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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1607**

Mark R. Zweber,
Appellant,

vs.

Credit River Township, et al.,
Respondents.

**Filed June 10, 2019
Affirmed
Rodenberg, Judge**

Scott County District Court
File No. 70-CV-13-5687

Thomas Fafinski, Nathan Nelson, Steven V. Rose, Virtus Law, PLLC, Minneapolis,
Minnesota (for appellant)

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(for respondents)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Mark Zweber appeals from the district court's order and judgment dismissing his regulatory-taking and equal-protection claims following a court trial after remand from the Minnesota Supreme Court. We affirm.

FACTS

This appeal arises from a more-than-a-decade-long contention between appellant and respondents Credit River Township and Scott County concerning approximately 100 acres of undeveloped land. This is the fourth appeal arising from the dispute. Because the facts are extensively discussed in earlier decisions, we address them only briefly. See *Zweber v. Credit River Township*, 882 N.W.2d 605 (Minn. 2016); *Zweber v. Credit River Township*, No. A14-0893, 2015 WL 1128985, at *2 (Minn. App. Mar. 16, 2015), *rev'd*, 882 N.W.2d 605 (Minn. 2016); *Zweber v. Scott Cty. Bd. of Comm'rs*, No. A09-1990, 2010 WL 2733275, at *1 (Minn. App. July 13, 2010).

In 2001, appellant purchased the subject land in Credit River Township, Scott County. He paid \$1,050,000 for it. He first intended to develop a golf course, but when the golf-course market became unfavorable, he sought to subdivide the land for residential single-family homes because the real-estate market was “red hot.” In 2003, appellant contacted the county to develop a plan for the subdivision. Appellant and county officials discussed where to locate roads within the subdivision and how to stem the flow of traffic into adjoining neighborhoods. In 2006, appellant submitted his preliminary plat application for his home-site development, Liberty Creek, to the county.

The property next to appellant’s land was owned by Laurent Company. This land was also being developed for residential-home use and was identified as the “Territory” development. After appellant submitted his proposal to develop Liberty Creek, Laurent contacted the county with criticisms of the Liberty Creek plan. Laurent demanded that

roads be moved, that appellant develop the property from west to east, and that a connection from appellant's property to Territory be eliminated. Laurent also complained that appellant's development would cause a substantial increase in traffic to the detriment of Territory.

Shortly thereafter, the county informed appellant that he would have to change a road connection to ease the flow of traffic. Months later, the county planning commission recommended approval of appellant's amended plat on the condition that his development occur in phases. The county later imposed another condition that required appellant to construct a barricade between Liberty Creek and Territory that was to remain in place until Liberty Creek was 90% complete.

The county eventually approved appellant's proposed development plan, but conditioned approval on appellant complying with the barricading and phasing conditions. Appellant did not proceed with the Liberty Creek development. Instead, he proposed a re-subdivision called Estates of Liberty Creek. The county denied that proposal, and appellant challenged the denial by a certiorari appeal. *Zweber*, No. A09-1990, 2010 WL 2733275, at *8 (reversing and remanding board's denial of appellant's subdivision application because the proposal met all applicable and enforceable standards in the county's ordinance). Following that appeal, appellant and respondents discussed various plans of moving forward until the negotiations reached an impasse.

In 2012, appellant sought mandamus relief in district court, alleging that the restrictions imposed by the county as conditions of his Liberty Creek subdivision amounted

to an unconstitutional taking of property without just compensation under the United States and Minnesota Constitutions and 42 U.S.C. § 1983. Appellant amended his complaint in 2013 and sought money damages, claiming that (1) the county took his property without just compensation by placing conditions on the approval of his plat application; and (2) the county's treatment of him from 2006 to 2012, the period during which it considered his various applications, violated his equal-protection rights. *Zweber*, 882 N.W.2d at 607. Appellant also sought a writ of mandamus ordering the county to commence inverse-condemnation proceedings to compensate him for the taking. *Id.*

Following the district court's denial of respondents' summary-judgment motion, which allowed appellant's constitutional claims to proceed in district court, respondents perfected an interlocutory appeal, arguing that the district court erred in denying summary judgment and in concluding that it had subject-matter jurisdiction over appellant's constitutional claims. Those appeals are explained further in both *Zweber* opinions. See *Zweber*, 882 N.W.2d at 607; *Zweber*, A14-0893, 2015 WL 1128985, at *2 (reversing district court's determination that it had subject-matter jurisdiction to address appellant's constitutional claims because those claims were not separate and distinct, and because plat approval subject to conditions is a quasi-judicial action, reviewable only by certiorari appeal within 60 days).

The Minnesota Supreme Court granted review and held that a district court has subject-matter jurisdiction over a property owner's takings and equal-protection claims under 42 U.S.C. § 1983, when neither claim requires an examination into the validity of

any quasi-judicial decisions made by a local government entity. *Zweber*, 882 N.W.2d at 606. The supreme court remanded the case to the district court for trial.

A three-day court trial was held in October 2017. In a written order after trial, the district court dismissed appellant's claims. Because respondents never took physical possession of appellant's land, the district court analyzed appellant's claim under the *Penn Central* regulatory-taking analysis. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978) (rejecting use of a set formula and stating that whether a regulatory taking has occurred depends on three factors: the economic impact of the regulation, reasonable investment-backed expectations, and the character of the governmental action).

The district court found that appellant had failed to show that the conditions imposed on his proposed subdivision caused the complained-of losses, and further found that appellant failed to prove that he was deprived of all reasonable use of the property. Therefore, the first *Penn Central* factor weighed against appellant's takings claim. As to the second factor, the district court found that respondents repeatedly interfered with appellant's investment-backed expectations and that, as a result, appellant was prevented from developing the project as he desired. As to the third factor, the character of the governmental action, the district court found that respondents "targeted" appellant's property and imposed Laurent's demands without examining their legitimacy or purpose. The district court concluded that, because "the connection between [respondents'] actions and the property's loss in value is too attenuated," appellant's regulatory-takings claim fail.

Similar to its analysis of appellant’s takings claim, the district court also determined that appellant’s equal-protection claim failed because appellant “failed to prove he was similarly situated to other developers,” and failed to “connect his damages to [respondents’] conduct.”

After trial, appellant moved the district court for amended findings of fact, conclusions of law and order and, in the alternative, for a new trial. Along with other issues, appellant asserted that the district court erred by failing to consider his takings claims under the *McShane* analysis for claims of taking that are based on the existence of a governmental enterprise, and that the district court also erred when determining the economic impact of the taking. The district court denied appellant’s posttrial motions.

This appeal followed.

D E C I S I O N

Appellant argues that the district court erred by determining that respondents’ demands for revised design, phasing, and barricading did not amount to a compensable regulatory taking and that it erred in rejecting appellant’s equal-protection claim. In their cross-appeal, respondents assert that, because appellant knowingly and voluntarily signed a master development agreement (MDA) after receiving advice and input from his professional team, which included an attorney, he waived his constitutional claims.¹

¹ At oral argument, respondents agreed that we need reach the waiver issue only if appellant prevails in his appeal. Because we resolve this appeal based on our conclusion that the district court did not clearly err and did not abuse its discretion concerning appellant’s takings and equal-protection claims, we do not address respondents’ additional argument.

“In an appeal from a bench trial, we do not reconcile conflicting evidence. We give the district court’s factual findings great deference and do not set them aside unless clearly erroneous.” *Porch v. General Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002) (citation omitted), *review denied* (Minn. Jun. 26, 2002). A district court’s findings of fact may be set aside only if a reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Minn. Pub. Interest Research Grp. v. White Bear Rod & Gun Club*, 257 N.W.2d 762, 782-83 (Minn. 1997). When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the district court discretion in its ultimate conclusions, and we review those conclusions for abuse of discretion. *Porch*, 642 N.W.2d at 477. We do not defer to the district court’s legal analysis. *Id.*

I. Because the record supports the district court’s factual finding that appellant failed to prove that respondents’ conditions caused the complained-of property-value decrease, the district court did not reversibly err by determining that a regulatory taking had not occurred.

Appellant argues that the district court erred both by failing to apply the *McShane* enterprise analysis to his claims and by determining that respondents’ regulations did not amount to a compensable regulatory taking. Respondents argue that appellant failed to preserve the issue of consideration of the *McShane* analysis because it was not raised in his posttrial brief and was argued only in appellant’s posttrial motions.

Whether a governmental entity’s action constitutes a taking is a question of law that is reviewed de novo. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007). The Minnesota Constitution provides that “[p]rivate property shall not be taken,

destroyed or damaged for public use without just compensation.” Minn. Const. art. I, § 13. Under the Fifth Amendment of the United States Constitution, the government takes property when it ousts an owner from his property or when its regulation of the property is “so onerous that its effect is tantamount to a direct appropriation or ouster.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 2081 (2005). Through a regulatory taking, the government need not directly appropriate or physically invade private property. *Wensmann*, 734 N.W.2d at 632 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414-15, 43 S. Ct. 158, 159-60 (1922)). The Supreme Court has rejected using a “set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government” and the determination of whether a taking has occurred is highly fact-specific, depending on the particular circumstances underlying each case. *Wensmann*, 734 N.W.2d at 632 (quotation and citation omitted).

Because the takings clause in the Minnesota Constitution is comparable to that of the United States Constitution, the Minnesota Supreme Court often relies on United States Supreme Court decisions—and on *Penn Central*, in particular—in interpreting Minnesota’s takings clause. *Id.* at 631-32. In analyzing regulatory-takings claims under the Minnesota Constitution, Minnesota courts have often applied and balanced the factors established by the Supreme Court in *Penn Central*: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *See*

DeCook v. Rochester Int’l Airport Joint Zoning Bd., 796 N.W.2d 299, 304 (Minn. 2011) (citing *Penn Cent. Transp. Co.*, 438 U.S. 104, 98 S. Ct. 2646).

In Minnesota, *Penn Central* is not the only test used to decide regulatory-takings cases. In regulatory-taking-zoning cases, Minnesota courts employ one of two tests to review a regulation that interferes with private property—the enterprise test or the arbitration test. *DeCook*, 796 N.W.2d at 306; *McShane v. City of Faribault*, 292 N.W.2d 253, 257-58 (Minn. 1980); *Concept Props., LLP v. City of Minnetrista*, 694 N.W.2d 804, 822-23 (Minn. App. 2005), *review denied* (Min. Jul. 19, 2005); *cf. Johnson v. City of Minneapolis*, 667 N.W.2d 109, 115-16 (Minn. 2003) (declining to apply *Penn Central* analysis to takings claims where facts of the case presented a unique situation, and concluding that, under the Minnesota Constitution, cumulative effect of city’s actions substantially interfered with appellants’ property rights).

The enterprise analysis is triggered only when a specific governmental enterprise takes an effective easement on private property, causing a substantial diminution in the property’s value. *Concept Props.*, 694 N.W.2d at 822-23 (citing *Thompson v. City of Red Wing*, 455 N.W.2d 512, 517 (Minn. App. 1990), *review denied* (Minn. June 6, 1990)). In both *McShane* and *DeCook*, the supreme court concluded that a regulatory taking had occurred where the regulations imposed on the subject parcel of land were for the sole purpose of a governmental enterprise—an airport. *See DeCook*, 796 N.W.2d at 306; *McShane*, 292 N.W.2d at 258. In those cases, the Minnesota Supreme Court concluded that a regulatory taking occurred because the ordinances caused a substantial diminution

in the value of private property. The *McShane/DeCook* analysis has been applied only in contexts where the complained-of regulation is one intended to benefit a governmental enterprise. This is not such a case.

Here, appellant's argument is that the district court should have applied the *McShane* enterprise-takings analysis because Laurent and the county were engaged in a "joint enterprise" and the conditions imposed by the county benefitted that enterprise.

Appellant did not assert that *McShane* applied until after trial when he moved the district court for amended findings and a new trial. Having not argued the theory of an enterprise-regulatory taking at trial, and having produced no evidence at trial to support such an argument, appellant is foreclosed from now adopting that theory.² See *Minn. Mut. Fire & Cas. Co. v. Retrum*, 456 N.W.2d 719, 723 (Minn. App. 1990); *Ness v. Ylvisaker*, 412 N.W.2d 769, 769-70 (Minn. App. 1987). We have stated that "a party may not raise an issue for the first time in a new-trial motion." *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 553 (Minn. App. 2007) (concluding that challenge to judicial notice was raised too late, where party knew about motion but did not contest the judicial-notice issue until after

² Appellant seems to argue that, because he brought his takings claims under both the U.S. and the Minnesota Constitutions, the district court should have analyzed his claims under *McShane* because the Minnesota Constitution provides broader protection. But appellant's generalized assertion of takings claims under the Minnesota Constitution did not adequately preserve his more specific *McShane* argument. See *Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (upholding district court's denial of a new-trial motion based on legal theory that had not been raised at an earlier stage, where, although general pleadings could have possibly made a claim based on an ejectment theory, complaint did not contain any language that would have alerted anyone to ejectment claim and plaintiff did not present the argument during trial).

trial) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)). We conclude that appellant failed to preserve this issue.

But even if we were to assume that the enterprise argument was preserved by a reference to *DeCook* in appellant's posttrial briefing, the record supports the district court's posttrial reasoning that appellant's failure to show a connection between the governmental regulation and his claimed damages would defeat a *McShane* argument in any event. See *DeCook*, 796 N.W.2d at 307; *McShane*, 292 N.W.2d at 257-58 (explaining that the ordinances at issue must have caused the substantial diminution in property value in order for there to be a compensable regulatory taking under the enterprise-taking theory).

The expert who testified for appellant at trial prepared three valuation reports and testified concerning those reports. But none of those reports analyze or consider the effect that any of the conditions imposed by the county have on the property's value. Each is an appraisal of the property at a specified point in time. None opine concerning the connection, if any, between the claimed damages and the county-imposed conditions. On cross-examination, appellant's valuation expert testified that he had "never been involved in evaluating damages in a regulatory takings case" and that his opinions did not concern any regulatory-taking issues. He testified further that he was not provided at the time of his appraisals with the conditions that the county imposed on the preliminary plat plan and that he had never heard of any conditions until his deposition. He testified that he did not evaluate the economic impact of those conditions in preparing his appraisal reports.

Appellant's trial proof was limited to evidence of the difference between the expert's opinion of the market value of appellant's property before and after the conditions. The expert's market-value opinions were that the property was worth \$5,269,300 on September 5, 2006; \$2,438,900 on October 13, 2009; and \$2,347,900 on October 20, 2011. But the district court found as a fact that these values failed to demonstrate that the differences in the value of the property over time were caused by the conditions imposed. In order to proceed under *McShane*, appellant needed to show that the conditions were related to his claimed damages. And the record supports the district court's finding that appellant failed to connect the conditions with the decrease in the property's value.

Because appellant waived asserting *McShane* at trial and because the record supports the district court's finding that appellant failed to prove that the conditions caused his claimed damages, the district court properly analyzed appellant's claims under *Penn Central* and not under *McShane/DeCook*.

Concerning the district court's analysis of the *Penn Central* factors, appellant takes issue with only the district court's analysis of the first factor. He argues that the district court's analysis was improper because the preponderance of the evidence established that the conditions imposed by respondents on his development plans caused his property to suffer a substantial diminution in value.

The first *Penn Central* factor is the impact of the zoning ordinance on appellant's property interests. *Interstate Cos., Inc. v. City of Bloomington*, 790 N.W.2d 409, 414 (Minn. App. 2010), review granted (Minn. Jan. 26, 2011) and order granting review

vacated (Minn. Apr. 27, 2011). “We look first at the economic impact of the city’s denial of the comprehensive plan amendment.” *Wensmann*, 734 N.W.2d at 634. The inquiry under this factor turns in large part, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests. *Id.* Where the government chooses to maintain an existing comprehensive plan designation, courts should determine whether the government’s decision leaves any reasonable, economically viable use of the property. *Id.* at 635.

In determining the economic impact of the conditions, the district court analyzed both (1) the value before and after the conditions and (2) whether there was any reasonable, economically viable use of the property left. The district court noted that, although *Wensmann* rejected using the fair-market value before and after the regulation in determining the economic impact, because appellant had argued that this was the correct approach, it would address the value of appellant’s property before and after the conditions.

Appellant’s argument that the proper inquiry as to the economic impact is to compare the value of the property before and after the conditions appears to be based on a portion of *Wensmann* where the supreme court, responding to the parties’ arguments, noted that “[t]he city argues that the economic impact should be measured by comparing the value of the property as a golf course before and after the denial of the comprehensive plan.” *Id.* at 634. The supreme court rejected that analysis. *Id.* The court concluded that, “the most appropriate method in cases like this, where the government chooses to maintain

an existing comprehensive plan designation, is to determine whether the [regulation or ordinance] leaves any reasonable, economically viable use of the property.” *Id.* at 635.

At trial, appellant claimed that he had no reasonable use for the property because, after his original plan to construct a golf-course fizzled, he decided that using the land for farming “wasn’t an option.” Appellant claimed that the land could no longer be used for farming because he “paid too much” for it to be used as farmland. “Farming into perpetuity at that price is not an option.” But farmland is what the property was when appellant acquired it. The district court found that appellant “presented very little evidence on the [reasonable use] issue” and that there was “some cursory discussion by [appellant] that neither a golf course, nor farm, were viable uses for the land” and ultimately concluded that the evidence at trial showed that reasonable uses of the property remained. The district court properly analyzed appellant’s regulatory-taking claim, and its findings are supported by the record.

Moreover, and as with the *McShane/DeCook* analysis, the district court found as fact that appellant had failed to prove that the changes in his property’s appraised value over time were caused by the conditions imposed. The first *Penn Central* factor considers whether there has been a substantial diminution in value caused by the regulations. The record supports the district court’s conclusion that appellant had failed to prove such a causal connection.

The district court’s determination that appellant’s claim of damage is based on the “extraordinary assumption” that all of the lots were fully developed and sold in a single

transaction and that there is “no evidence of the property’s value with the conditions or their effect on the property’s value” is supported by the record.

Because the record supports the district court’s findings that appellant failed to show that he was deprived of all reasonable use of the property and failed to prove that the decrease in the property’s value over time was caused by the conditions, the district court acted within its discretion in concluding that appellant had failed to demonstrate a regulatory taking under *Penn Central*. It also acted within its discretion in denying appellant’s posttrial motions. See *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018) (appellate courts review a district court’s decision to grant or deny a new trial for an abuse of discretion, and the district court may grant a new trial where errors of law occurred at the trial or when the decision is not justified by the evidence or is contrary to law).

II. Because appellant cannot show that the conditions were attributable to the alleged disparate treatment, the district court did not reversibly err in denying appellant’s equal-protection claim.

Appellant also argues that the district court erred when it determined that appellant’s equal-protection rights were not violated. He contends that “[a]ll developers, regardless of the size of the development are entitled to have the ordinances applied in the same manner” and that the record is replete with evidence demonstrating that respondents applied their ordinances differently.

We review equal-protection claims de novo. *Thul v. State*, 657 N.W.2d 611, 616 (Minn. App. 2003), review denied (Minn. May 28, 2003). The United States and

Minnesota Constitutions guarantee citizens equal protection of the laws. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 2. A zoning ordinance must operate uniformly on those similarly situated. *Nw. Coll. v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979). As stated, appellate courts review a district court’s decision to grant or deny a new trial for an abuse of discretion. *Christie*, 911 N.W.2d at 838.

Generally, in bringing an equal-protection challenge, a person must identify a class of which he is a member, but the equal-protection clause provides a cause of action for a class of one. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074 (2000). To prevail in a class-of-one claim, a plaintiff must show that the government (1) intentionally treated the plaintiff differently from others who are similarly situated, and (2) that there is no rational basis for the difference in treatment. *Id.*

An equal-protection challenge requires an initial showing that “similarly situated persons have been treated differently.” *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) (quotation omitted). In determining whether persons are similarly situated, the focus is on “whether they are alike in all relevant respects.” *Id.* at 522. Appellate courts “routinely reject equal-protection claims when a party cannot establish that he or she is similarly situated to those whom they contend are being treated differently.” *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 656 (Minn. 2012) (quotation omitted).

The district court determined in its first order that, even if appellant were treated differently than similarly situated developers, “like the regulatory taking claim, [appellant’s] damages are problematic.” The district court noted that appellant’s claim

“asks this Court to infer that the property’s loss in value is attributable solely to the alleged disparate treatment.” But it found that appellant’s “own expert’s valuations show that this decline in value occurred regardless of any action by [respondents].” The record supports the district court’s conclusion. Appellant’s equal-protection claim fails for the same reasons as his regulatory takings claims. The record supports the district court’s finding that appellant failed to show that the county’s conditions caused the decrease in his land’s value.³

Affirmed.

³ Similarly, in its order addressing appellant’s motion for amended findings and a new trial, the district court determined that appellant’s claims fail because appellant “failed to demonstrate that he was similarly situated to any other developer.” But because we agree with the district court that appellant failed to show that the conditions were attributable to the alleged disparate treatment, we do not address whether appellant is similarly situated to other developers.