COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1914 **Cir. Ct. No. 2010CV3808**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MCKEE FAMILY I, LLC AND
JD MCCORMICK COMPANY, LLC,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

CITY OF FITCHBURG,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. McKee Family I, LLC, challenges a decision of the City of Fitchburg, Wisconsin, to rezone property that McKee owns. McKee argues that Fitchburg was not entitled to rezone this property because, even though

McKee had not yet applied for a building permit to develop the property before Fitchburg approved the challenged rezoning, McKee had obtained a vested right in the preexisting zoning classification and therefore the rezoning constitutes a taking. McKee contends that it obtained this vested right by getting as far as it did in the City's development planning process.

¶2 The circuit court granted summary judgment to Fitchburg, dismissing McKee's claims. In addition to the argument based on an asserted vested right at the time of the rezoning, McKee raised additional takings arguments in its summary judgment submissions. As pertinent to the preserved issues that McKee raises on appeal, the court concluded that McKee did not have a vested right in the preexisting zoning classification and that its constitutional claims fail as a result. McKee appeals. For the reasons set forth below, we affirm the judgment of the circuit court.[1]

BACKGROUND

¶3 This case involves a dispute over the municipal zoning of two lots that McKee owns in Fitchburg. McKee argues that, in getting as far as it did in the City's development planning process, it obtained a vested right in a Planned Development District (PDD) zoning classification for the two lots, and that this vested right precludes Fitchburg from rezoning the property to a Residential-Medium (R-M) classification. When Fitchburg rezoned the property to R-M, McKee argues, this improperly prevented McKee from developing the property

[1] Fitchburg filed a cross-appeal to preserve an alternative argument that we need not address because we conclude that the circuit court properly granted Fitchburg's motion for summary judgment and dismissed McKee's complaint in its entirety.

with the higher housing density that McKee had hoped to achieve, as allowed under the former PDD classification, and that McKee was entitled to achieve, based on its alleged vested right.

¶4 With the consent of property owners, municipalities may use a PDD zoning classification to establish planned mixed-use developments that have a higher density than is allowed under an R-M classification. *See* WIS. STAT. § 62.23(7)(b) (2013-14).[2] Before a property owner can develop land that is zoned under the PDD classification, the Fitchburg General Ordinances require that the property owner submit a proposed general implementation plan to the City's Plan Commission. The Plan Commission has the option of forwarding the general implementation plan to the Fitchburg Common Council for potential approval. FITCHBURG, WIS., GEN. ORDINANCES §§ 22-593, 22-594 (2015).[3]

---

[2] WISCONSIN STAT. § 62.23(7)(b) addresses "districts" in the context of zoning by cities. It provides, in pertinent part:

> [T]he council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land.... The council may establish mixed-use districts that contain any combination of uses, such as industrial, commercial, public, or residential uses, in a compact urban form. The council may with the consent of the owners establish special districts, to be called planned development districts, with regulations in each, which … will over a period of time tend to promote the maximum benefit from coordinated area site planning, diversified location of structures and mixed compatible uses.…

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] All references to the Fitchburg General Ordinances are to the 2015 version of the ordinances, unless otherwise noted. Although the ordinances pertinent here were renumbered in 2010, after McKee sought approval of its zoning request, our review of the pertinent language (continued)

¶5 But obtaining City approval for a general implementation plan is not the end of the road for an owner seeking to develop property zoned PDD. If Fitchburg approves a general implementation plan, the next step in the development planning process requires the property owner to submit a specific implementation plan. ***Id.*** § 22-599. It is only after the City approves a specific implementation plan that the owner is allowed to apply for a building permit. ***Id.*** § 22-597.

¶6 Fitchburg approved the lots at issue for a PDD classification in 1994, at the request of McKee's predecessor in title. At the same time in 1994, Fitchburg also approved a general implementation plan submitted by the then-owner of the lots.

¶7 In 2008, McKee and JD McCormick Company, LLC, entered into negotiations for McCormick to purchase the lots at issue, contingent on McCormick's ability to obtain approval from Fitchburg to build 128 apartment units on the lots.[4] After several neighborhood meetings in which residents expressed concerns that the proposed development would have negative effects, McCormick submitted a proposed specific implementation plan for review.

¶8 After McCormick submitted the proposed specific implementation plan, two Fitchburg alders petitioned the City to rezone the lots at issue from PDD to R-M. The R-M zoning classification provides that the lots may be developed

---

reveals no changes that appear to matter to the issues on appeal and neither of the parties suggests that there has been any meaningful change in ordinance language.

[4] McCormick was a plaintiff in this action before the circuit court granted Fitchburg's motion to dismiss McCormick from the case based on a lack of standing. McCormick did not appeal the standing decision, and McKee does not raise the issue on appeal.

only with single-family or duplex structures, excluding the possibility of the apartment units that McCormick contemplated. GEN. ORD. § 22-113.

¶9 After the alders filed their rezoning petition, McCormick submitted a revised proposed specific implementation plan, which incorporated suggestions by Fitchburg Plan Commission staff.

¶10 The Fitchburg Common Council postponed the referral of McCormick's revised proposed specific implementation plan to a review commission, pending the council's consideration of the alders' rezoning application. Following a public hearing and an additional session with public comment, the council approved the PDD-to-R-M rezoning application, and the rezoning to R-M took effect before any commission review of the revised proposed specific implementation plan. The council concluded that the rezoning was "in the best interest of maintaining a stable surrounding neighborhood to reduce the density on [the] lots." Because, as discussed above, the Fitchburg development planning ordinances require City approval of a specific implementation plan for a development project as a prerequisite to application for building permits, McKee never reached the stage at which it could apply for the required building permits to develop the lots under PDD zoning. GEN. ORD. § 22-597.

¶11 Eight months after the council approved rezoning from PDD to R-M, McKee filed a notice of claim, followed by a complaint in circuit court, alleging that Fitchburg's adoption of the rezoning ordinance was unlawful. As pertinent to the discussion of the issues on this appeal, both parties ultimately filed motions for summary judgment, and the circuit court concluded that McKee does not have a vested right in the PDD zoning classification, requiring approval of its specific

implementation plan, and that McKee's constitutional claim based on the alleged vested right fails. The circuit court dismissed the complaint against Fitchburg. McKee appeals.

DISCUSSION

¶12 McKee appeals the circuit court's grant of summary judgment to Fitchburg. We review a circuit court's decision on summary judgment de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We affirm a summary judgment when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. ***Hoida, Inc. v. M & I Midstate Bank***, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17.

¶13 McKee argues that the circuit court erroneously granted summary judgment in Fitchburg's favor and that instead it should have granted summary judgment to McKee on the ground that McKee had a vested right in developing the land under the PDD zoning classification. In the alternative, McKee argues that summary judgment for either party is not appropriate because: (1) there are material factual disputes as to the existence of McKee's alleged vested right; and (2) the circuit court failed to apply the correct legal analysis in reviewing McKee's constitutional claims. For the following reasons, we disagree with McKee.

¶14 The primary issue on appeal is whether McKee had obtained a vested right in the PDD zoning classification before the challenged rezoning to the R-M zoning classification. As to this issue, McKee makes several arguments. Our review of the record shows that the primary arguments that McKee made before the circuit court are dramatically different from those it primarily advances on appeal. Here, McKee has abandoned most of the arguments it made to the

circuit court and it now makes several new arguments that the circuit court had no opportunity to consider. Therefore, before we address McKee's preserved arguments, we explain our conclusion that McKee has forfeited certain arguments on appeal by failing to preserve them in the circuit court.

McKee's Forfeited Arguments

¶15 Fitchburg takes the position that three of McKee's arguments are raised for the first time on appeal and are, therefore, forfeited, and that we should not address these forfeited arguments. McKee acknowledges that it failed to raise these arguments before the circuit court. However, McKee contends that we should not treat its new arguments as forfeited because they relate to "issues" that were raised to the circuit court, and, even if we conclude that the new arguments are not sufficiently related to the arguments that were raised, we should address the new arguments because the issues involved are of public significance.

¶16 The following are the new, and therefore potentially forfeited, arguments: (1) that McKee has a vested right in the PDD zoning classification based on what McKee calls a "reasonable investment backed expectations" theory; (2) that McKee has a contract with Fitchburg, precluding the challenged rezoning, based on a 1990 settlement agreement between McKee and the City dealing with topics that included the dedication of land to the City for parks; and (3) even if McKee does not have a vested right in the PDD zoning classification, it might still be entitled to an award of compensation because McKee's dedication of land for parks in 1990 created a property interest of McKee's in the PDD zoning that the challenged rezoning has stripped away in an "unlawful exaction" under the Takings Clause.

¶17 McKee contends broadly that it is entitled to make any argument on appeal that is related to the concept of vested rights because it made a broad argument to the circuit court on summary judgment that "it had vested rights in the [PDD] zoning" classification. McKee contends that its new arguments merely "concentrate[] [with] greater focus on, and expand[] its arguments [to the circuit court] relating to, [the] vested rights" argument. In support, McKee relies on authority that includes ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶10, 261 Wis. 2d 769, 661 N.W.2d 476, and ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 331 N.W.2d 320 (1983), which McKee asserts stand for the proposition that "an additional argument on issues already raised in the trial court does not violate the general rule against raising issues for the first time on appeal."

¶18 We disagree with McKee's interpretation of forfeiture law and conclude that McKee has forfeited these arguments. We have explained that ***Schonscheck*** and "countless" opinions "after ***Holland Plastics*** have reaffirmed that the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155, (citing ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (forfeiture rule requires that parties must "make all of their arguments to the trial court" to preserve the arguments)).

¶19 As we explained in ***Townsend***, judicial efficiency and fairness support the application of a forfeiture rule that is defined in this manner. *See* ***Townsend***, 338 Wis. 2d 114, ¶26. As in ***Townsend***, here "the rule [McKee] advocate[s] would seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party." *See* ***id.***; *see also*

State v. Ndina, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 ("The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal.").

¶20 Moreover, if McKee intends to argue that its new arguments are merely refinements of arguments that it made to the circuit court, or that the new arguments merely provide additional authority for arguments it made, there is no support for these positions in the record. While McKee is of course generally entitled to abandon on appeal any argument that it made to the circuit court, the facts are that McKee primarily directed the court's attention to arguments *other* than the ones now raised, and, most important for current purposes, McKee never developed in any manner the three specific arguments at issue here.

¶21 It is true that McKee defended its constitutional claims before the circuit court based on its position that the rezoning ordinance was "wrongfully adopted" and that the City "has taken" McKee's "vested property rights." However, only now for the first time on appeal does McKee argue that, even if McKee does not have a vested right, it may still be entitled to an award of compensation under the Takings Clause and under an "unlawful exaction" doctrine based on the dedication of park lands in 1990. We deem all of the new arguments to have been forfeited because they were not preserved before the circuit court on appeal as the forfeiture rule requires.

¶22 We could consider the new arguments. *See* ***Townsend***, 338 Wis. 2d 114, ¶24 ("Nothing prevents a party from making an argument for the first time on appeal and, as the statement implies, nothing prohibits an appellate court from

addressing a new argument." But "***Holland Plastics*** does not require appellate courts to consider new arguments."). However, we decline to do so.

¶23 McKee suggests that we should address the new arguments on the ground that they are of great public importance. Assuming without deciding that one or more of these arguments are of significant public interest, that factor would be outweighed here by the inability of Fitchburg and the circuit court to bring to bear on these issues additional facts or legal authority that might be pertinent and helpful to this court in resolving the issues appropriately. On these facts, McKee's "public interest" argument is self-defeating, particularly in legal areas as potentially complex as those raised in the new arguments. It is all the more important to resolve such important and complex issues with the benefit of full argument and circuit court refinement of the issues and deliberation.

¶24 Because we conclude that on summary judgment Fitchburg did not have the opportunity to address, and the circuit court did not have the opportunity to consider, the new arguments McKee now raises on appeal, we deem the new arguments forfeited, and we decline to consider them.

McKee's Preserved Arguments on the Vested Right Issue

¶25 Properly before us on appeal, because it was argued to the circuit court, is the question of whether McKee acquired a vested right in the PDD zoning classification, despite the fact that it was not eligible for, and thus did not apply for, a building permit prior to Fitchburg's adoption of the ordinance rezoning the lots from PDD to R-M. Based on Wisconsin's longstanding bright-line "building permit rule" in this context, we conclude that McKee did not have a vested right in the PDD zoning classification when Fitchburg rezoned the lots. *See* ***Lake Bluff***

Hous. Partners v. City of S. Milwaukee, 197 Wis. 2d 157, 540 N.W.2d 189 (1995).

¶26 Wisconsin focuses on building permits and applications for permits in defining the point at which a right to develop property might vest in the property owner. In ***Lake Bluff***, our supreme court explicitly applied this rule to hold that a property owner's rights did not vest because the developer had not submitted an application for a building permit that conformed to zoning or building code requirements in effect at the time of application. *See* ***id.*** at 182; *see also* ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 381-82, 548 N.W.2d 528 (1996) (explaining that "[p]roperty owners obtain no vested rights in a particular type of zoning solely through reliance on the zoning" but only acquire vested rights after the submission of a building permit application that "conforms to the zoning or building code requirements in effect at the time of the application.") (quoted source omitted).

¶27 As summarized above, it is undisputed that neither McCormick nor McKee ever applied for a building permit. While the council approved a general implementation plan, the City never approved the specific implementation plan and no building permit application was submitted. Applying the building permit rule, then, McKee's claims fail because it never acquired a vested right in the PDD zoning classification.

¶28 McKee argues that we should decline to apply the building permit rule under the circumstances presented here because "PDD zoning is contractual in nature" and requiring approval of a general implementation plan as a necessary pre-requisite to approval of a specific implementation plan and, ultimately, to a building permit, "create[s] expectations upon which developers are expected to

rely." McKee suggests that PDD zoning classifications should be seen as agreements that are the product of "tradeoffs" and negotiations between property owners and the City. Seen that way, McKee argues, City approval of a general implementation plan represents a bargain that has been struck, and the remainder of the process is essentially a formality, barring a substantial change in the property owner's proposals. McKee argues that "[t]he only reason a developer agrees" to expend the funds necessary to achieve the goals of PDD zoning "is because the type of development permitted in return is anticipated to justify such expenditures." Therefore, McKee argues, a vested right is "a necessarily implied authorization in the legislative approval of [a] PDD district[]." We disagree that this theoretical construct provides the applicable legal rule here.

¶29 McKee's argument has no merit, because it is the sort of equitable argument that the court rejected in ***Lake Bluff***, in which the property owner argued that the building permit rule does not apply or is modified if a property owner can point to investments made in anticipation of permit approval. *See* ***Lake Bluff***, 197 Wis. 2d 157, 178 (declining to employ equitable considerations as opposed to the building permit rule, and noting that the court in an earlier case "only looked to equitable considerations in discussing the nature of the municipality's change in the zoning ordinance[ ] *after* having found that the builder had submitted a plan conforming to the former requirements and thus had a clear right to a permit" (emphasis in original)).[5]

[5] In a similar and equally unavailing argument, McKee effectively suggests that we read ***Lake Bluff Housing Partners v. City of South Milwaukee***, 197 Wis. 2d 157, 540 N.W.2d 189 (1995), in light of cases from other jurisdictions, as supporting a new, case-by-case approach in evaluating whether a property owner has vested rights in a particular zoning classification. However, we see no such suggestion in ***Lake Bluff*** and we are not free to depart from supreme (continued)

¶30 We also observe that, even if we had authority to deviate from the rule plainly stated in ***Lake Bluff***, which of course we do not, we would likely reject McKee's "contract" argument because it appears to run afoul of precedent apart from ***Lake Bluff***. "[L]egislative acts are presumed *not* to create contractual rights ... because the primary function of a legislative body is to make laws that effectuate policies, not to make contracts that bind future legislative bodies." ***Dunn v. Milwaukee Cnty.***, 2005 WI App 27, ¶9-10, 279 Wis. 2d 370, 693 N.W.2d 82 (holding that wage increase ordinance did not contractually bind county to wage increases for future years (emphasis in original)); *see also* ***Brockway v. Black River Falls***, 2005 WI App 174, ¶27, 285 Wis. 2d 708, 702 N.W.2d 418 ("a municipality may not make contracts that will control them in the performance of their legislative functions in the future, and that includes zoning."). Starting from this "very strong" presumption, in determining whether a zoning-related statute may be treated as a contract between a property owner and a municipality, "it is of first importance to examine the language of the statute." ***Dunn***, ¶8 (quoted source omitted).

¶31 Contrary to McKee's argument that we should read WIS. STAT. § 62.23(7) as creating private contractual rights for developers, the language of the statute appears to support the opposite conclusion. There is nothing in the statute to suggest that, once a municipality classifies real property with the PDD zoning status, the municipality is thereafter contractually obligated to maintain that zoning classification indefinitely, or at least until the property owner consents to a change in the classification. To the contrary, the Wisconsin legislature has

---

court precedent based on persuasive authority. *See* ***Cook v. Cook***, 208 Wis. 2d 166, ¶51, 560 N.W.2d 246 (1997).

specifically authorized municipalities to amend or repeal zoning districts or regulations so long as the municipalities abide by certain procedural requirements. *See* § 62.23(7)(d)(2) and (3).

¶32 For all of these reasons, we conclude that McKee did not acquire a vested right in the PDD zoning classification under the building permit rule.[6]

CONCLUSION

¶33 For the reasons set forth above, we affirm the summary judgment of the circuit court.

By the Court.—Judgment affirmed.

[6] McKee uses a variety of labels for its "vested rights" theory, including one stated in terms of the law governing regulatory takings. McKee argues that it could or does prevail under ***Penn Central Transportation Co. v. City of New York***, 438 U.S. 104 (1978) (even when government interference falls short of completely eliminating use or value of private property, a partial regulatory taking may have occurred, when evaluated under a multi-factor framework). However, although McKee recites the ***Penn Central*** factors, it does not explain how we should apply the factors to the circumstances here. We conclude that McKee's constitutional argument based on ***Penn Central*** is undeveloped, and we decline to consider this undeveloped argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). If McKee intends to make any other constitutional arguments not addressed in this opinion, we deem the arguments to be insufficiently developed.

We also observe that, even if we were to consider McKee's constitutional arguments, we would likely conclude that the rezoning is not unconstitutional, based on the City's argument that, while the rezoning cuts into profits that McKee expected to enjoy from use of the property, McKee "did not suffer the loss of substantially all of the beneficial uses of [its] land." *See* ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 380, 548 N.W.2d 528 (1996) (no taking despite the fact that rezoning resulted in depreciation of property value because the property remained useable and developable); *see also* ***Eberle v. Dane Cty. Bd. of Adjustment***, 227 Wis. 2d 609, ¶25, 595 N.W.2d 730 (1999) ("The rule applied by Wisconsin and federal courts is that a regulation or government action 'must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required.'" (quoted source omitted)). As a result of the rezoning, McKee may still develop 48 units, even if it would have preferred to develop the 128 units that would have been allowed under the PDD zoning classification.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.