D The Macomb Township Planning Commission, against the judgment of its planners, rushed to complete the limited 1999 amendments made to the Master Plan before receiving the current 2000 census data.
>
> * * *
>
> [FOF-61] (G The Township's Commercial Development Atlas shows that there are very few vacancies in the Township's developed commercial centers.
>
> [FOF-62] (H The end result of the 1999 change to the Township's commercial development policy is that the Planning Commission intentionally created an obstacle for Grand/Sakwa to overcome before developing the property it seeks to have rezoned to commercial.
>
> * * *

[FOF-107] (G In short, Grand/Sakwa's proposed rezonings for mixed-use development are consistent with the development trends for the area, are appropriate for the subject site, provide for uses for which there are current demands, and are supported by sound planning rationale. [Trial Court's Findings of Fact, pp 1-12.]

The parties were unable to agree on a proposed order for entry of judgment and after several months of motions and hearings, then Macomb County Circuit **[*12]** Judge Patrick Donofrio entered a judgment in favor of plaintiffs. This order was subsequently vacated by Judge Donofrio and the matter was referred to Judge Sanborn, who entered a judgment approving plaintiffs' proposed residential and commercial uses for the subject property and enjoining defendant from interfering with plaintiffs' development pursuant to their requested zoning classifications. The judgment preserved, for later trial, the issue of plaintiffs' damages.

Although trial on plaintiffs' damages claims was scheduled, trial was stayed by the trial court, over defendant's objections, until plaintiffs obtained approval of their development plans. [1] On June 11, 2004, the stay was lifted and, pursuant to the parties stipulations a final order was entered dismissing plaintiffs' damages claims without prejudice. This appeal ensued.

[*13] II

Although "there is no single standard of review that applies in zoning cases," *Macenas v Village of Michiana, 433 Mich. 380, 394; 446 N.W.2d 102 (1989)*, we review the specific questions presented in this equitable action de novo as questions of law. *Kropf v Sterling Heights, 391 Mich. 139, 152, 163; 215 N.W.2d 179 (1974)*; *Jude v Heselschwerdt, 228 Mich. App. 667, 670; 578 N.W.2d 704 (1998)*. Giving considerable weight to the findings of the trial judge, we review for clear error the findings of fact supporting the decision. See *Kropf, supra at 163*; *Hecht v Niles Twp, 173 Mich. App. 453, 458-459; 434 N.W.2d 156 (1988)*. A clearly erroneous standard of review for findings of fact recognizes and defers to the trial court's superior position to observe the credibility of the witnesses who testify during the bench trial. *MCR 2.613(C)*; *Marshall Lasser, PC v George, 252 Mich. App. 104, 110; 651 N.W.2d 158 (2002)*. Thus, to reverse a trial court's factual finding as clearly erroneous, we must conclude **[*14]** that although there is evidence to support it, we are nonetheless, upon review of the entire record, left with the definite and firm conviction that a mistake was made. *Walters v Snyder, 239 Mich. App. 453, 456; 608 N.W.2d 97 (2000)*.

III

A

The state and federal constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; *Const 1963, art 1, § 17*. In order to afford a property owner substantive due process, an ordinance must be reasonable and rationally related to a legitimate governmental interest. *Landon Holdings, Inc v Grattan Twp, 257 Mich. App. 154, 173-174; 667 N.W.2d 93 (2003)*. The reasonable basis for an ordinance must be grounded in the police power and includes protection of the safety, health, morals, prosperity, comfort, convenience, and welfare of the public. *Hecht, supra at 460*. A zoning ordinance is presumed to be valid, and the party challenging the ordinance has the burden of showing that it has no real or substantial relation to public health, morals, safety, or general welfare. *Bevan v Brandon Twp, 438 Mich. 385, 398; **[*15]** 475 N.W.2d 37 (1991)*, amended on other grounds *439 Mich. 1202 (1991)*. A zoning ordinance also violates due process where it constitutes an unreasonable means of advancing a legitimate governmental interest. *Hecht, supra at 461*. Thus, an ordinance may not unreasonably, arbitrarily, or capriciously exclude other types of legitimate land use from the area in question. *Kropf, supra at 158*. In order to establish a substantive due process violation, it must appear that the ordinance is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness. *Id. at 162*.

Defendant, citing *Brae Burn, Inc v Bloomfield Hills, 350 Mich. 425, 430-432; 86 N.W.2d 166 (1957)*, asserts that judicial review of a zoning ordinance is deferential and limited, and that in determining the constitutionality of a zoning classification, this Court should do no more than determine whether the classification is or is not fairly debatable. Stated differently, defendant contends that so long as it has presented some evidence that its **[*16]** legislative zoning determination is arguably correct, irrespective of any contradictory evidence, this Court should defer to its legislative zoning decision. The

[1] Between August 1, 2003 and March 23, 2004, plaintiffs proceeded with development and have received permits and approvals from various agencies and the township board for an outlay of $ 464,000.

"debatable question" rule enunciated by the Supreme Court in *Brae Burn*, *supra* at 432-433, provides:

> The question always remains: As to this property, in this city, under this particular plan (wise or unwise though it may be), can it fairly be said there is not even a debatable question? If there is, we will not disturb.
>
> * * *
>
> This is not to say, of course, that a local body may with impunity abrogate constitutional restraints. The point is that we require more than a debatable question. We require more than a fair difference of opinion. It must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness.

In *Alderton v Saginaw, 367 Mich. 28, 33-34; 116 N.W.2d 53 (1962)*, the Supreme Court explained the scope and application of the "debatable question" rule:

> The debatable question rule as presented in *Brae Burn, supra,* **[*17]** does not mean such question exists merely because there is a difference of opinion between the zoning authority and the property owner in regard to the validity of the ordinance. If this were the case, no ordinance could ever be successfully attacked. In determining validity [sic] of an ordinance we give consideration to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development; unsuitability for residential purposes; lack of market for such purpose and whether the land will become "dead land" or nonincome-producing land without residential value. [see also *Reibel v Birmingham, 23 Mich. App. 732, 736, 179 N.W.2d 243 (1970)* (the "debatable question" criterion which limits appellate review when the rationality of zoning is put in issue does not govern when the factual question presented is whether particular property can reasonably be used as zoned).]

The scope of our review is also guided, however, by the Supreme Court's instruction in *Kropf, supra at 163-164*. There, the Court reviewed a confiscatory taking **[*18]** claim in which the parties' presented equally forceful evidence that could reasonably support either party's position, and noted that "in cases . . . where the evidence presented on the record could reasonably support either party" an appellate court should:

> Give considerable weight to the findings of the trial judge in equity cases . . . because the trial judge is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity . . . . [Moreover], the findings of the trial judge in an equity case . . . [should not be disturbed] unless after an examination of the entire record, we reach the conclusion we would have arrived at a different result had we been in the position of the trial judge. [*Id.* (citations omitted).]

Accordingly, while defendant's zoning decision may initially be entitled to deference and presumed valid on the basis of the rationale articulated by the defendant, this presumption of validity is *rebuttable* and may be overcome by the evidence. If the trial court's findings are such that it concludes plaintiffs have established by clear, **[*19]** satisfactory, and competent evidence that defendant's ordinance " 'is an arbitrary fiat, a whimsical *ipse dixit*,' " plaintiffs are entitled to prevail unless we conclude that the trial court's findings are clearly erroneous or that, on the basis of the whole record, we would have reached a different conclusion than the trial judge.

B

Defendant contends that the trial court erred in finding that the zoning ordinance in question is arbitrary and capricious. We disagree. Principally, defendant contends the zoning classifications are in accordance with its master plan, that the classifications advance a reasonable governmental interest to plan for future industrial development and employment, to separate incompatible land uses, to provide a tax base that created more revenue than residential development and to maintain the faith of its residents who made commitments on the basis of its current zoning. While these stated goals are certainly legitimate governmental interests, the record does not support defendant's contention that its defense of the ordinance in question was in support of these legitimate interests.

Regarding defendant's master plan, the trial court found that the **[*20]** realignment of M-59 to Hall Road from 21-1/2 Mile Road had substantially changed what was the historical basis for the initial plan, and that defendant had not diligently updated the plan to reflect changes in economic and development trends. Moreover, the trial court found that defendant had demonstrated a significant willingness to modify or deviate from the

master plan on an inconsistent basis, as most significantly demonstrated by the already existing incompatible land classifications adjacent to the subject property. The trial court did not clearly err in making these findings of fact.

Even if defendant had demonstrated adherence to its master plan, such adherence is but one factor in determining the reasonableness of an ordinance. *Troy Campus v City of Troy, 132 Mich. App. 441, 457; 349 N. W. 2d 1777 (1984)*. In order to be determined reasonable, the master plan must take into account existing circumstances, *Biske v Troy, 381 Mich. 611, 617-618; 166 N.W.2d 453 (1969)*; *Gust v Canton Twp, 342 Mich. 436, 440-442; 70 N.W.2d 772 (1955)*, and other pertinent factors, including, the stability of **[*21]** the master plan, the extent to which the goals of the master plan are advanced, and the extent to which the master plan constitutes a coherent development plan taking into account legitimate expectations. *Id.*; *Biske, supra at 617-618*. The trial court's findings of fact [2] that defendant's admissions, that industrial development as contemplated in the master plan is incompatible with the residential development that had already occurred and continued to occur in the areas around the subject site, that the agricultural zoning adjacent to the subject site would accommodate as a permitted use the development of single-family residential property on one acre lots, and that, inconsistent with it's master plan, defendant would initiate proceedings to rezone agricultural property to industrial to prevent such residential development, demonstrates that defendant's master plan neither takes into account existing circumstances nor exhibits a stability or coherence in the plan of development.

[*22] Regarding defendant's contention that its zoning ordinance advances a reasonable governmental interest to plan for future industrial development and employment, the trial court made findings of fact that, despite the fact that Macomb Township was at the time of trial the fastest growing municipality in the state, industrial growth was much slower than anticipated, that there is a lack of demand for industrial property, and that using defendant's industrial development data, it would take between thirty-seven and forty years to absorb the land master planned as development by defendant. The trial court further found that industrial development is incompatible with the nearby residential development, that defendant's adoption of its 1999 master plan update occurred with the intention to create an obstacle to plaintiffs' proposed rezoning, and that the residential growth of the township will create demand for and support the commercial developments and growth proposed by plaintiffs. These findings of fact are not clearly erroneous on the record before us.

Defendant's assertions that its zoning separates incompatible land uses and provides more revenue for its tax base are similarly **[*23]** not supported by the record. The trial court's findings that plaintiffs' proposed development is consistent with existing land uses, and that defendant's insistence on maintaining an industrial zoning in the subject area is inconsistent with nearby uses and current economic and development trends are well supported by the evidence, and are not clearly erroneous. Moreover, while defendant asserts that township property owners are entitled to rely upon the existing zoning schemes established in the master plan, specifically, the location of industrial-zoned property within the township, defendant offered no testimony by specific property owners of such reliance and the trial court made no specific findings regarding such reliance. On the whole, we find no basis to disturb the trial court's findings of fact.

The reasons asserted by defendant to support their claim that the zoning ordinance in question was not arbitrary and capricious are not supported. Thus, plaintiffs have carried their burden of demonstrating that the township ordinance did not advance a legitimate governmental interest, that the ordinance " "is an arbitrary fiat, a whimsical *ipse dixit*," " and that there is no **[*24]** room for a legitimate difference of opinion concerning the ordinance's reasonableness. *Kropf, supra at 162*, quoting *Brae Burn, supra at 432*. We find no basis on this record to conclude that we would have reached a different conclusion than the trial judge.

C

Defendant next argues that the trial court erred by concluding that the ordinance constitutes a confiscatory taking of plaintiffs' property. [3] We agree. In *K&K Construction, Inc v Dep't of Natural Resources, 456 Mich. 570, 576-577; 575 N.W.2d 531 (1998)*, our Supreme Court summarized the requisites of a taking claim:

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[2] These findings are also not clearly erroneous.

[3] A distinct analysis must be used for both a confiscatory taking claim and a substantive due process claim. *Hecht, supra at 462*.

> Courts have found that land use 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.
>
> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," or (b) a taking recognized **[*25]** on the basis of the application of the traditional "balancing test" [established in *Penn Central Transportation Co v City of New York, 438 U.S. 104; 98 S. Ct. 2646; 57 L. Ed. 2d 631 (1978)]*.
>
> * * *
>
> In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual 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, investmentbacked expectations. [Citations omitted.]

In this case, plaintiffs effectively conceded that the township's decision did not constitute a "categorical" taking. Thus, we apply the balancing test to determine whether the evidence showed that plaintiffs were denied the economically viable **[*26]** use of their land. We conclude that it does not. Even if we were to assume that the character of the township's action was not simply the legislative application of a zoning classification affecting plaintiffs' property, we find no facts in the record to support a finding that defendant's choice to zone plaintiffs' property for industrial use negatively impacted the economical viable use of the property or that the regulation has interfered with distinct, investment-backed expectations. Instead, the record shows that plaintiffs, at the time of the original purchase, were aware of the land's current land use plans/zoning, but hoped for substantial industrial development in the area. In our judgment, the fact that the pace of industrial development in the surrounding area did not occur at the rate plaintiffs hoped is insufficient to constitute a taking, where defendant submitted evidence establishing the value of the property under its current zoning between $ 8 million and $ 9.2 million dollars. While plaintiffs' emphasize their inability to make a profit, distribute dividends, or sell the property as currently zoned, "the Taking Clause does not guarantee property owners an economic **[*27]** profit from the use of their land." *Paragon Props Co, supra* at 579 n 13. Nor does the mere diminution of property value by application of regulations, without more, amount to an unconstitutional taking. *Id. at 579*, citing *Penn Central, supra at 104*. Plaintiffs' own appraisal at the time of the sale agreement to sell the property to Grand/Sakwa appraised the property at $ 7 million. Moreover, AIC also received $ 33,000 in annual rental income. Notably, plaintiffs concede that, at the start of their endeavor to operate an airport, they had full knowledge that an airport operation generally produces low profits, if any at all. Given this evidence, taken with the uncontroverted evidence establishing that plaintiffs, in the seventeen years immediately preceding Grand/Sakwa's proposed purchase, made no attempts to market the property, we conclude that a definite mistake has been made. The trial court clearly erred in finding that a confiscation occurred.

D

Defendant next claims that the trial court's remedy to impose an injunction was overbroad and that plaintiff failed to meet the high threshold necessary to establish that their proposed use for the subject property **[*28]** was reasonable. We disagree. After finding an existing zoning classification to be unconstitutional, a trial court should determine the reasonableness of the proposed use. *Rogers v Allen Park, 186 Mich. App. 33, 40; 463 N.W.2d 431 (1990)*. Reasonableness can be determined by examining the existing uses and zoning of nearby properties but the standard of reasonableness should "be appropriately high, so that a plaintiff who has successfully challenged an unconstitutional ordinance will not automatically be free to proceed with its proposed use." *Schwartz v Flint, 426 Mich. 295, 328; 395 N.W.2d 678 (1986)*. The trial court's findings of reasonableness are not "unlike the findings that must be read initially in order to find a particular zoning ordinance unconstitutional as applied." *Id. at 325*. If the plaintiff can show the reasonableness of the proposed use by a preponderance of the evidence, the trial court may issue an injunction preventing a township from interfering with the proposed use. *Electro-Tech, Inc, v H F Campbell Co, 433 Mich. 57, 89; 445 N.W.2d 61 (1989)*; *Schwartz, supra at 325.* **[*29]**

In this case, our review of the exhibits and testimony supports a finding that plaintiffs' proposed use is reasonable. The record shows that plaintiffs, although not required, submitted studies and reports showing a

sound planning rationale, including a comprehensive site use plan. See *Schwartz, supra at 325* (a proposed use must be specific but need not amount to a plan). Plaintiffs' feasibility analysis accounted for drainage, public utilities, flood plans and wetlands. This evidence, taken together with evidence that the proposed uses were consistent and compatible with development in the area and provided the township uses on the basis of demonstrated and current needs, supports the trial court's finding of reasonableness. Having rejected, *supra*, defendant's argument challenging the trial court's determination that the zoning was arbitrary and capricious, we are not compelled to conclude that a mistake has been made. The trial court's remedy was proper under the circumstances.

IV. Conclusion

For the reasons cited herein, we reverse that portion of the trial court's order finding that defendant's zoning scheme constituted a confiscatory taking. Our review **[*30]** of the record on this issue establishes that a mistake has been made and the trial court clearly erred in this regard. We affirm in all other respects, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette

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PULTE LAND CO. v. ALPINE TWP.

Court of Appeals of Michigan

September 12, 2006, Decided

No. 259759, No. 261199

Reporter
2006 Mich. App. LEXIS 2641 *; 2006 WL 2613450

PULTE LAND COMPANY, LLC and MARGARET BRECHTING, Plaintiffs-Appellees/Cross-Appellants, v ALPINE TOWNSHIP, Defendant, and CHRIS BRECHTING, Intervening Defendant-Appellant/Cross-Appellee. PULTE LAND COMPANY, LLC and MARGARET BRECHTING, Plaintiffs-Appellees, v ALPINE TOWNSHIP, Defendant-Appellee, and CHRIS BRECHTING, Intervening Defendant-Appellant.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Appeal denied by *Pulte Land Co. v. Alpine Twp., 2008 Mich. LEXIS 651 (Mich., Mar. 28, 2008)*

Prior History: Kent Circuit Court. LC No. 02-008377-CZ.

Judges: Before: Davis, P.J., and Sawyer and Schuette, JJ. SCHUETTE, J. (concurring).

Opinion

PER CURIAM.

In these consolidated appeals, intervening defendant appeals as of right an order granting rezoning of property owned by plaintiffs in Alpine Township and an order awarding costs to plaintiff. Plaintiffs cross-appeal the order granting rezoning. Although we substantially agree with the trial court's resolution of this case, we vacate the order and remand for entry of a corrected order.

The property at issue in this case is 52 acres of historically agricultural property located at the corner of 6 Mile Road and M-37 in Alpine Township, Kent County, Michigan. The property is located within, but at the extreme eastern edge of, a unique geographic region known as the "fruit ridge." The property is also located within, but at the extreme western edge of, sewer and water utility districts. The property had "always" been used for farming, although by the time of trial most of **[*2]** it had been disused for some time. Some of the surrounding land continues to be used for farming, and other surrounding areas are commercial.

Plaintiff Margaret Brechting ("Ms. Brechting") acquired the property in 1967, when she and her husband paid her in-laws $ 5,000 on a land contract. The property was intended as an inheritance: the money was paid only to avoid inheritance tax, and Ms. Brechting's mother-in-law retained a life estate. The Brechtings were not farmers and did not intend to farm the property. Intervening defendant's parents received a Centennial Farm from the same in-laws. Ms. Brechting's husband and mother-in-law both died in 1993. By that time, Ms. Brechting had been renting the property to her nephew, Martin Brechting, for at least six years in exchange for enough money to pay the property taxes. In 1999, she sought to sell the property for development, explaining that no one wanted to purchase it for farming. Plaintiff Pulte Land Company LLC ("Pulte") eventually agreed to purchase the property for approximately a million dollars for the purpose of constructing a residential development.

At the time, Pulte was aware that the property was zoned for agriculture. **[*3]** However, Alpine Township's master plan and future use plan showed that the area was planned for medium density residential development, consistent with Pulte's development plans. On August 20, 2001, Pulte applied to Alpine Township to rezone the property from agricultural to Open Space Neighborhood-Planned Unit Development ("OSN-PUD"), consistent with the township's master plan. The Alpine Township Planning Commission and the Alpine Township Board approved the rezoning. However, a referendum was held during the 2002 election, on the basis of which the rezoning ordinance was rejected, resulting in the property remaining zoned for agriculture. Pulte then asked the Zoning Board of Appeals for a variance, which was denied. Plaintiffs then

brought this suit against Alpine Township, alleging violation of substantive due process, inverse condemnation, and violation of equal protection; they sought an injunction against Alpine Township interfering with the use of the property for single family homes. Intervening defendant moved to intervene, noting that he had been the motivating force behind the referendum and arguing that he had a personal interest in the matter "both as a nearby property **[*4]** owner whose property rights will be affected" and "as a citizen of the Township with an interest in ensuring that his initiative rights are meaningful and effective." Intervening defendant opined that the township would not adequately represent his interests, and he argued that rezoning would affect his interest "in his own property" across the road from the proposed development. On that basis, the trial court granted the motion to intervene.

During the pendency of the principal litigation, plaintiffs and Alpine Township resolved their differences in an agreement that, in significant part, permitted plaintiffs' proposed use of the property. The trial court entered a partial consent judgment reflecting that agreement. The consent judgment explicitly stated that intervening defendant was not a party to the agreement and that it would become null and void if the continuing litigation with intervening defendant resulted in a final judgment incompatible with the terms of the consent judgment. The matter continued to trial on intervening defendant's case. After a three-day bench trial, the trial court entered an opinion and order finding that the zoning ordinance, as applied to the property, **[*5]** constituted a "taking" under the balancing test set forth in *Penn Central Transportation Co v New York City, 438 U.S. 104; 98 S. Ct. 2646; 57 L. Ed. 2d 631 (1978)*. The parties appealed that opinion and order in Docket No. 259759. Plaintiffs subsequently requested costs from intervening defendant, which the trial court granted. Intervening defendant appealed the grant of costs in Docket No. 261199. This Court consolidated the appeals.

We first note our agreement with both parties that the trial court's remedy in this case, a judicial order granting rezoning of the property, violates the doctrine of separation of powers. *Schwartz v City of Flint, 426 Mich. 295, 306-310; 395 N.W.2d 678 (1986)*. Therefore, the portion of the order rezoning the property must be vacated. However, there exists no prohibition against the trial court entering a modified order achieving the same functional result by enjoining the township from interfering with the development of the property. *Id., 329*.

Intervening defendant argues that the consent judgment itself is impermissible because it achieves a result contrary to the referendum, **[*6]** thereby allegedly thwarting the will of the citizenry. We reject this contention as contrary to both precedent and logic. A consent judgment in which a township agrees to grant a use variance is entirely permissible and is construed as a contract. *Inverness Mobile Home Community, Ltd v Bedford Twp, 263 Mich. App. 241, 248; 687 N.W.2d 869 (2004)*. The only limitation is whether entering into such a contract "constitutes an act that impermissibly contracted away the legislative powers of a future governing body." *Id*. Intervening defendant does not argue that the consent judgment here contains any legislative requirements to be imposed on future boards, nor do we perceive any such requirements. Rather, intervening defendant urges us to adopt a special rule for situations where there has been a referendum contrary to the consent judgment.

Legislative acts of municipalities are afforded a presumption of validity, and the courts may not disturb them unless those acts are found arbitrary or unreasonable. *Kropf v City of Sterling Heights, 391 Mich. 139, 161-162; 215 N.W.2d 179 (1974)*. A referendum is simply another way to create **[*7]** such municipal legislation. *Stadle v Battle Creek Twp, 346 Mich. 64, 69-70; 77 N.W.2d 329 (1956)*. The fact that the municipal legislation was arrived at by a referendum vote does not immunize it from an attack on the basis of its constitutionality or reasonableness. *Newman Equities v Charter Twp of Meridian, 474 Mich. 911; 705 N.W.2d 111 (2005)*; *Poirier v Grand Blanc Twp, 167 Mich. App. 770, 777; 423 N.W.2d 351 (1988)*. The fact that a majority vote can be obtained on a given subject does not grant a municipality the absolute right to do anything it wishes. The consent judgment was entered into by township officers who were authorized to act and to conclude that it was in the township's best interests to compromise potentially disruptive litigation.

Intervening defendant next argues that the trial court erred by failing to afford the proper level of deference to the zoning board of appeals' denial of the requested use variance. Specifically, intervening defendant argues that the trial court erred in relying on *Janssen v Holland Charter Twp Zoning Bd of Appeals, 252 Mich. App. 197; **[*8]** 651 N.W.2d 464 (2002)*. We disagree. The trial court in this case was not engaged in a review of the actions of a zoning board of appeals, as was the trial court in *Janssen*. The analysis in *Janssen* regarding the standard of review applicable to a ZBA decision has no relevance here. *Id., 198-201*. The trial court here was

analyzing the economic effect the zoning ordinance has on the property, and it relied on *Janssen* only for the statement of the applicable legal analysis: "'[w]hether property used in trade or business or held for the production of income can reasonably be used for a purpose consistent with existing zoning will, no doubt, ordinarily turn on whether a reasonable return can be derived from the property as then zoned.'" *Janssen, supra at 201-202*, quoting *Puritan-Greenfield Improvement Ass'n v Leo, 7 Mich. App. 659, 673-674; 153 N.W.2d 162 (1967)*. The trial court's reliance on *Janssen* was only for a correct statement of the applicable law.

Intervening defendant's primary argument on appeal is that the trial court erred in finding a taking. We disagree.

There are three circumstances under **[*9]** which "the government may effectively 'take' a person's property by overburdening that property with regulations." *K&K Constr, Inc v Dep't of Natural Resources, 456 Mich. 570, 576-577; 575 N.W.2d 531 (1998)*, cert den *525 U.S. 819; 119 S. Ct. 60; 142 L. Ed. 2d 47 (1998)*. The first, where the regulation is irrational, is argued by plaintiffs on cross appeal, *infra*. The second, where the owner is denied *all* economical uses of the property, also known as "categorical taking," cannot be argued by plaintiffs in light of their concession at trial that they have no basis for such a claim. Finally, a taking may be "recognized on the basis of the application of the traditional 'balancing test' established in *Penn Central*[, *supra*]." *K&K Constr, supra at 577*. Under this test, "a reviewing court must engage in an "ad hoc, factual inquir[y]," 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." *Id*., citing **[*10]** *Penn Central, supra at 124*. "We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki, 247 Mich App 167, 169; 635 N.W.2d 339 (2001)*.

Intervening defendant first argues that plaintiffs were aware of the property's agricultural zoning, so it is legally impossible for them to have had any investment-backed expectations. We disagree. Our Supreme Court has explicitly stated that "one who purchases with knowledge of zoning restrictions may nonetheless be heard to challenge the restrictions' constitutionality." *Kropf, supra at 152*. Intervening defendant argues that this latter point has been implicitly but necessarily overruled by our Supreme Court's more recent case of *Adams Outdoor Advertisingv City of East Lansing, 463 Mich. 17; 614 N.W.2d 634 (2000)*, cert den *532 U.S. 920; 121 S. Ct. 1356; 149 L. Ed. 2d 286 (2001)*. We disagree. *Adams* was not a zoning case, and our Supreme Court's decision was based on the well-established holding that **[*11]** a property owner cannot *create* a taking by artificially splitting property or otherwise considering a portion of the property apart from the whole. *Id., 25-26*. See also, *Bevan v Brandon Twp, 438 Mich. 385, 395-397; 475 N.W.2d 37 (1991)*, cert den *502 U.S. 1060; 112 S. Ct. 941; 117 L. Ed. 2d 111 (1992)*.

The *Adams* Court noted as an aside that the plaintiff had been aware of the sign code and therefore "could have had no reasonable expectation that it could maintain the signs at the rooftop locations after the date designated in the code." *Adams, supra at 27*. However, this statement is in the context of the *Adams* Court's conclusion that "even before enactment of the sign code, the leases at issue did not include an absolute right to display signs on the rooftops." *Id., 25*. The statement was not made in the context of the Court's analysis of whether there had been interference with an investment-backed expectation. Rather, "any interference would be limited because the rooftop is only a small portion of the lessors' property and because they never had an *absolute* **[*12]** right to display signs on the rooftop." *Id., 26* (emphasis in original). *Adams* thus held that a municipality may without effectuating a "taking" exercise its police power to forbid something plaintiff never had a right to and affects only a small portion of the property anyway, especially where the plaintiff was aware of the regulation. In any event, a land use regulation may initially be reasonable but become unreasonable over time, so a later property owner should always have a right to challenge it - including on the basis of interference with investment-backed expectations - when it does become unreasonable, even if the property owner was aware of it when he or she purchased the land. *Palazzolo v Rhode Island, 533 U.S. 606, 626-628; 121 S. Ct. 2448; 150 L. Ed. 2d 592 (2001)*.

Although "there is no set formula for determining when a taking has occurred under" the *Penn Central* balancing test, the inquiry minimally "'requires at least a comparison of the value removed with the value that remains.'" *K&K Constr, supra at 588*, quoting *Bevan v Brandon Twp, 438 Mich. 385, 391; **[*13]** 475 N.W.2d 37 (1991)*. On the other hand, the mere fact that the property is zoned for a less profitable use, standing

alone, is insufficient to establish a taking under this test. *Dorman v Clinton Twp, 269 Mich. App. 638, 647; 714 N.W.2d 350 (2006)*. The United States Supreme Court explained that all of its regulatory takings tests for the various circumstances share a common theme: "each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle v Chevron USA Inc, 544 U.S. 528, 539; 125 S. Ct. 2074; 161 L. Ed. 2d 876 (2005)*. In particular, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id., 540*. The United States Supreme Court admitted that it "quite simply[] has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated **[*14]** on a few persons." *Penn Central, supra at 124*.

The first significant factor to consider is "the character of the government's action." This would be most significant if the government physically invaded the property, which it did not do here. Rather, it imposed a zoning restriction that limits the uses to which the property may be put. It does not eliminate *all* uses. However, there was extensive and undisputed expert testimony below that the zoning ordinance is not the entire story: the zoning ordinance and the township's master plan must be considered together to determine what is legal to do today and what the township's policy is for what may be done tomorrow. Moreover, Alpine Township's master plan was unusually well-updated and entailed significant public involvement. The Alpine Township master plan had, in every incarnation thereof, reflected an overall plan to address future development not by precluding it entirely, but by containing and directing it into specified areas, including the property at issue in this case. Alpine Township therefore planned for growth in a controlled manner, but would not generally rezone property automatically in the absence **[*15]** of a request.

Intervening defendant argues that one cannot save farmland by destroying it, especially where developing the property here will indisputably increase development pressure on neighboring farms. However, the proofs indicate that the surrounding properties are not within any utility districts, and there is no plan for future extension of those services. Further, the surrounding properties, in contrast to the property at issue here, are not and have never been part of the master plan for controlled development. Finally, intervening defendant's argument presumes that there will never be any demand for growth in Alpine Township. This is inconsistent with intervening defendant's concern about *general* development pressure in the form of urban sprawl emanating from Grand Rapids. Logically, if Alpine Township is under increasing development pressure as a whole, the overwhelming likelihood is that something will eventually have to give. The evidence presented indicates that channeling development onto the property here was a careful plan by Alpine Township, with a great deal of public involvement, to control the inevitable. The facts of the case therefore strongly suggest **[*16]** that the zoning ordinance serves a rational and legitimate purpose, but that in the long term retaining it would serve to *frustrate* the public good rather than serve it. Therefore, in tandem with the long range intent of the master plan for development, the "character of the government action" favors plaintiffs.

The second relevant factor is the value of the property as it is zoned compared to the value of the property under the proposed zoning. None of the experts below provided any comparative valuations of the property both as zoned and as proposed. However, in the aggregate it appears that the property is worth between $ 156,000 and $ 266,000 zoned for agriculture, and it can be made to yield approximately $ 20,000 a year. In contrast, most of the purchase offers Ms. Brechting received for development were in the vicinity of a million dollars. Martin Brechting opined that the property was at most worth $ 3,000 an acre, and Pulte actually paid between $ 17,153 and $ 16,639 an acre for it, which was "probably on the low end" of its worth. Although a "diminution in property value, standing alone, [cannot] establish a 'taking,'" *Penn Central, supra at 131,* **[*17]** the evidence clearly shows that the property is worth significantly more when zoned for residential development than when zoned for agriculture.

The final significant consideration is "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central, supra at 124*, citing *Goldblatt v Town of Hempstead, NY, 369 U.S. 590, 594; 82 S. Ct. 987; 8 L. Ed. 2d 130 (1962)*. [1] Intervening defendant primarily relies on the arguments that Pulte had no reasonable expectations given their awareness of the zoning ordinance, and Ms. Brechting had no investment to speak of given the $ 5,000 she paid and

[1] The term "investment-backed expectation" does not actually appear in *Goldblatt*.

the $ 500,000 she has already received. [2] **[*19]** Both arguments are superficial. The proposed zoning is consistent with the township's master plan, which the township board relied on heavily as a general matter and which Pulte was also aware of when it purchased the property. Given the long-established plan by the community as a whole to permit development of the property, as reflected by a document that was to be given considerable deference by the community, Pulte would have been entirely reasonable **[*18]** in expecting the property to be rezoned for development upon request. Ms. Brechting is not a sophisticated businessperson, nor is she a farmer, nor is she a developer. However, the evidence suggests that her payment of $ 5,000 [3] on a land contract for the property is not as dispositive as intervening defendant argues. She essentially received the property as an inheritance that she and her husband could use for their support after her in-laws' deaths. Given Ms. Brechting's testimony that no one indicated to her an interest in purchasing the property as a farm, the trial court's finding that the zoning ordinance interferes with her investment-backed expectations is not clearly erroneous. Thus, the trial court did not commit clear error in reaching the factual conclusion that the "balancing test" factors, when viewed in the aggregate, weigh sufficiently in plaintiffs' favor to make the zoning ordinance a "taking."

Intervening defendant next argues that the trial court abused its discretion in awarding costs because of the public question involved in this case. Even if we were to presume that there was a public question involved, we disagree. This Court generally reviews a trial court's award of costs for an abuse of discretion, but any preliminary questions of law, such as what constitutes a permissible cost or other issues of statutory construction, are reviewed de novo. *Michigan Citizens for Water Conservation v Nestle Waters North America Inc, 269 Mich. App. 25, 106; **[*20]** 709 NW2d 174 (2005)*. We have observed that "Michigan courts frequently refuse to award costs when cases involve public questions." *House Speaker v Governor, 195 Mich. App. 376, 396; 491 NW2d 832 (1992)*, rev'd on other grounds *443 Mich. 560 (1993)*. It is generally not an abuse of the trial court's discretion to decline to award costs on that basis. *Id*. We emphasize that a trial court does not *abuse its discretion* by declining to award costs because a public question is involved. *Village Green of Lansing v Board of Water and Light, 145 Mich. App. 379, 395; 377 NW2d 401 (1985)*. Logically, this means a trial court *has* the discretion to impose costs notwithstanding a public question, in an appropriate situation. "While we do frequently refuse to award costs in cases involving pubic questions, this is hardly a "rule of law" such that failure to adhere to it constitutes an abuse of discretion." *Id*.

Here, intervening defendant sought to intervene in the case on the basis of an alleged *personal* injury he would suffer if plaintiffs obtained rezoning. Intervening defendant relies on *Vestevich v West Bloomfield Twp, 245 Mich. App. 759, 761-762; **[*21]** 630 N.W.2d 646 (2001)*, where we recognized the right of property owners, both abutting and in the general vicinity, to intervene in a zoning case where *their interests* may not be adequately represented by the municipality. However, intervening defendant did not present *any* proofs or argument in support of his own personal injury, but rather argued largely on the basis of the harm that would befall the community *in general* should plaintiffs' proposed development take place. Indeed, intervening defendant did not present any argument showing that he had a legally protected interest that would "be detrimentally affected in a manner different from the citizenry at large." *Moses Inc v SEMCOG, 270 Mich. App. 401, 414; N.W.2d (2006)*. Where intervening defendant wholly failed to present any proofs or argument in support of the basis for his intervention, we cannot conclude that the trial court abused its discretion in awarding costs.

Intervening defendant finally argues that the costs awarded were excessive as a matter of law. We disagree. Under *MCL 600.2164*, "an award of reasonable **[*22]** expert witness fees, as determined by the trial court, is mandatory." *Hartland Twp v Kucykowicz, 189 Mich. App. 591, 599; 474 N.W.2d 306 (1991)*. Services properly compensated include "court time and the time required to prepare for their testimony

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[2] The purchase proceeded in two parts: Ms. Brechting transferred approximately half of the property immediately for half of the money, and Pulte committed to purchasing the other half at a future date.

[3] We note that $ 5,000 in the year 1967 could be computed as being worth anywhere between $ 23,478.44 and $ 74,988.59 in the year 2005, depending on the method used for comparison. These values were obtained from the Economic History Association's "What is the Relative Value?" dollar value comparison calculator online at *http://eh.net/hmit/compare/*. Further, the property was encumbered by Ms. Brechting's mother-in-law's life estate, which can be viewed as lessening its value or increasing the compensation actually paid.

as experts," but not "'conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position.'" *Id., 107-108*, quoting *City of Detroit v Lufran Co, 159 Mich. App. 62, 67; 406 N.W.2d 235 (1987)*. Intervening defendant argues that time spent sitting in court while waiting to testify is, by definition, consultation time.

Intervening defendant relies entirely on an unpublished opinion of this Court in which we merely found no abuse of discretion in a trial court's factual finding that, in that case, certain expert time that had been invoiced as "court time" had actually been spent in consultation. *Doyle v Archbold Ladder Co*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2002 (Docket No. 227092), slip op at 4-5. *Doyle* is not binding precedent. *MCR 7.215(C)(1)* **[*23]** . Even if it was, nothing in that opinion can be construed as establishing a rule that time spent waiting to testify is automatically consultation time. Intervening defendant advances no evidence suggesting that, as in *Doyle*, the experts' challenged time was actually being used for consultation. Intervening defendant does not assert any other basis for the award of costs being excessive. As discussed, experts may be compensated for "court time" and "preparation time." We see no indication that the trial court made any factual errors or committed an abuse of discretion in imposing the award of costs.

In light of our resolution of the above issues, plaintiffs could not derive any further practical benefit even if we were to conclude that the trial court should not have dismissed their substantive due process or equal protection claims, and at this point whether intervening defendant had or has standing is moot. We therefore decline to consider those issues raised on cross-appeal.

The trial court's order awarding costs to plaintiffs is affirmed. We agree in substance with the trial court's resolution of the underlying case. However, because the order granting re-zoning violates **[*24]** the doctrine of separation of powers, we vacate it, and we remand the matter to the trial court to enter a suitable order consistent with our opinion.

/s/ Alton T. Davis
/s/ David H. Sawyer

Concur by: Bill Schuette

Concur

SCHUETTE, J. (*concurring*).

I concur in the decision reached by my distinguished colleagues in this matter, but I write separately to express my concerns in several areas.

I agree with the majority opinion that a trial court may not engage in judicially rezoning private property. *Schwartz v City of Flint, 426 Mich. 295, 306-310; 395 N.W.2d 678 (1986)*. Rezoning of property is strictly the responsibility of the legislative branch of government, not the other branches of our government. *Id.*

The partial consent judgment agreed upon between plaintiff and defendant Alpine Township contained language which in essence overrides the referendum which prohibited changing the zoning classification of the property in question from agricultural use. The partial consent judgment also included language declaring that the consent judgment would become void if the ongoing litigation between intervening defendant and plaintiff **[*25]** and defendant resulted in an outcome contrary to the terms of the agreement. At oral argument, counsel for intervening defendant did not seem disturbed that this consent judgment overturned the election of the majority of the voters in Alpine Township. Elections have meaning and elections have consequences. The referendum held in Alpine Township in 2002, was an expression by the majority of the voters saying "no" to a zoning change and that the decision of the Township Board to rezone farmland to residential use had insufficient public support. Subsequently, the consent judgment agreed to by a very few people changed the election result voted upon by a great many people. Altering the outcome of an election would seem to pose serious constitutional challenges. However, because the intervening defendant chose not to argue vigorously and to raise these issues, we need not addressthem at this time.

/s/ Bill Schuette

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Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, MI

United States Court of Appeals for the Sixth Circuit

August 23, 2022, Filed

No. 22-1534

Reporter
2022 U.S. App. LEXIS 23575 *; 2022 WL 22236853

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, a Michigan Nonprofit Corporation (WOMP), et al., Plaintiffs-Appellees, v. TOWNSHIP OF PENINSULA, MI, a Michigan Municipal Corporation, Defendant-Appellant, PROTECT THE PENINSULA, INC., Movant.

Prior History: *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, 41 F.4th 767, 2022 U.S. App. LEXIS 20725 (6th Cir. Mich., July 27, 2022)*

Counsel: [*1] For WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, a Michigan Nonprofit Corporation (WOMP), BOWERS HARBOR VINEYARD & WINERY, INC, a Michigan Corporation, BRYS WINERY, LC, a Michigan Corporation, CHATEAU GRAND TRAVERSE, LTD., a Michigan Corporation, GRAPE HARBOR INC., a Michigan Corporation, MONTAGUE DEVELOPMENT, LLC, a Michigan limited liability company, OV THE FARM LLC, a Michigan liability company, TABONE VINEYARDS, LLC, a Michigan liability company, TWO LADS, LLC, a Michigan liability company, VILLA MARI, LLC, a Michigan liability company, WINERY AT BLACK STAR FARMS LLC, a Michigan liability company, CHATEAU OPERATIONS, LTD, a Michigan Corporation, Plaintiff - Appellees: Joseph M. Infante, Christopher J. Gartman, Stephen M. Ragatzki, Miller Canfield, Grand Rapids, MI.

For TOWNSHIP OF PENINSULA, MI, a Michigan Municipal Corporation, Defendant - Appellant: Timothy Allen Diemer, Eric Paul Conn, Jacobs and Diemer, Detroit, MI; John S. Brennan, William Kelly Fahey, Christopher Scott Patterson, Fahey Schultz Burzych Rhodes, Okemos, MI; Gregory M. Meihn, Matthew T. Wise, Gordon Rees Scully Mansukhani, Bloomfield Hills, MI.

For PROTECT THE PENINSULA, INC., Movant: Tracy J. Andrews, Law **[*2]** Office, Traverse City, MI.

Judges: Before: MOORE, STRANCH, and LARSEN, Circuit Judges. LARSEN, Circuit J., concurring in part and dissenting in part.

Opinion

ORDER

Eleven wineries and an association representing their interests ("the Wineries") sued the Township of Peninsula, Michigan, alleging that township zoning ordinances regulating the operation of vineyards on the peninsula were unconstitutional and/or unlawful. The Township appeals an order of the district court granting in part summary judgment to the Wineries and enjoining the Township from enforcing various subsections of three ordinances—sections 6.7.2(19), 8.7.3(10), and 8.7.3(12) of its zoning code—after finding them unconstitutional and/or unlawful. The Wineries move to dismiss the appeal for lack of jurisdiction because the district court did not issue its injunction in a separate document. The Township opposes dismissal. The Wineries reply that, although the district court has since issued its injunction in a separate document, dismissal is still warranted because the injunction lacks sufficient specificity under *Federal Rule of Civil Procedure 65(d)*. The Township moves for leave to file a sur-reply, asserting that the district court's action renders the motion to dismiss moot. The **[*3]** Township also moves to stay the injunction pending appeal. The Wineries oppose a stay. Protect the Peninsula ("PTP")—a citizen watchdog group representing peninsula farmers and residents—supports a stay. The Township replies. Additionally, the Wineries move to strike PTP's response because it is not a party and its response is untimely; PTP opposes striking its response; the Township moves for leave to file an exhibit in support of the motion to stay that purportedly establishes that the Wineries are interpreting the injunction too broadly; and the Wineries oppose this motion.

Our disposition of these motions is guided by the complicated procedural history of this case, which we briefly recount here. In 1972, the Township adopted a

zoning code; zoning ordinances regulating the Wineries' operations were added twenty to thirty years later. Broadly, those ordinances compel the Wineries to concentrate their operations on agriculture through restricting their sales to wine primarily composed of peninsula-grown fruit, curbing their hosting of social events for hire, limiting retail and alcohol sales, restricting the size and scope of nonagricultural uses, and mandating promotion of the peninsula. **[*4]** Over the course of several years, the Wineries worked with the Township to rewrite the winery-related ordinances. Frustrated by their lack of success, the Wineries filed suit against the Township alleging that the ordinances violated the Constitution, violated state law, or were preempted by state law. The Wineries contemporaneously sought, and were denied, a preliminary injunction after the district court found that the lack of irreparable harm outweighed any relative merit of the Wineries' arguments (all of which it found unpersuasive except for preemption). PTP then moved to intervene, arguing in part that the district court should decline supplemental jurisdiction over the preemption claim. The district court denied intervention, and PTP appealed. The Township and the Wineries cross-moved for partial summary judgment on their preemption and constitutional claims. The district court granted summary judgment in part to the Wineries, finding numerous subsections of the ordinances unconstitutional or unlawful and enjoined the Township from enforcing those subsections. This appeal followed. Although the district court denied the Township's later efforts challenging the injunction and **[*5]** denied a stay of the injunction, it issued a separate order entitled "preliminary injunction" memorializing its injunction. We subsequently reversed its denial of intervention. *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, Mich. ("WOMP"), 41 F.4th 767, 2022 WL 2965614 (6th Cir. 2022)*. Since then, the district court has adjourned the trial and stated its intent to order additional briefing.

Before reaching the substantive motions, we address the parties' procedural motions. The Wineries move to strike PTP's response to their motion to dismiss, asserting that PTP is not a party and their response is untimely. We reversed the denial of intervention in *WOMP*; the mandate in that case has since issued. Thus, PTP is an interested party in this appeal, and the issuance of the mandate ensures that it is also such a party before the district court. Consequently, we requested a response from PTP. Its response was filed shortly after it was due, not through any fault of its own, but as the result of an entry error in the court's docketing system. Thus, we deny the motion to strike.

The Township moves for leave to file a sur-reply to the Wineries' motion to dismiss and for leave to file an exhibit that is outside the record on appeal to demonstrate that the scope of the injunction is unclear. Typically, **[*6]** when a party seeks to introduce extraneous evidence, it would move to supplement the record under *Federal Rule of Appellate Practice 10(e)(2)*. The Township did not do so here. Consequently, we deny the Township's motion for leave to file an exhibit that is outside the record. On the other hand, we find the Township's sur-reply helpful and will grant that motion.

We now turn to the substantive motions. In determining whether to stay an injunction pending appeal, we consider four factors: (1) whether the movant has a likelihood of success on the merits; (2) whether the movant will suffer irreparable harm absent an injunction; (3) whether the injunction would cause substantial harm to others; and (4) where the public interest lies. *Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 220?21 (6th Cir. 2016)* (order) (per curiam). "The first two factors . . . are the most critical," and more than a "possibility" of both is required to warrant a stay. *Nken v. Holder, 556 U.S. 418, 434?35, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)*.

These factors are difficult to evaluate given our decision in *WOMP* reversing the denial of intervention to PTP in the district court. First, we consider the likelihood of success on appeal. PTP's intervention below will fundamentally alter the district court's evaluation of its decision on summary judgment. The district court has set out its intent to order **[*7]** further briefing. At the very least, PTP's intervention below will revive its jurisdictional challenge, in which it contends that the district court should decline supplemental jurisdiction over the preemption claim. Given the procedural history of this case, PTP's intervention might achieve more. For example, although PTP has not yet been able to defend the ordinances, the district court initially denied a preliminary injunction, concluding that the Wineries' constitutional arguments were unpersuasive. As PTP recognizes, the district court eventually invalidated numerous subsections of the ordinance based not on the merits of the legal arguments, but on the Township's waivers, defaults, and/or concessions before the district court on various of the Wineries' claims. These circumstances raise serious questions regarding the merits of the district court's injunction following its partial grant of summary judgment as well as regarding the prejudice that PTP faces by not having been able to

raise arguments against the injunction before the district court.

This prejudice has only been compounded before this court. The Township "presents succinct summaries of the arguments it expects to **[*8]** prevail on" and refers the court to its motion to alter or amend which "contains a more expansive view of [its] legal arguments." (Doc. 35-1, Mot. at 11). But "[a] motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." *Fed. R. App. P. 27(a)(2)(A)*. Motions must not exceed 5,200 words. *Fed. R. App. P. 27(d)(2)(A)*. Having made no argument that the applicable limit is insufficient, the Township will not be permitted to circumvent *Rule 27(d)(2)* by incorporating by reference its motion to alter or amend—filed before the district court and supported by a brief numbering 10,622 words—into its motion for a stay of the injunction pending appeal. And, perhaps most critically, the Wineries did not request or brief the issue of permanent injunctive relief in their motions for summary judgment. Instead, the district court summarily considered and *sua sponte* awarded injunctive relief based on its determination of the merits of the claims it considered. Consequently, not even the Township's arguments concerning the propriety of permanent injunctive relief were fully considered below, much less PTP's arguments.

To illustrate one way in which PTP's perspective bears on this point, we consider **[*9]** the Township's first argument regarding laches. We review a district court's conclusion that the doctrine of laches precludes injunctive relief for an abuse of discretion. *Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470, 493 (6th Cir. 2007)*. "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Id.* (citation omitted). It "is an equitable doctrine" that is fact specific and "relies in part on an *unexplained* delay." *PACE Indus. Union-Mgmt. Pension Fund v. Dannex Mfg. Co., 394 F. App'x 188, 196 (6th Cir. 2010)*.

The delay alleged here is significant, and other courts have found laches precluded suit in the face of similar delays. *See Thatcher Enters. v. Cache Cnty. Corp., 902 F.2d 1472, 1476 (10th Cir. 1990)*. The Wineries explained their delay by detailing prior efforts to amend the ordinances and asserted that laches is not an absolute defense when ongoing or recurring harms are alleged. *See Danjaq LLC v. Sony Corp., 263 F.3d 942, 959?60 (9th Cir. 2001)*. The district court declined to apply laches because, even if undue delay occurred, the Township could not demonstrate prejudice. The Township did not challenge this conclusion or explain how pretrial rulings impeded presenting evidence regarding prejudice. In reversing the denial of intervention in *WOMP*, however, we held that PTP had substantial interests in the litigation, and those interests certainly bear on any prejudice suffered **[*10]** by the Wineries' delay.

Second, we consider irreparable harm. The Township correctly asserts that it will suffer irreparable harm if it is enjoined from enforcing its duly enacted ordinances and asserts that restoring the status quo ante would protect all parties. *See Maryland v. King, 567 U.S. 1301, 1303, 133 S. Ct. 1, 183 L. Ed. 2d 667 (2012)* (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citation omitted)). Absent a constitutional violation, the Wineries likely cannot establish irreparable harm because their injuries are largely monetary. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 154 (6th Cir. 1991)*. But if the statutes are unconstitutional, the maxim in *King* does not apply, and the Wineries easily demonstrate irreparable harm. *See Thompson v. DeWine, 976 F.3d 610, 619 (6th Cir. 2020)* (per curiam). Thus, absent consideration of PTP's arguments following intervention, the extent of any harm caused by issuance of the injunction cannot be fully determined.

Next, the Wineries move to dismiss the appeal, asserting that jurisdiction does not lie in this court over the injunction because the district court failed to issue it in a separate document. *Federal Rule of Civil Procedure 58* requires that a separate document issue even when a district court's opinion is "explicit in **[*11]** stating the effect and scope of the injunction to be issued." *Beukema's Petrol. Co. v. Admiral Petrol. Co., 613 F.2d 626, 628?29 (6th Cir. 1979)* (per curiam). This requirement was needed "to avoid the uncertainties that once plagued the determination of when an appeal must be brought." *Bankers Tr. Co. v. Mallis, 435 U.S. 381, 386, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978)* (per curiam). But as the Supreme Court recognized, when issues of timeliness are not salient, *Rule 58* need not be mechanically applied. *See id*. Because the district court has since issued a separate document memorializing its injunction, and because this injunction is what the Township clearly appeals, we deny as moot the Wineries' motion to dismiss the appeal.

The Wineries also filed a reply in support of their motion

to dismiss the appeal, arguing that the injunction failed to provide the specificity demanded by Federal Rule of Civil Procedure 65. While we will generally not consider arguments raised for the first time in a reply, *see* Scarber v. Palmer, 808 F.3d 1093, 1097 (6th Cir. 2015), we do so here because the Township did not invoke this general rule, it had the opportunity to respond in its sur-reply, and PTP separately raised this issue in its response to the motion to stay the injunction.

An order granting an injunction "must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint **[*12]** or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d). These "are no mere technical requirements," Schmidt v. Lessard, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) (per curiam); they serve the "'important' functions" of "prevent[ing] uncertainty and confusion" on those enjoined and enabling reviewing courts to determine the scope of its review, Union Home Mortg. Corp. v. Cromer, 31 F.4th 356, 362 (6th Cir. 2022) (quoting Schmidt, 414 U.S. at 476). Thus, "an injunction must be couched in specific and unambiguous terms, such that 'an ordinary person reading the court's order [is] able to ascertain from the document exactly what conduct is proscribed.'" *Id.* (alteration in original) (quoting Scott v. Schedler, 826 F.3d 207, 211 (5th Cir. 2016)). "An injunction order is typically vacated when it violates this standard." *Id.*

The district court's order memorializing its injunction falls well below the specificity required here. In its opinion, the district court permanently enjoins enforcement of certain subsections of the ordinances; its separate document, however, is entitled a "preliminary injunction." The separate document enjoins subsections of three ordinances. It does not identify which subsections it enjoins, stating only that it found these subsections unconstitutional or contrary to law. To determine what subsections are enjoined, the parties must consult the district court's fifty-page **[*13]** opinion. That opinion also does not summarize which subsections are enjoined. Instead, the parties must read the opinion in its entirety.

Based on the foregoing, we conclude that the injunction must be vacated because it does not comply with Rule 65(d) and for prudential reasons because PTP's intervention changes the landscape and requires reconsideration of the district court's partial grant of summary judgment and issuance of an injunction. *See* Sanguine, Ltd. v. U.S. Dep't of Interior, 798 F.2d 389, 391?92 (10th Cir. 1986) (discussing intervention following entry of a consent decree as "a unique situation in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing the opportunity to litigate the merits of the case" and holding that res judicata does not bind the intervenors, who "were not adequately represented in the first instance").

Accordingly, the district court's injunction is **VACATED**, and this matter is **REMANDED** to the district court for further proceedings in accordance with this order. The motion for leave to file a sur-reply is **GRANTED**, the motion for leave to file an exhibit is **DENIED**, the motion to strike is **DENIED**, and the motions to dismiss the appeal and to stay the injunction are **DENIED AS MOOT**.

Concur by: LARSEN (In part) **[*14]**

Dissent by: LARSEN (In part)

Dissent

LARSEN, Circuit J., concurring in part and dissenting in part.

I would grant the Township's motion to stay the injunction pending appeal given that enforcement of the injunction would irreparably harm PTP, recently added as an intervenor, before it has had an opportunity to participate in the district court proceedings. At this time, however, I would not vacate the injunction. The district court has set a reasonable briefing schedule for determining PTP's role in the proceedings and the effect of its addition as an intervenor on the injunction. I would allow that process to play out while this appeal remains pending. I concur in all other aspects of the court's order.

End of Document

Wolters Realty v. Saugatuck

Court of Appeals of Michigan

October 25, 2005, Decided

No. 247228

Reporter
2005 Mich. App. LEXIS 2608 *; 2005 WL 2757994

WOLTERS REALTY, LTD., Plaintiff-Appellee, v SAUGATUCK TOWNSHIP, SAUGATUCK PLANNING COMMISSION, and SAUGATUCK ZONING BOARD OF APPEALS, Defendants-Appellants.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Appeal denied by *Wolters Realty, Ltd. v. Saugatuck Twp., 2006 Mich. LEXIS 1066 (Mich., May 30, 2006)*

Prior History: Allegan Circuit Court. LC No. 00-028157-CZ.

Disposition: Affirmed.

Judges: Before: Fort Hood, P.J., and Donofrio and Borrello, JJ. DONOFRIO, J. (concurring).

Opinion

ON REMAND

PER CURIAM.

Defendants Saugatuck Township, Saugatuck Planning Commission, and Saugatuck Zoning Board of Appeals appeal as of right from the trial court's ruling that the township's zoning ordinance, as applied to a certain parcel of land owned by plaintiff Wolters Realty, Ltd., was unreasonable, and the trial court's order enjoining defendants from interfering with plaintiff's development of a travel plaza [1] on property that plaintiff owned within the township. We affirm.

This Court previously issued an opinion in this case in which we did not consider the merits **[*2]** of defendants' arguments on appeal because we concluded that plaintiff had not sought a variance and therefore had failed to satisfy the rule of finality as defined and explained in *Paragon Properties Co v Novi, 452 Mich. 568; 550 N.W.2d 772 (1996)*. We therefore determined that defendants' issues were not ripe for adjudication. *Wolters Realty, Ltd v Saugatuck Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 3, 2004 (Docket No. 247228). In lieu of granting leave to appeal our previous decision in this case, the Supreme Court remanded to this Court, directing us to reconsider our opinion in light of a misstatement in the opinion in which we asserted that plaintiff never sought a zoning variance. *Wolters Realty, Ltd v Saugatuck Twp, 472 Mich. 908; 696 N.W.2d 711 (2005)*. On remand, we will consider defendants' arguments which we previously declined to address based on our conclusion that because plaintiff failed to exhaust its administrative remedies, the issues on appeal were not ripe for review. The facts of this case were adequately articulated in our previous opinion; therefore, we will not restate **[*3]** them again in this opinion.

Defendants contend that the trial court erred in holding that the zoning ordinance was unreasonable as applied to plaintiff's property because plaintiff failed to satisfy its burden to demonstrate that the current zoning scheme is arbitrary and capricious and fails to advance a reasonable governmental interest. We disagree.

We review de novo a trial court's ruling regarding a constitutional challenge to a zoning ordinance. *Jott, Inc v Clinton Twp, 224 Mich. App. 513, 525; 569 N.W.2d 841 (1997)*. However, we give considerable deference to the trial court's factual findings, and we will not disturb such findings unless we would have reached a different result if we had been in the trial court's position. *Id. at 525-526*.

Both the Michigan and United States Constitutions guarantee that no person will be deprived of life, liberty,

[1] The travel plaza apparently would include a gas station, truck stop, fast food center, and convenience store.

or property without due process of law. Landon Holdings, Inc v Grattan Twp, 257 Mich. App. 154, 173; 667 N.W.2d 93 (2003), citing US Const, Am XIV; Const 1963, art 1, § 17. The essence of a claim for a violation of substantive due process is that the government may **[*4]** not deprive a person of liberty or property by an "*arbitrary*" exercise of power. *Id.* (emphasis in original). A plaintiff is denied due process by a zoning ordinance if the ordinance is unreasonable. *Id.* "A zoning ordinance may be unreasonable either because it does not advance a reasonable governmental interest or because it does so unreasonably." Id. at 173-174. The following rules apply when this Court reviews a challenge to a zoning ordinance:

> (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 owner's 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 v Highland Twp, 228 Mich. App. 575, 594; 579 N.W.2d 441 (1998), quoting A & B Enterprises v Madison Twp, 197 Mich. App. 160, 162; 494 N.W.2d 761 (1992).]

Some of the factors to consider in making **[*5]** a reasonableness determination include the use of surrounding areas, traffic patterns, and available water supply and sewage disposal systems. Johnson v Lyon Twp, 45 Mich. App. 491, 494; 206 N.W.2d 761 (1973). In addition, a master plan adopted in compliance with statutory requirements by a responsible political body is of itself evidence of reasonableness. Parkdale Homes, Inc v Clinton Twp, 23 Mich. App. 682, 686; 179 NW2d 232 (1970).

Both plaintiff and defendants presented expert testimony regarding the uses of the property surrounding plaintiff's property. Plaintiff's expert concluded that the surrounding land uses near plaintiff's parcel were commercial in nature, while defendants' expert testified that the land surrounding plaintiff's property contained many residential dwellings and that the A-2 (agricultural) portion of plaintiff's property was sufficiently large to accommodate a number of home sites. A map of the geographical area in question indicates that there are residential areas near plaintiff's property, but it also reveals that the property immediately adjacent to the portion of plaintiff's property that **[*6]** the proposed travel plaza would occupy, which was the southern portion of the parcel, was zoned commercial and was being used for commercial purposes. We further observe that the evidence revealed that the portion of plaintiff's property that was zoned C-1 (commercial) was irregularly shaped and separated. It is undisputed that there is one southern piece of C-1 property that is 208 feet deep and 176 feet wide, along with a separate rectangular section of C-1 property which runs parallel to the Blue Star Highway that is 700 feet long by 90 feet wide and is landlocked between existing commercial uses and the A-2 portion of plaintiff's property.

In light of the parties' conflicting evidence regarding the nature of the use of the property surrounding plaintiff's property, we defer to the trial court's superior ability to judge the credibility of the witnesses. The trial court was in a better position than this Court to evaluate the credibility of the witnesses because the trial court had the opportunity to observe the witnesses in court and hear them testify. See Kropf v Sterling Heights, 391 Mich 139, 163; 215 NW2d 179 (1974). As an appellate court, this **[*7]** Court had no such opportunity. *Id.* In light of the trial court's superior ability to judge the credibility of witnesses, we decline to interfere with the trial court's finding that the land surrounding plaintiff's land was predominately commercial in character because this decision depended, ultimately, upon which witnesses the trial court found most credible.

Defendants contend that they have a legitimate and reasonable interest in prohibiting the development of the travel plaza because there is no city water or sewer service to serve plaintiff's land. According to defendants, the lack of public utilities to service a gas station constitutes a legitimate governmental interest. Defendants contend that the absence of water and sewer poses a problem because there is a risk of a fire at a gas station, and this risk is magnified by the lack of access to public water. In addition, defendants contend that they have a legitimate interest in preventing groundwater contamination, and public water would be essential in the event of a gasoline spill or leak to minimize contamination. The trial court disagreed, stating that in light of "the present technology and present attitude of the **[*8]** State Department regulating the type of business that plaintiffs proposed here, the likelihood of a major event occurring [is] slight as not [to] be a concern or more specifically of slight concern only."

Given the level of deference we must afford the trial court's finding in this regard, we decline to disturb the

trial court's conclusion because there was ample testimony by plaintiff's witnesses that the groundwater table would be sufficiently protected by underground storage tanks with backup warning systems. Additionally, we observe that in addition to many single-family residences that are located in the geographical area near plaintiff's property, roughly twelve commercial establishments already exist in the area of plaintiff's parcel, including one gas station. These existing residences and commercial uses have been adequately served by non-public sewer and water. Therefore, we are not persuaded by defendants' argument that one additional commercial business, plaintiff's travel plaza, could not also be adequately served without public water and sewer.

Defendants next argue that the trial court should have given defendant township's comprehensive plans more deference **[*9]** and more respect in deciding this case. The township's comprehensive plan proposed to eliminate commercial zoning in the area where plaintiff's proposed travel plaza would be located. Specifically, the plan states that "the present commercial zoning of Blue Star [Highway] south of the Douglas interchange should be eliminated except for small areas representing existing commercial establishments at the freeway and M-89 interchanges." "Whether a zoning classification advances a city's master plan is a factor in determining reasonableness. It is, however, only one factor; it does not replace the balancing of interests required under an assertion of the police power." *Troy Campus v City of Troy, 132 Mich. App. 441, 457; 349 N.W.2d 177 (1984)*. Certainly, defendants are entitled to create a comprehensive plan for future development that limits commercial uses for the health, safety and welfare of the surrounding area and its residents. However, a comprehensive plan for the future does not by itself validate existing zoning patterns or the township's change to those zoning patterns. See *id.*

Despite the comprehensive plan's proposal to eliminate all other **[*10]** commercial zoning in the area where plaintiff's proposed travel plaza would be located, defendants expanded the C-1 portion of plaintiff's parcel after establishing its comprehensive plan. Defendants' expert planner admitted on cross-examination that, notwithstanding the fact that the master plan suggested that there was already too much commercial zoning, the C-1 portion by plaintiff's parcel was actually expanded because of its location next to a highway interchange. The validity of a zoning regulation must be tested by existing conditions. *Id.* In this case, the existing conditions included the fact that plaintiff's property was located near other commercial property and that it was located near access to a major highway. Therefore, we conclude that the trial court properly balanced defendants' interest in carrying out its comprehensive plan with plaintiff's proposal to use its property to construct a travel plaza.

In sum, we find that plaintiff satisfied its burden to establish that application of the zoning ordinance was unreasonable as applied to plaintiff's property. Mindful of our responsibility to defer to the trial court's factual findings, we decline to disturb the **[*11]** trial court's conclusions regarding the nature of the property surrounding plaintiff's property, the lack of public water and sewer to service plaintiff's property, and the township's comprehensive plan. We also refuse to interfere with the trial court's balancing of defendants' authority to adopt a zoning ordinance and establish zoning districts with plaintiff's reasonable use of its property because we are not convinced that we would have reached a different decision had we been in the trial court's position.

Defendants finally argue that plaintiff failed to establish that its proposed use of its property was reasonable and that the trial court erred in failing to make adequate factual findings regarding the reasonableness of plaintiff's proposed use of its property. In an "as applied" challenge to a zoning ordinance, even if a court determines that a challenged zoning ordinance is unreasonable, there remains the issue of determining whether the proposed use by the plaintiff is reasonable. See *Schwartz v Flint, 426 Mich. 295, 328; 395 N.W.2d 678 (1986)*. A plaintiff must establish that a specific use is reasonable by a preponderance of the evidence. **[*12]** *Id.* "The court generally looks to the existing uses and zoning of nearby properties in determining reasonableness." *Id.* As we stated above, we defer to the trial court's conclusion that the land uses for the property surrounding plaintiff's property were primarily commercial. We therefore find that plaintiff satisfied its burden of establishing that the property surrounding its property was primarily commercial and even included one gas station. Furthermore, we find that plaintiff established by a preponderance of the evidence that its proposed use of its property as a travel plaza was reasonable.

Furthermore, we conclude that the trial court articulated adequate findings of fact regarding the reasonableness of plaintiff's proposed use of the property. Findings of fact regarding matters contested at a bench trial are sufficient even if they are "brief, definite, and pertinent,"

where it appears that the trial court was aware of the issues in the case and correctly applied the law and where appellate review would not be facilitated by requiring further explanation. MCR 2.517(A)(2); Triple E Produce Corp v Mastronardi Produce, Ltd, 209 Mich. App. 165, 176; **[*13]** 530 N.W.2d 772 (1995). Moreover, brevity in the explanation of factual findings is not improper so long as the factual findings reveal the factual basis for the court's ultimate conclusions. Powell v Collias, 59 Mich. App. 709, 714; 229 N.W.2d 897 (1975). Finally, as we observed above, we give considerable deference to the trial court's factual findings, and we will not disturb such findings unless we would have reached a different result if we had been in the trial court's position. Jott, supra at 525-526.

In this case, the record reveals that the trial court heard extensive testimony regarding the reasonableness of the proposed use. Both plaintiff and defendants presented expert testimony regarding the characteristics of the area surrounding plaintiff's parcel. There was also testimony from both sides concerning underground storage tanks and the risks, or lack thereof, associated with the existence of another gas station off of M-89 and Interstate 196. Indeed, the factual arguments regarding the reasonableness of the ordinance itself were intermingled and interchanged with the reasonableness of the proposed use. The **[*14]** trial court's opinion clearly acknowledged all of the competing evidence, acknowledged the proposed use, and then concluded that the proposed use was reasonable. Therefore, despite the apparent brevity of the trial court's finding that the proposed use was reasonable, it is clear that the trial court's determination that plaintiff's proposed use was reasonable was supported by the facts. It is unnecessary to remand this matter because the record indicates that the trial court was aware of the issues in the case and correctly applied the law and because any further explanation by the trial court would not facilitate appellate review.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello

Concur by: DONOFRIO

Concur

DONOFRIO, J. (*concurring*).

I concur with the determinations of the majority but write separately to address the finality issue. Plaintiff, in the instant action, unlike the plaintiffs in Braun v Ann Arbor Twp, 262 Mich App 154; 683 N.W.2d 755 (2004), did seek review before the Zoning Board of Appeals (ZBA). In *Braun*, the plaintiffs sought compensation for an alleged regulatory taking without first seeking redress **[*15]** before the ZBA and therefore proceeded without a final determination regarding the nature and extent of all permissible uses of the land at issue as currently zoned within a reasonable degree of certainty. In other words, when seeking economic damages it is incumbent on the plaintiff to "illustrate the extent of the economic use of the property as it is currently zoned." Id. at 159. The instant judicial action challenges the constitutionality of a zoning ordinance as applied to its land as being unreasonable and therefore a denial of due process. Plaintiff seeks to reverse the ZBA's affirmation of the Planning Commission's denial of a special applied use within the then existing zoning ordinance and the subsequent amended zoning ordinance which categorically denied the use. Plaintiff's claim was for injunctive relief to specifically allow the sought-after special applied use rather than economic damages resulting from that denial. The ZBA's affirmation was a final determination as it relates to the pleaded challenge and therefore plaintiff was not required to revisit the ZBA in order to achieve finality.

/s/ Pat M. Donofrio