STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

WHITMAN FORD,
a Michigan corporation,

Plaintiff,

v.

File No. 09-27523-CH
Hon. Joseph A. Costello, Jr.

TOWNSHIP OF BEDFORD,
a municipal corporation,

Defendant.
_____/

Thomas M. Hanson (P62725)
DYKEMA GOSSETT PLLC
Attorney for Plaintiff
1717 Main Street, Ste 4000
Dallas, TX 75201
(214) 462-6420

Philip D. Goldsmith (P37650)
LENNARD GRAHAM & GOLDSMITH, P.L.C.
Attorneys for Defendant
222 Washington Street
Monroe, Michigan 48161
(734) 242-9500
_____/

ORDER OF JUDGMENT

At a session of said Court, in the
City of Monroe, State of Michigan,
On the 28th day of January, 2011.

Present: Hon. Joseph A. Costello, Jr., Circuit Court Judge.

This matter having come before the court on the Complaint of the Plaintiff seeking relief against the Defendant, Township of Bedford; the Plaintiff, Whitman Ford, a Michigan corporation, appearing by and through its attorney, Thomas M. Hanson; the Defendant, Township of Bedford, a municipal corporation, having appeared by and

through its attorney, Philip D. Goldsmith; a bench trial having been conducted, oral argument having been presented; and the Court being advised in the premises;

IT IS HEREBY ORDERED that the attached Memorandum of Law is hereby incorporated by reference.

IT IS FURTHER ORDERED that based upon said Memorandum of Law, Judgment shall enter in favor of the Plaintiff. The referendum action is hereby vacated, and the Township Board is directed to reinstate the reclassification of the 5 lots as it had previously approved on December 2, 2008 (Plaintiff's Exhibit 11). Furthermore, the only viable application pending for Lot 6 is the Plaintiff's request, which is hereby granted for the reasons stated in the following decision.

Date: January 28, 2011

Hon. Joseph A. Costello, Jr. (P33769)
38th Circuit Court
Monroe, Michigan

MEMORANDUM OF LAW

I. Chronology and Statement of Facts.

On February 2, 2007, this Court entered a decision against the Plaintiff, Whitman Ford, in file #04-18604-CH. The instant case addresses a different application to rezone the subject property located at, and surrounding, 7555 Lewis Avenue, Temperance, Michigan. This Court does not intend on substituting findings from the prior decision in resolving the instant case. It would be error for any interested party to cite to the prior ruling in commenting on the current decision, as the Court will base the decision on the evidence adduced at the hearing held in January 2011. It may very well be that the Court will cite to case law also found in the February 2007 decision, but it will be based upon whether the same case law still applies today.

On January 13, 2011, the bench trial in the instant case was completed and this written decision follows.[1] The Court acknowledges the written trial briefs of the attorneys, and commends both attorneys for a clear and succinct presentation of their respective cases. The facts of the case can be gleaned from the opposing trial briefs, and to the extent necessary, the facts will be cited within the balance of the decision herein. The following decision is based upon the Court's copious notes in this matter, the various exhibits that were admitted into evidence, and the interpretation and application of the applicable law on this issue.

Following the Plaintiff's case-in-chief on January 12, 2011, the Defendant presented an oral Motion for Involuntary Dismissal pursuant to MCR 2.504(B)(2). It was denied for reasons as stated on the record.

II. Summary of the Evidence.

The following represents a summary of the evidence presented at trial.

Mr. Jon Whitman

Mr. Jon Whitman is the owner and President of "Whitman Ford." He sought to have the subject property rezoned in preparation to sell it. He seeks to rezone a number

[1] The Plaintiff dropped his claim regarding "exclusionary zoning."

of parcels as reflected in Plaintiff's Exhibit 46, from its current zoning as reflected in the Defendant's site map. (Plaintiff's Exhibit 10, page 6). In essence the two lots to the north and south of the business known as "Whitman Ford" would be rezoned from C-2 (Shopping Center Business District, Article XII, Section 400.1200, et seq.; Plaintiff's Exhibit 28) to a C-3 classification (General Business District, Article XIII, Section 400.1300, et seq.; Plaintiff's Exhibit 28), and the lots immediately adjacent to the Indian Acres residential subdivision (west line of the Whitman property) would be rezoned to a "Professional Business Office" (PBO; Article X, Section 400.1000, et seq.; Plaintiff's Exhibit 28), "Multiple Family Residential" (RM-2), and "Elderly Housing" (RME), starting from Sterns Road (southwest section of the property and proceeding to the northwest section of the property). This would leave a center section of over 8 acres to be rezoned from its current "Single Family Residential" (R-2A) classification to C-2. Thereafter, the eastern portion of the subject property would be "local commercial" and the western portion would reflect a "mixed residential/office/commercial" area. (See Plaintiff's Exhibit 26, page 95). He indicated that a "number of businesses" were interested in the site but that no formal discussions had been made with Wal-Mart.

Mr. Whitman lamented about his prior unsuccessful attempts to meet with the neighbors in the area, the boycotts against him, the negative letters sent to the Ford Corporation, and a website indicating that his business was "for sale." He believed that a citizens watchdog group, named "Bedford Watch," was spearheading an effort to "stop Wal-Mart." He had entered into an option to purchase with Rudolph-Libbey in 2007, but by the spring of 2008 the company was convinced that the property would not be rezoned and the option was cancelled.

He hired the DuBose & Associates (DuBose) engineering firm in 2008 to draft the proposed site (Plaintiff's Exhibits 1 and 46) drawing from the data and court decision in Whitman Ford v. Township of Bedford, file #04-18604-CH. He did not hire a planning consultant, nor did he conduct a market study. Instead, he reviewed various documents from the earlier court case and highlighted portions of the prior testimony of Paul

LeBlanc and Julie Johnston[2] in revising his current proposal. (Plaintiff's Exhibit 44). He also reviewed the prior deposition testimony of attorney Philip Goldsmith[3] (Plaintiff's Exhibit 41) in order to "propose exactly what [the township] wanted."

Mr. Whitman submitted the proposed plans to Mr. Dennis Jenkins, the Defendant's Coordinator for Community Development and Planning. Mr. Jenkins stated in a letter dated June 19, 2008, that other than issues about a road[4] and setbacks, he "found no other issues that need to be addressed at this point." (Plaintiff's Exhibits 2 and 46). The revised plan increased the distance between the center parcel and the Indian Acres subdivision from 250 feet to 286 feet (Plaintiff's Exhibit 3). In fact, the Plaintiff indicated he would extend the buffer to 315 feet if requested to do so.[5]

DuBose completed an application for rezoning and Mr. Whitman signed it (Plaintiff's Exhibit 4). Due to the crops being grown on the vacant property at the time, he would not give permission for the township to inspect the property. By August 5, 2008, the Defendant's planning consultant, Wade Trim & Associates (Wade Trim), through its employee, Adam Young, recommended adoption of the proposed rezoning plan indicating that it coincided with the township's Master Plan with one exception, to wit: the C-2 designation for Lot 5, on Sterns Road should remain. (Plaintiff's Exhibit 5; specifically page 6 for the "exception").[6] By August 13, 2008, Mr. Young sent a second letter indicating that the Plaintiff agreed to the modification and the foregoing parcel would be left "as is." (Plaintiff's Exhibits 7 and 8). A public hearing was held on September 10, 2008. (Plaintiff's Exhibit 9). In the end, the Bedford Township Planning Commission (BTPC) approved the proposal except for the center parcel "because it does not totally conform with the Master Plan and it would be too close and intense to the RME and RM-2 residential areas." (Plaintiff's Exhibit 9, page 14).[7]

---

[2] Mr. LeBlanc testified in both cases as an expert in the area of "Planning" on behalf of the Defendant. Ms. Johnston was a planning consultant for Wade Trim & Associates, the Defendant's professional planning consultants.

[3] Defendant's trial counsel in the instant action.

[4] The RM2 and RME proposed development would require the installation of a road, as they would otherwise be landlocked.

[5] Mr. Dennis Jenkins would later testify that the installation of a road to service the RME and RM2 lots would lengthen the buffer between the commercial zone and the Indian Acres subdivision.

[6] As will be noted later in this decision at page 7, Mr. Dennis Jenkins agreed with this recommendation.

[7] As will be noted later in this decision at page 12, Mr. Adam Young disagreed with this conclusion indicating it was not a "legitimate basis" to deny the request.

One month after the BTPC action the Monroe County Planning Commission issued a letter and report recommending approval of the proposed rezoning, stating,

> "It could be argued that the proposed rezoning plan is inconsistent with the local plan due to the fact that the plan calls for a much wider Mixed Residential/Office/Commercial district than that being proposed, and that a wider district would do a better job of buffering the existing residential areas from impacts of an intensely developed C-3 district along Lewis Avenue. However, it could also be argued that, taken together, the proposed RME, PBO, RM2 and C-2 districts, which occupy the area of the plan designated for Mixed residential, accomplished exactly what is intended by the district." (Plaintiff's Exhibit 10, pages 4-5).[8]

The Bedford Township Board took action on the proposal on December 2, 2008. Despite the approval of the Monroe County Planning Commission (Plaintiff's Exhibit 10), the Board virtually adopted the finding of the BTPC, including the denial to rezone the center parcel stating,

> ". . . it is inconsistent with the master plan which provides for residential use and possible mixed office or local business use and because more of a buffer and transition is needed between the residential zoning on the west to general commercial zoning and uses on the east. While it is recognized that the existing R-2A zoning classification does not provide the desired transition from residential uses to commercial uses, neither does the proposed C-2 zoning. Rezoning to a less intense transitional use would better fit this parcel." (Plaintiff's Exhibit 11, page 4).[9]

The Plaintiff had been aware all along that a proactive group of citizens known as, "Bedford Watch," was opposed to any rezoning of the subject property, and they were successful in overturning the Board's actions by way of a public referendum. (Plaintiff's Exhibits 18, 19, 31, and 40).[10]

---

[8] The summary of the report appears to erroneously report a "deep transitional zone" of 200 feet, although other evidence shows it to be greater, to wit: 250-286 feet deep; See Plaintiff's Exhibit 10, page 5 as compared to Plaintiff's Exhibit 3.

[9] This Court noted the Board's decision to disregard the recommendations of the various planners and planning commissions in denying the Defendant's Motion for Involuntary Dismissal at the close of the Plaintiff's proofs, for reasons as stated on the record.

[10] MCL 125.3402. Although the Plaintiff contends that the Township should have made an effort to confront the citizens' group and address their alleged misleading campaign, this Court found that the Township properly refrained from doing so.

Prior to the referendum, the Township Supervisor, Mr. Walt Wilburn, signed and filed an application to rezone the center parcel to PBO in recognition that the R-2A classification did not comply with the Master Plan. As a result of the referendum the Board decided that the issue was moot, and withdrew the application. Mr. Whitman claimed he was unaware of the Board's application until receiving notice as an interested party inasmuch as he had property rights within 500 feet of the subject property affected by the application. Mr. Adam Young issued a letter on January 9, 2009, supporting the proposal. (Plaintiff's Exhibit 14).[11] As a result of the referendum the subject property remains zoned as "it has been for 20 years." (Plaintiff's Exhibit 29).

Mr. Dennis Jenkins

Mr. Dennis Jenkins is the Defendant's Planning and Zoning Coordinator. He agreed that Lewis Avenue is the "longest stretch of 5-miles of road" and the "only 'stand-alone' commercial designation." (Plaintiff's Exhibit 26). Citing to the Master Plan he acknowledged the Defendant's "local commercial" definition (Plaintiff's Exhibit 26, page 95) and stated that C-1 (Local Business District, Article XI, Section 400.1100 et seq.; Plaintiff's Exhibit 28) and C-2 are compatible with the "local commercial" definition, although more so for C-1. He did not recall that anyone had asked to demonstrate a "market need."[12] He indicated that, "sewer and water would be considered for rezoning, but no other infrastructure." He acknowledged that rezoning applications and site plan applications had significantly "fallen off" in the township and that there had been "very little" development in recent years.

Mr. Jenkins agreed with the position of Wade Trim as stated in their letter dated August 5, 2008 (Plaintiff's Exhibit 5) recommending the Plaintiff's proposal with the exception of "Lot 5." The Plaintiff accepted this recommendation and dropped his request to rezone Lot 5 as C-3. (Plaintiff's Exhibit 8). He also agreed with the recommendations of the Monroe County Planning Commission. (Plaintiff's Exhibit 10, see page 4).

---

[11] It is noted that the Plaintiff questioned why the letter predated the application, which was dated January 21, 2009).

[12] Mr. Jenkins acknowledged the 2006 Monroe County Road Commission's traffic study in anticipation of a "big box" store. (Plaintiff's Exhibit 30).

He acknowledged the Board's action on December 2, 2008 (Plaintiff's Exhibit 11), and that it left the center parcel in need of further action. He further noted the Board proceeded with its own application without resorting to any planning commission, a feasibility study, or market need analysis. In the past, if the Board received any objection from a property owner regarding a township application for rezoning of their property, the application would be dropped.[13] He also testified that he did not know of any other rezoning application where the township planner and the Monroe County Planning Commission recommended "approval" only to have the township deny the request. Mr. Jenkins noted that Mr. Young's letter indicated that a PBO classification, as requested in the Township's application for the center parcel, would comply with the Master Plan, as would C-2. (Plaintiff's Exhibits 12 and 13). He also acknowledged that the Board dropped the application in light of the referendum[14] (Plaintiff's Exhibit 20) leaving no transition between the original C-2 parcels and the R-2A center parcel.

Mr. Jenkins also recalled that since 1973 the Plaintiff had requested 15 rezoning classifications and noted 11 had been approved. One of the four denials includes the instant application. He also noted that if the Plaintiff were to prevail the "property could support a structure of 200,000 square feet." He believes that Article X (PBO) does not permit retail uses, but would permit commercial uses. (Plaintiff's Exhibits 26 at page 95, and 28). Finally, he stated, "Rezoning should not be denied based on limits to size." (See Plaintiff's Exhibit 26).

Mr. Walt Wilburn

Mr. Walt Wilburn is the Supervisor for Bedford Township. He acknowledged that Bedford Township had been "hit hard by the recession" and that "revenues were down" through the loss of businesses and little economic development. He stated that the "Local Commercial" designation is the "only stand-alone commercial designation" listed in the Master Plan. (Plaintiff's exhibit 26, page 95). He further indicated that "local commercial" within the definition of "Mixed Residential/Office/Commercial" coincides,

[13] Although Mr. Jenkins claimed that Mr. Whitman had not objected, Defendant's Exhibit Q reflects that his attorney did lodge an objection at the public meeting on January 20, 2009. Mr. Walt Wilburn also testified that the Plaintiff did object to the Township's application for rezoning.

[14] The citizens group known as "Bedford Watch" submitted an amendment to No. 44A, a zoning ordinance amendment. The Township Board did not adopt it, nor was it supported by Wade Trim. (Plaintiff's Exhibits 21, 22, and 23).

and that "C-1, C-2, and C-3 would all fit" and permit a large scale retail store. Referring to Mr. Young's letter and report dated August 13, 2008, he disagreed with the following statement,

> "The proposed rezoning would provide an effective land use transition from the existing single-family residential subdivision to the west to the more intensive commercial portions of the site along Lewis Avenue." (Plaintiff's Exhibit 7, page 5).

Mr. Wilburn indicated that he "did not want to see" any residential property next to commercial property as it "is not transitional." He still believes that the approved rezoning of the subject property is correct and that the proposed rezoning of the center parcel (parcel 6) was properly denied. He would like to see more of a buffer between the RME and RM2 lots.[15] He recognized that the center parcel created an island (Plaintiff's Exhibit 11) and sought to rezone it to PBO (a "win-win" for everyone) but dropped the application (Plaintiff's Exhibits 13 and 46) in light of the expected lawsuit and the intervening referendum. He had focused on the zoning issue and not the possibility of a big box store (i.e., Wal-Mart).

Mr. David Birchler

Mr. David Birchler was qualified as an expert in the area of "planning." (Plaintiff's Exhibit 47). He opined that the Master Plan's designation of "Mixed Residential/Office/Commercial" requires a "commercial" element. He stated that "mixed use" puts "uses together in a supportive fashion." He would find that the Plaintiff's proposal "met the Master Plan, and met the 'mixed use' criteria." He further opined that in reference to Lot 6, a C-2 classification would be the "best plan to develop the [R2-A] property," while a residential and PBO area [would] not comply with the Master Plan." In his opinion the C-2 would be the best plan to develop the property as opposed to individual small businesses with no relation to each other. The C-2 would require "everything to be planned" with common parking and landscaping. He believes that "as a whole," PBO ignores the commercial element that is supposed to be part of the "mix".

[15] The Monroe County Planning Commission recommendation as stated in the alternative raised some questions as to whether the reference of a buffer with the "residential" area was the currently existing subdivision, or the proposed rezoning of the RME and RM2 lots. (Plaintiff's Exhibit 10, pages 4-5). The report at page 5 appears to be in error regarding the depth of "200 feet" as the buffer zone when compared to Plaintiff's Exhibits 1 and 46, which clearly show a buffer of 286 feet constituting the depth of the RME and RM2 parcels.

He stated that the proposed PBO, or C-3 parcel(s) along Lewis Avenue are "not designed to meet the day-to-day needs" of the township as outlined in the "mixed use" district. He opined that the Plaintiff's proposal is the "best example in Bedford" in relation to the Master Plan, even more so than the lot directly across the street (east side of Lewis Avenue). He discounted a C-1 classification for Lot 6 stating it would "provide some services, but lacks a 'planned aspect'."

Mr. Birchler contends that the senior housing and multi-dwelling zone (RME and RM2) is part of the "transition," and that it would be a "good transition to the adjacent single homes" in the Indian Acres subdivision. He believes that a large retail store such as Lowe's Lumber next to a residential property is not a problem given the ordinance's "triggers" for berms. A depth of 286 feet is "deep enough" to be developed as proposed, with transitional use in the future and would create a significant physical separation. The property as currently zoned (Lot 6 as R-2A) "does not incorporate a 'mixed use' concept of the Master Plan." He stated that C-3 next to R-2A is "not preferred although it appears elsewhere in the township."

He agrees with Mr. Young's report (Plaintiff's Exhibit 7, see page 5) and that the Plaintiff's proposal "advances compact development." He further "totally agrees" with Mr. Young's conclusion,

> "The rezoning of the subject site would allow for a planned and compact mixed use residential, office, and commercial development at a strategic location, representing an improvement to the vicinity and Township as a whole." (Plaintiff's Exhibit 7, page 6, item 4).

He disagreed with the contentions of the "Bedford Watch" materials that a large retail store would be detrimental to property values and would destroy locally owned businesses. He also disagreed with the Township Board's conclusion that Lot 6 was "too close and intense" to the proposed RME and RM2 residential areas. (See Plaintiff's Exhibit 9, page 14). He agreed that there was "some inconsistency" in the Master Plan but that the title of "Mixed Residential/Office/Commercial" was clear. (Plaintiff's Exhibit 26, page 95). The BTPC's actions on September 10, 2008 to deny the reclassification of Lot 6 (Plaintiff's Exhibit 9, page 14) left him to opine that the "logic escapes me." He acknowledged the apparent conflict in the conclusion by the Monroe County Planning

Commission (See Plaintiff's Exhibit 10, bottom of page 4) but agreed that the proposal was a "good mix of districts" pursuant to the Master Plan. In the end, he stated that not only did he disagree with the Township Board's conclusion as to Lot 6 (Plaintiff's Exhibit 11, page 4), but that "no more buffer is needed," and that there was "no reasonable basis for the denial" of the request.

On cross-examination Mr. Birchler agreed that there was not a market analysis to review. He agreed that "retail" is absent from the definition of "Mixed Residential/Office/Commercial," but that it was "embodied in the word 'commercial'." Although PBO "coupled with the other commercial uses on Lewis Avenue" would meet the needs of the Township, the Master Plan presented a transitional pattern of a "mix" of the three uses, to wit: residential, office, and commercial. He believes the issue of "compact development" causes the Township's PBO proposal "to fall apart" and that the Township had "split the concept." Since the Plaintiff's proposal was "planned to function together as a unit," the C-2 classification "would be perfect."

On redirect examination he opined that the Township's PBO proposal "introduced a new 'mixed' concept," but that the PBO "excludes any retail." He would find that the Township must have a "retail component in order to reach the 'mixed' use." Otherwise, "commercial" that excludes "retail" is not "commercial."

Mr. Adam Young

Mr. Adam Young of Wade Trim was qualified as an expert in the area of "planning," and serves the Township. He assisted another company employee, Julie Johnston, in handling the Plaintiff's proposal. He found the following:

- It complied with the Master Plan.
- It was compatible with the zoning in the area.
- It was capable of providing public services.
- It protected natural features (i.e., wetlands).
- It addressed local and county roads.
- It did not require a traffic study.
- The sentiment of local residents would be heard at a public hearing.

In consideration of the Master Plan's goals and objectives, he relied upon the "future land use map" and narrative, and the background demographic information.

(Plaintiff's Exhibit 26). He considered the Plaintiff's initial application (Plaintiff's Exhibit 4), the revision after his letter (i.e., dropping the request for the C-3 reclassification on Sterns Road; Plaintiff's Exhibits 5, 6 and 7)[16], and the Township's application for rezoning (Plaintiff's Exhibit 13). He reviewed this Court's opinion from the case of Whitman Ford v. Bedford Township, in file #04-18604-CH, and found it to be a "good learning experience." He otherwise "uniformly supported" the Plaintiff's application. He continues to support his earlier findings. (Plaintiff's Exhibit 7, see pages 5 and 6). He had no preference for a C-2 or C-3 classification up against a residential area especially since it would be adjacent to a "higher intensity use" such as the RME and RM2. He believed that a "market study was not only needed, but usually not submitted."

He was aware of the earlier court case and a proposal for a Wal-Mart store, and conducted his current review with the "possibility of a big box store." He believes there is no soil or wetland issues, and recognizes the intersection of Sterns Road and Lewis Avenue as a "major commercial node." He opined, "Retail businesses, personal service establishments, and restaurants, all fall within the term 'commercial'." He stated that the Master Plan recognizes the needs of the community and that Bedford Township can meet those needs. (See Plaintiff's Exhibit 26, pages 86, 89, and 95). He recognized that the BTPC went against his recommendations and he disagreed with their basis. (Plaintiff's Exhibit 9, page 14). He acknowledged that any ambiguous language of the Master Plan, even a good plan, would make it difficult to "totally conform."

He agreed with the recommendations of the Monroe County Planning Commission. (Plaintiff's Exhibit 10).[17] Although he agreed with the Township's actions as to five of the six parcels (Plaintiff's Exhibit 11), he disagreed with their findings as to Lot 6 based upon the application of a "mixed use." He believes that "additional buffering" could be handled by "landscaping" regardless if it was in relation to the proposed RME and RM2 parcels or the currently existing Indian Acres subdivision. He opined that the current R-2A neither provides an adequate buffer nor complies with the Master Plan, but that the proposed C-2 would provide such a buffer. Nonetheless, he believes that the proposed

[16] Mr. Young was concerned about the single-family residential lot immediately across the street, as it did not provide for transitional zoning.
[17] Mr. Young agreed that the report is unclear as to whether the need for an additional buffer referred to the RME and RM2 or the Indian Acres subdivision.

PBO would be in compliance with the Master Plan despite its noncompliance with the "mixed" element and no retail.[18]

On "direct" examination by the Defendant, Mr. Young left this Court with the impression that he backtracked a bit. It would appear that he also is of the opinion that the "mixed" category (Plaintiff's Exhibit 26, page 95) supports a "lower intensity" while the Plaintiff's proposal of a C-2 classification allows a "large retail" store and a "high intensity," and therefore, the C-2 classification may not meet the objectives of the Master Plan. Nonetheless, although he believes the "mixed" designation is clear in the Master Plan, and a big box store would not be encouraged, it is "not enough to shoot down" the Plaintiff's application. He would find that the Townships' prior application for a PBO classification would constitute a "sound transitional zone," complies with the Master Plan, and is an acceptable alternative to C-2.

Following the end of Mr. Young's testimony, the Plaintiff rested their case. As indicated previously in this written decision the Defendant's Motion for Involuntary Dismissal was denied on January 12, 2011, for reasons as stated on the record.

Mr. Paul LeBlanc

Mr. Paul LeBlanc was qualified as an expert in "planning." (Defendant's Exhibit Z). In reaching his final opinion he considered all of the reports and plans of record, and found that the denial of the reclassification of the central parcel was "sound practice." Pursuant to the Plaintiff's conceptual plan (Plaintiff's Exhibit 4) and the Master Plan map (Plaintiff's Exhibit 27), he believed it was "reasonable to consider the adjacent land use, buffering, and transitional zoning." He agreed with most of Mr. Young's findings (Plaintiff's Exhibit 7, page 5) as it was an "effective land use transition." He disagreed that a C-2 classification was consistent with a "mixed" use. He opined that the classification of "Mixed Residential/Office/Commercial" intended a "lower intensity commercial use" while a C-2 classification provided no size limit and permitted a high intensity use.

[18] The Plaintiff called Mr. Young as an adverse witness and would disagree with this portion of his testimony. Furthermore, the Plaintiff contends that the township's withdrawal of their application (Plaintiff's Exhibit 13) leaves only the Plaintiff's proposal, the referendum, and the current classification to be considered by this Court.

Regarding the Township Board action (Plaintiff's Exhibit 9, page 14) he stated that C-2 was too intense to be adjacent to the proposed RME and RM2 parcels, and that it does not conform to the Master Plan. He further opined that the "Mixed Residential/Office/Commercial" focused on "local commercial" which would consist of "small businesses, convenience shopping and size limits" such as personal services, specialty shops and individual businesses of a small scale. Therefore, the Township Board properly denied the rezoning request of the center parcel. (Plaintiff's Exhibit 11, page 4). He agreed that the parcel in question could be properly rezoned as PBO as a "very effective and reasonable transitional scheme."

On cross-examination he acknowledged his "three C's" test, to wit: a request for rezoning must "have consistency with the Master Plan, be compatible with surrounding uses, and capable to be supported by public services and facilities." He agreed with Plaintiff's counsel that in considering each of the 6 parcels individually and the three C's criteria the Plaintiff scored 17 out of 18.[19] Regarding Mr. Young's report of August 13, 2008, he agreed that it constituted "transitional zoning" but opined that a C-1 or C-2 classification would not comport with the Master Plan because it would permit "more than retail uses."[20] Only a Planned Unit Development (PUD)[21] or PBO within the center parcel would comport to the Master Plan. He also acknowledged that the current R2-A classification does not comply with the Master Plan. He believes that since PBO is allowed there is no need to allow a C-1 or a more intense use, and that it is improper to use "commercial" as a synonymous term with "retail." He agreed that within the "strategies" of the Master Plan for "commercial land use" (Plaintiff's Exhibit 26, page 86) a "shopping center or big box store" would constitute a compact development. Furthermore, a buffer of 286 feet would be an adequate buffer regardless if the RME and RM2 parcels were ever developed.

Upon further cross-examination he agreed with the Board's actions on December 2, 2008, regarding the 5 parcels and denying the request for Lot 6 (Plaintiff's Exhibit 11, pages 2-4), although he disagreed with the basis stated by the Board in finding Lot 6 was

[19] He concluded that this part of the proposal would not be "compatible" with the surrounding uses.
[20] According to a discovery deposition on November 22, 2006, at page 65, the witness stated that a C-1 classification would also "get the mix" but it was not preferable.
[21] Mixture of housing types and land uses.

incompatible with the Master Plan or that it failed to provide a sufficient buffer. Unsure whether the Board meant it was insufficient to serve as a buffer between the RME and RM2 parcels, or instead, the Indian Acres subdivision, he would find that under either scenario the buffer was sufficient.

In the end, Mr. LeBlanc opined that even with a classification of PBO for the center parcel the Township could not force the development of a commercial component. If it were to be rezoned to C-2, the Township could not prohibit a large scale business other than to subject it to minimum setbacks and other ordinance requirements. Lastly, any two of the three classifications, "Mixed Residential/Office/Commercial" would be appropriate. (Plaintiff's Exhibit 11, and 26 at page 95).

III. The Parties' Positions and Closing Arguments.

The attorneys are to be commended for their presentation of their corresponding legal briefs, the presentation of the evidence, and their closing arguments.

The Plaintiff contends that the Defendant violated the Plaintiff's substantive due process rights by "unreasonably" denying his application for rezoning of the subject property. *Landon Holdings, Inc v Gratton Township, 257 Mich App 154, 173 (2003); Kirk v Tyrone Township, 398 Mich 429, 434 (1976); Kropf v Sterling Heights, 391 Mich 139, 158 (1974).* The Plaintiff further argues that it was denied equal protection of the law as a result of the arbitrary and capricious actions of the Defendant which are not related to a "legitimate governmental interest." *Landon, supra at 173.* The Plaintiff submits that the Zoning Enabling Act (ZEA), MCL 125.3101, et seq., must be applied in such a way that the government's actions must be based on the Master Plan. MCL 125.3203; *Biske v City of Troy, 381 Mich 611, 617-618 (1969); Troy Campus v City of Troy, 132 Mich App 441, 457 (1984).*[22] The foregoing arguments would also apply to the referendum. *Mohave Plantations, Inc v Rose Township, 23 Mich App 232, 237 (1970); Poirier v Grand Blanc Township, 167 Mich App 770, 772-723 (1988).* Finally, the Plaintiff argues that the Defendant's termination of its application for a PBO on Lot 6

[22] The Plaintiff contends that although the ZEA became effective on July 1, 2006, and thereby repealed prior city, village, county, and township acts, there was no substantive change to zoning requirements. Therefore, it has relied upon "cases citing references to parallel sections of the repealed acts.

results in the Court choosing between the referendum's reinstallation of the status quo, or the Plaintiff's application.

The Defendant agrees that it must adhere to the Master Plan in its decision-making, and submits that it did. Since ordinances are "presumed to be valid and constitutional," the burden rests upon the Plaintiff to prove otherwise. *Bell River Associates v China Township, 223 Mich App 124, 129 (1997); Kropf, supra at 156.* The Defendant notes that if the Plaintiff prevails, a big box store could be constructed on the center parcel of the subject property, and an application of the Master Plan would not support this finding. The Defendant contends that based upon the Plaintiff's own admission that he "doesn't care whether the RME and RM2 parcels are developed or not" would result in "transition in name" but not in reality. Therefore, the denial of the reclassification of Lot 6 was "reasonable" and not the result of an arbitrary and capricious act of the Township. *Kropf, supra at 157-158; A & B Enterprises v Madison Township, 197 Mich App 160, 162 (1992).* Regarding the Township's "inaction" toward the referendum, the Plaintiff understands that "zoning amendments are legislative acts subject to referendum." MCL 125.3402; *Jacobs, Visconsi, & Jacobs Co v City of Burton, 108 Mich App 497, 502-503 (1981); Albright v Portage, 188 Mich App 342 (1991).* The application of the classification of "local commercial" and "office" envisions small businesses being adjacent to offices, which served as the basis for the Defendant's actions in initiating an application for the PBO reclassification. The Defendant contends that it did not violate the Plaintiff's equal protection rights, as it was not treated differently as compared to a similar situation. *Dowerk v Oxford Township, 233 Mich App 62, 73 (1998).* Even so, the alleged disparate treatment was "rationally related to a legitimate governmental interest." *Crego v Coleman, 463 Mich 248, 259-260 (2000).*

IV. Applicable Law and Application to Instant Case.

The Court recognizes that, "Generally, zoning authorities will not be estopped from enforcing their ordinances unless there are 'exceptional circumstances'." *Howard Township Board of Trustees v Waldo, 168 Mich App 565, 575-576 (1988).* Both parties appreciate and understand that the Court does not sit as a "super zoning commission." *Kropf, supra at 161.* Nor is the Court to second-guess the local governing body, or local

referendum action, in the absence of a showing of an "arbitrary or capricious" act. *Id.*, at 161; *Brae Burn, Inc. v Bloomfield Hills, 350 Mich 425, 430-432 (1957).* It is also true that the challenging party has the burden of proving any ordinance to be unconstitutional. *Belle River Associates v China Township, 223 Mich App 124, 129 (1997).*

In the *Kirk* case the Michigan Supreme Court relied heavily upon the *Kropf* case, citing:

> "The principles and tests to use to determine whether the present zoning of plaintiffs' property is valid was detailed in *Kropf.*
>
> The important principles require that for an ordinance to be successfully challenged plaintiffs prove:
>
> > [F]irst, that there is no reasonable governmental interest being advanced by the present zoning classification itself, or
> >
> > [S]econdly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question."

Kirk, supra at 434, 439. The four rules for applying these principles were also outlined in *Kropf.* They are:

> "1. [T]he ordinance comes to us clothed with every presumption of validity.
>
> 2. [I]t is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property. 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.
>
> 3. Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.

> 4. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases."

Kirk, supra at 439 (Citations omitted). Therefore, "[a] zoning ordinance will be presumed valid, with the burden on the party attacking it to show it to be an arbitrary and unreasonable restriction upon the owner's use of his property." *Id.* at 440. (Citations omitted; Emphasis added).

This Court has acknowledged in prior written decisions and opinions, and still recognizes the power to review the acts of a legislative body, is subject to the doctrine of separation of powers, and certain decisions are best left to "that branch [the legislative body] which is closest to, and most representative of, the people". *46th Circuit Court v Crawford County, 476 Mich 131, 141-142 (2006).* Nonetheless, if the legislative body, or the will of the people expressed through a referendum, makes a decision that totally excludes a legal use of one's property, the burden shifts to the legislative body, or its citizenry, to justify the ordinance or action taken. *Landon, supra at 173, 174; Kropf, supra at 155.* In the alternative, if the use is not totally excluded, the aggrieved party may still prevail if they can demonstrate disparate treatment, or if it can be demonstrated that there is "no reasonable relationship to a legitimate governmental interest." *Landon, supra at 176-177.* Furthermore, if it is established that the legislative body acted in "bad faith," such as amending the ordinance specifically to thwart the proposed use of the land, Plaintiff may obtain relief. *Id. at 161, 162.*[23]

A review of the admitted exhibits and testimony reflects a series of events, and discretion exercised by different members of various zoning and planning commissions. Over a significant period of time the eventual outcome was that Bedford Township would approve 5 of the 6 requests made by the Plaintiff, leaving Lot 6 unsettled until further action. Meanwhile, the referendum reverted the subject property to its prior status, effectively reversing the Township's actions on the 5 parcels.[24]

---

[23] This includes overturning the result of a referendum.

[24] It is noted from the prior case, Whitman Ford v Bedford Township, file #04-18604-CH, that the Plaintiff through its former President, Mr. Paul Whitman, had tried to rezone the subject property but was unsuccessful in reclassifying the western half of the property. This fact is not of record in the instant case.

It is noted from the prior case that the Plaintiff, through its former President, Mr. Paul Whitman, had tried again and again to rezone the subject property meeting mostly with success except for the western-most strip which remains zoned as R-2A.[25]

The Master Plan may be utilized as a "guide" in conjunction with the zoning ordinance. *Fredericks v Highland Township,* 228 Mich App 575, 605 (1998). It is true that the Master Plan is "open to interpretation," as has been seen in the instant case, but in the end a common opinion[26] was reached except for the classification of Lot 6. The Township Board may consider the roads, infrastructure and public welfare and safety, or the "three C's" as espoused by their expert, Mr. Paul LeBlanc. Once again, the only dispute at trial was the opinion regarding Lot 6.

If this action been a jury trial, the jury would have been instructed,

> "Although you may consider the number of witnesses testifying on one side or the other when you weight the evidence as to a particular fact, the number of witnesses alone should not persuade you if the testimony of the lesser number of witnesses is more convincing."

M Civ JI 4.07. This Court would find that the judge sitting as the "trier of fact" should also follow this principle. Despite the impressive qualifications of Mr. LeBlanc, he would agree with the Plaintiff's position with the exception of Lot 6. However, applying his three C's test, the Court would find that Mr. LeBlanc only concluded that Lot 6 was "not compatible" with the surrounding uses. As will be seen in the balance of this decision, this aspect is insufficient to deny the Plaintiff's application.

The experts were questioned about their interpretation of the terms "commercial" and "retail" in connection with "local commercial" as utilized in the Master Plan. (Plaintiff's Exhibit 26, page 95). Whether the term "local commercial" was intended to have its own definition, or to be defined by common usage, it is clear that the Master Plan references "retail business" that would serve the "day-to-day convenience shopping and service needs of neighborhood residents." (Plaintiff's Exhibit 26, page 95). This term is later used in defining "Mixed Residential/Office/Commercial" (Plaintiff's Exhibit 26,

---

[25] See written decision dated February 2, 2007, page 18, *Whitman Ford v Bedford Township, file # 04-18604-CH.*

[26] This conclusion is stated with all due respect to the referendum action, and the comments are directed at the evidence adduced at the trial.

pages 95-96) and a fair reading of this section is found to mean that "retail" and "commercial" are synonymous terms. It is noted that Mr. LeBlanc strictly interprets the Master Plan to focus on "less intense" retail than a "big box" store. It is noted that the Master Plan indicates that the "Local Commercial area should not exceed" a set amount of square feet, and it is found that this permissive language does not prohibit a larger structure.[27] (Plaintiff's Exhibit 26, page 95). To the contrary of Mr. Birchler's opinion is the testimony and opinions of the other experts. Mr. Wilburn also stated that "C-1, C-2, and C-3 would all fit," and this indicates agreement with Mr. Young and Mr. Birchler.

As will be noted again at the end of this decision, without an opposing application from the Township, or any other entity, the choice is between the current classification as mandated by the referendum or the Plaintiff's application.[28] As such, this Court would find that the evidence clearly supports the approval of a C-2 classification. The battle of whether "retail" and "commercial" are synonymous terms, and whether any proposal meets the Master Plan, i.e., "Mixed Residential/Office/Commercial," is resolved in favor of the "commercial" element of the Master Plan, and C-2 meets this criteria. Whether or not a PBO classification would also be acceptable is not addressed in this opinion as the Court does not sit as a "super zoning commission," and the application for such consideration has been withdrawn. *Kropf, supra at 161.*

The Township Board acted reasonably as to the 5 parcels, and the referendum inappropriately reversed it, which violates the first principle of the *Kropf* case, to wit: there is no reasonable governmental interest being advanced by the present zoning classification of R-2A. *Kropf, supra at 434, 439* (Emphasis added). The best evidence adduced at trial as summarized within this written decision also supports a further finding that the Township Board excluded "other types of legitimate land use from the area in question," as to Lot 6, and the referendum action restored the subject property to R-2A which also clearly violates the second principle of the *Kropf* case, to wit: an ordinance [or other governmental action] is unreasonable because of the arbitrary and capricious and unfounded exclusion of other types of legitimate land use from the area in question. *Id. at 434, 439* (Emphasis added).

---

[27] Any-sized building would have to meet other code and zoning requirements (i.e., setback, etc.).
[28] The Township withdrew its application for rezoning it to PBO. (Plaintiff's Exhibit 13).

Regarding "equal protection" the Defendant correctly contends that the principle to be applied is that, "similar circumstances be treated similarly". *Dowerk, supra at 73.* The Plaintiff has the burden of proving the Defendant's actions were "arbitrary". *Crego, supra at 259-260.* Proximity of competing land uses is a very important issue for a township to consider. *Belle River, supra* at 132. For the same foregoing reasons that the denial of the reclassification of Lot 6 was improper, and that the referendum action cannot stand, this Court is compelled to find the governmental action to be arbitrary and capricious.

V. Conclusion.

Regardless on which side of the issue a resident of Bedford Township is on this case, the Bedford Watch group is a great example of our democratic society at work. The group attempted to have the ordinance amended and pursued further relief by way of a referendum. The Township Board denied the proposed amendment to the ordinance, but the referendum was initially successful. Despite claims of a misleading and biased campaign, opponents were free to counter it, but no one did. The Township officials properly stayed out of the fray. The Township attempted to do the right thing by seeking its own application to rezone Lot 6 to a PBO. The fact is the application was withdrawn in light of the referendum and in anticipation of the Plaintiff's lawsuit. In this Court's opinion it is left with the prospect of enforcing the referendum, which it cannot legally do as stated in the instant decision and in the decision denying the Defendant's Motion for Involuntary Dismissal on January 12, 2011. The R-2A parcel does not comply with the Master Plan and the Township recognized this in its own application to rezone it to PBO but subsequently withdrew the application. What now remains is the Plaintiff's original application as modified[29] and the action taken by the Township and referendum.

The Plaintiff's request was found to be reasonable and in compliance with the Master Plan by virtually all planning commissions and the expert witnesses presented at trial with the exception of Lot 6 as opined by Mr. LeBlanc. The BTPC and the Township Board found that the Plaintiff's proposal for Lot 6 should not be granted. The Township dropped its application for a PBO classification for Lot 6, leaving the parcel classified as

[29] The Plaintiff agreed to drop his request for a C-3 reclassification on Sterns Road.

R-2A. The referendum overturned the Board's decision as to the 5 lots that had been approved, but leaves the subject property in a state that does not conform to the Master Plan to wit: leaving the western half of the property as R-2A in immediate proximity to commercial property to the east. Other than the referendum action, no governmental unit or the expert witnesses found the current classification to be appropriate. Based upon the evidence and applicable case law, neither can this Court.

This Court would find that both the Township Board action as to Lot 6, and the referendum as to the entire property render the subject property in an unacceptable state. This results in a finding that, (1) an unreasonable government interest is being advanced by the present zoning classification; and/or (2) arbitrary and capricious decisions were made resulting in an unfounded exclusion of other types of legitimate land use from the area in question. *Kropf, supra.* Therefore, the Court would find in favor of the Plaintiff. The referendum action is hereby vacated, and the Township Board is directed to reinstate the reclassification of the 5 lots as it had previously approved on December 2, 2008 (Plaintiff's Exhibit 11). Furthermore, the only viable application pending for Lot 6 is the Plaintiff's request, which is hereby granted for the reasons stated in the foregoing decision.

IT IS SO ORDERED.

Date: January 28, 2011

Hon. Joseph A. Costello, Jr. (P33769)
38th Circuit Court
Monroe, Michigan