THE STATE OF OHIO)
) SS.
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. 291595

MICHAEL A. SHEMO,
CO-TRUSTEE, et al.,

Plaintiffs,

-vs-

CITY OF MAYFIELD
HEIGHTS, OHIO, et al.,

Defendants.

OPINION AND JUDGMENT ENTRY

S. Strickland Saffold, J.:

The Plaintiffs, Michael A. Shemo and Larry Goldberg, are owners[1] of an undeveloped 22.6 acre parcel of land in Mayfield Heights. This 22.6 acre parcel (hereinafter the "Property") is an irregularly shaped tract of land bordering commercial properties to the south on Mayfield Road, residential properties to the north and west on Ridgebury Boulevard, and Bonnie Lane, and Interstate-271 to the east. On the eastern most edge of the Property are located six Cleveland Electric Illuminating Company (CEI) electric transmission towers carrying 138 kvh high tension power lines. These power lines, and the interstate with its high intensity lighting, run the entire length of the Property (approximately 2,000 feet). CEI, pursuant to an easement, has the right to uninterrupted access, ingress and egress to the property to relocate, construct, reconstruct, operate, repair, maintain, renew and remove

[1]In fact, the Plaintiffs hold the subject property as Co-Trustees for Milton Wolf and various branches of the Goldberg families.

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electric transmission lines, including poles and other structures. Finally, the easement area is 75 feet wide, and it forbids any construction of buildings, any changes in grade, any excavation or addition of fill within the easement without prior written approval of CEI. Until late 1995, the Property was zoned U-1 for single family homes only.

On March 19, 1992, Plaintiffs filed a Complaint for Declaratory Judgment in the Cuyahoga County Court of Common Pleas seeking to invalidate the U-1 single family zoning classification. On June 8, 1995, Michael A. Shemo, et al. v. City of Mayfield Heights, et al., Case No. 299140, was voluntarily dismissed without prejudice. Upon subsequently refiling the instant action, the parties entered a stipulation by which the defendant, City of Mayfield Heights, agreed that the U-1 single family zoning classification was constitutionally invalid. Further, the parties agreed pursuant to Union Oil v. City of Worthington (1980), 62 Ohio St.2d 263 that: 1) the City had the right to rezone the Property to a constitutionally valid use; and 2) the Plaintiffs reserved the right to challenge the subsequent zoning classification. This stipulation was made an order of the Court on December 22, 1995. Further, this Court entered an order, in accordance with an agreement between of the parties, invalidating the U-1 zoning classification.

On December 11, 1995, Mayfield Heights City Council met for the purpose of rezoning the Property. Council, over the objections of the Plaintiffs, enacted Ordinance 1995-42 which rezoned the Property to a U-2A (cluster single family) classification. A U-2A Planned Unit Development District requires a minimum 40 acre project area and a maximum overall density of 3.5 units per acre. See Mayfield Heights Zoning Code §1162.04. As the subject Property is only 22.6 acres, Council, on its own initiative, granted a variance from the

40 acre minimum project size and the 3.5 unit per acre density requirements of the U-2A district.

The Plaintiffs contend that upon stipulating that the U-1 classification was unconstitutional, the Defendants failed to rezone the Property within a reasonable time and in a constitutionally permissible manner pursuant to Union Oil Co. of California v. City of Worthington (1980), 62 Ohio St.2d 263. As such, Plaintiffs argue that the Court need not determine whether the U-2A zoning classification substantially advances a legitimate health, safety or welfare interest of Mayfield Heights, or provides the Property owners with an economically feasible use of their land. Rather, they contend that the Court may move directly to the issue of the reasonableness of Plaintiffs' development plan.

The Court finds that the City of Mayfield Heights did in fact rezone the Property within a reasonable time when it enacted Ordinance 1995-42. As such, this Court will determine the constitutionality of the U-2A zoning classification.

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, (quoting *Agins v. Tiburon*, 447 U.S. 225), the U.S. Supreme Court held that the Takings Clause of the United States Constitution is violated when a zoning ordinance "does not substantially advance legitimate state interest or denies an owner economically viable use of his land." (emphasis added). However, in Central Motors Corp. v. Pepper Pike, et al. (1995), 73 Ohio St.3d 581, the Ohio Supreme Court held that a plaintiff is required to satisfy both prongs of the Lucas test. In order to be successful in having a zoning regulation declared unconstitutional, therefore, a plaintiff must satisfy both parts of the above test, "beyond fair debate." Karches v. Cincinnati (1988), 38 Ohio St. 3d 12, 19. Fair debate was defined in

Central Motors v. City of Pepper Pike, et al. (1979), 63 Ohio App.2d 34, when Judge Krenzler wrote:

> The validity of a zoning ordinance is fairly debatable if reasonable minds may differ. A mere difference of opinion is not sufficient to make the issue of validity of a zoning ordinance fairly debatable because it is relatively easy for a property owner and a municipality to obtain the services of expert witnesses who will have differing opinions as to the validity of a zoning ordinance. The fairly debatable rule must concern itself not with mere words or expressions of opinion, but basic physical facts pertinent to the issue of the validity of the zoning ordinance.
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> Therefore, the courts must in an objective manner scrupulously review the underlying relevant and material evidence and facts in the case as well as the evidence upon which expert opinions are based before making a determination of the validity or invalidity of a zoning ordinance. Courts should resist the tendency to make a determination in regard to the validity of a zoning ordinance based on the mere conclusion or opinion of experts. If two experts have differing opinions, the court should not automatically rule that the issue of the validity of a zoning ordinance is fairly debatable without ever reviewing the underlying evidence. For a mere difference of opinion or a conflict in testimony does not require a finding that the reasonableness of a zoning ordinance is fairly debatable.

Id. at p. 51.

Therefore, in Ohio, for the Plaintiffs to succeed, they must satisfy both prongs of the Lucas test. In other words, they must prove beyond fair debate that the U-2A classification, as applied to the Property: 1) does not substantially advance a legitimate health, safety, and welfare concern of Mayfield Heights; and 2) that the U-2A zoning classification renders the Property economically nonviable.

The City of Mayfield Heights has alleged that the U-2A zoning classification is related

to the following three legitimate health, safety and welfare concerns: 1) maintaining the character of the neighborhood; 2) maintaining a balanced mix of uses in Mayfield Heights; and 3) not exacerbating traffic congestion in the city.

First, in Leslie v. Toledo (1981), 66 Ohio St.2d 488, the Court held that maintaining the residential nature of a neighborhood can be a legitimate governmental concern. However, the Court must determine whether the local governing entity is attempting to arbitrarily banish commercial development or is instead earnestly striving towards its stated goals. See Henry Meyer Assoc., Inc. v. Village of Moreland Hills, 1994 WL 693509 (Ohio App. 8th Dist. 1994).

In this case, the Court finds that the Plaintiffs have proven beyond fair debate that the U-2A zoning classification as applied to the Property does not substantially advance Mayfield Heights' interest in maintaining the character of the residential neighborhood. The Property is located within the I-271 and Mayfield Road intersection. At one point, all of Mayfield Heights was zoned single family. Since 1979, however, the City has rezoned for commercial uses a substantial portion of the land immediately adjacent to the Property. Today, the predominant uses within this intersection are retail/commercial and high density residential. To the southwest of the intersection lies the Golden Gate Shopping Center and a Cantina Del Rio Restaurant. To the southeast is the large Marsol apartment complex. To the northeast lies the Plymouth Park Apartments and an Eastside Mario's restaurant. Finally, in the northwest quadrant of I-271 and Mayfield Road lies a regional Best Buys store, a Bob Evans Restaurant, and a Budgetel Motel, which are immediately adjacent to the subject Property. As such, the extensive rezoning of the land immediate adjacent to the subject Property proves beyond fair

debate that the City has not advanced a substantial interest in maintaining the residential character of the neighborhood.

Second, the Court finds that the Plaintiffs have proven beyond fair debate that the U-2A zoning classification as applied to the Property does not substantially advance Mayfield Heights' interest in maintaining a balance of uses. In fact, permitting commercial zoning next to the two-family residential uses on Bonnie Lane helps maintain a mix of uses. Further, the Mayfield Heights Zoning Code, by providing for masonry walls and setbacks between the two uses, greatly eases the transition between the commercial and residential uses, making the mix more appropriate.

Third, the Court finds that the Plaintiffs have proven beyond fair debate that the U-2A zoning classification as applied to the Property does not substantially advance Mayfield Heights' interest in not exacerbating traffic congestion. While traffic may be considered as one factor in the overall evaluation of zoning validity, the law requires that traffic and road conditions be kept in proper prospective as a part of the total problem on zoning. See Columbia Oldsmobile, Inc. v. Montgomery (1990), 56 Ohio St.3d 60. A municipality may not use its zoning code for the purpose of avoiding its responsibility to provide adequate roads and municipal services. Alseanas v. Brecksville, 29 Ohio App.2d 255, 263 (Cuy. Cty. 1972). Prior to this case, the City has never taken an interest in controlling traffic through the streets north of Maplewood, except for precluding truck traffic through streets in this area. On numerous occasions the City has rezoned properties to the immediate south to U-4 retail/commercial without undertaking any traffic impact studies. Further, in doing this, the City has specifically found that the zoning changes to U-4 were within the health, safety and

welfare interests of the people of Mayfield Heights. Finally, there is no health, safety and welfare reason for keeping the traffic situation as it is presently. Mayfield Heights Police Officer Robert Bandelow testified that the adjacent Best Buy/Budgetel/Bob Evans drive is a safety hazard as currently designed. The merging traffic and poor lane identification are extremely dangerous and result in frequent accidents.

In addition, the Court finds that there is no legitimate health, safety or welfare concern which is substantially advanced by maintaining a residential zoning classification on the Property, as the Property is not suitable for habitation. The Property is extremely degraded by the adjacent freeway and high tension electric lines. Presently, 92,000 vehicles per day pass alongside the Property. By the year 2015, it is estimated that over 106,000 per day will travel the adjacent freeway. This vehicular traffic cause three major problems -- noise, light and pollution. The eastern boarder of the Property is lined with high intensity freeway lights. This light is so intense that Plaintiff's expert, Roger Ritley, testified that the freeway lights enable an individual to read a newspaper in the dead of night while standing on the Property. Finally, there are CEI high tension poles and wires running the length of the eastern boarder of the Property. Therefore, based on the foregoing, the Court finds that the Plaintiffs have satisfied the first prong of the Lucas test. That is, the Plaintiffs have, beyond fair debate, demonstrated that U-2A zoning does not substantially advance a legitimate health, safety or welfare interest of the City of Mayfield Heights.

The second prong of the Lucas test requires that the Plaintiffs demonstrate that the zoning classification denies the owner of an economically feasible use of the land. A property is rendered economically nonviable when a zoning ordinance "denies an owner all uses except

those which are highly unlikely or practically impossible under the circumstances." Gerijo v. Fairfield (1994), 70 Ohio St.3d 223. In other words, "zoning regulations that effectively make a land owner's property valueless without any corresponding public benefit can constitute unconstitutional takings." Clark v. Woodmeyer (1985), 28 Ohio App.3d 66, 68.

The Court finds that the Plaintiffs have proven beyond fair debate that the U-2A zoning classification as applied to their Property renders it economically nonviable because:

(a) It is undisputed that the freeway and high tension towers and wires, negatively impacts any cluster residential development on the Property.

(b) David Boston, an MA appraiser and recognized expert on the effect of high tension electric power lines on real estate market-ability, testified that power lines, like those which run the entire 2,000 feet length of the Property, reduce a property's value by 13-30%. This devaluation is the result of a popular perception of adverse health effects from the electromagnetic field created by power lines. Given the size of the Property and the relatively small number of homes which can be placed on it, a 13-30% devaluation significantly decreases the likelihood that a cluster home project on the Property could be economically feasible.

(c) Defendants' expert planner, David Hartt, testified that Plaintiffs could develop a maximum of 83 homes on the subject property. Plaintiffs' expert planner, Robert Hill, testified that a maximum of 66 homes could be constructed on the Property in accordance with the U-2A zoning classification, as "amended" by the De-cember, 1995 variances. This divergence in opinion between Mr. Hill and Mr. Hartt does not create "fair debate" sufficient to find for Mayfield Heights on the issue of economic nonviabilty. Whether 66 or 83 homes were placed on the Property, the cluster home development would be doomed and economically nonviable because of the numerous adverse physical realities negatively influencing the Property.

(d) Plaintiffs' economic expert, Roger Ritley, testified that the cost to develop 66 or 83 homes would exceed any economic return for

the Plaintiffs. Mr. Ritley reached this conclusion by conducting a cost analysis. Mr. Ritley's testimony on this issue is unrebutted in the record. Defendants did not engage an expert to conduct a cost analysis to rebut Mr. Ritley's testimony.

(e) Mr. Ritley's testimony was underscored by the practical experience of Paris Development Company with the L'Avion project in Pepper Pike. Paris' President George Zamecnik testified that after eight years none of the lots abutting I-271 and the high tension wires had been sold. This did not mean economic ruin for Paris at L'Avion because of the much larger total development and the depth of L'Avion away from the freeway. However, such a result would be devastating to Plaintiffs' project on the Property because all of the homes would be freeway and high tension lines and tower impacted lots. In addition, Mr. Zamecnik testified that the freeway lots at Highland Woods were reduced in price by 25%. The interior lots subsidized the freeway lots. Mr. Shemo also testified that the vacancy rates at the Plymouth Park Apartments, directly across I-271 from the subject property, was five times greater for freeway facing apartments than those on the interior. This testimony is compelling since all of the proposed lots on the Property are freeway and high tension lines and tower impacted lots.

(f) Mr. Baker's testimony that the Property had some value developed as a cluster home site under the UI-2A classification was not credible and thus does not create an issue of fair debate. First, the comparable sites which Mr. Baker used in his appreciable did not have all or even a majority of the degrading factors as the Property. Second, compared to a cost analysis, an appraisal does not give this Court a true picture of the viability of cluster home development on the site since it does not consider the cost of such development or its economic feasibility. Third, Mr. Baker admitted that he has not conducted a market or economic cost feasibility analysis for the Property as zoned U-2A. Fourth, Mr. Baker testified that between the date of his first report in 1994 and his second in 1996 that the Property's value had increased by 25%. This testimony is not credible given the fact that the only changes in the Property were the increased degrading factor of the completion of the high speed lanes on I-271 and addition of the high intensity freeway lights.

(g) Testimony by two Mayfield Heights residents, Lisa Lang and

> Nadine Bowen, that they would live on the Property despite the freeway, high tension wires and adjacent commercial use is not probative on the issue of economic nonviability. As the Cuyahoga County Court of Appeals held in *Brooklyn Airport Associates v. City of Brooklyn*, 1994 WL 693543 (1994) "Legal matters are decided by facts, not beliefs or desires." See also, *Pinnacle Woods Survival Game, Inc. v. Hambden Township Zoning Inspector*, 33 Ohio App. 3d 139, 514 N.E. 2d 906 (Geauga 1986), in which the Geauga County Court of Appeals held, in its second syllabus: The objections of a large number of residents of an affected neighborhood are not a sound basis for the denial of a zoning certificate. See also, *SCA Services of Ohio, Inc. v. Ream*, 1985 WP 6480 (1985), "In summary, we point out that this is a government of laws and not of men." Land use is regulated by law and not by popular outcry. Moreover, their testimony that their concerns about the effect of the retail development on their neighborhood, but that they would live under the high tension lines on the Property calls into question their credibility.

Therefore, the Court finds that the Plaintiffs have satisfied, beyond fair debate, both prongs of the Lucas test. That is, Plaintiffs have shown: 1) that the U-2A zoning classification does not substantially advance a legitimate health, safety or welfare concern of the City of Mayfield Heights; and 2) that the U-2A zoning classification denies the owner of an economically feasible use of the land. Accordingly, the Court finds in favor of the Plaintiffs and holds that the U-2A zoning classification is arbitrary, capricious, and unconstitutional.

Finally, in Union Oil Co. of California v. City of Worthington (1980), 62 Ohio St.2d 263, the Court held that upon finding an existing zoning classification unconstitutional, the trial court may not order the property rezoned to a new and different use classification. Id. at p. 263. Rather, the trial court must put the zoning authority on notice that it may rezone the property within a reasonable time certain. Therefore, the Court hereby puts the City of Mayfield Heights on notice that it may rezone the Property within 90 days of this order.

NOTICE OF SERVICE

A copy of the foregoing Judgment Entry was forwarded this _____ day of May, 1996 by United State First Class Mail addressed to: Attorneys for the Plaintiffs, Timothy J. Grendell and Mark Ferguson, Taft, Stettinius & Hollister, 6140 West Creek Road, Independence, Ohio 44131, and George Forbes and Scott H. Schooler, Forbes & Associates, 614 Superior Avenue, N.W., Suite 700, Cleveland, Ohio 44113, and Attorneys for the Defendant, Leonard F. Carr and Leslie Spencer, Carr, Feneli and Carbone, L.P.A., 1392 S.O.M. Center Road, Mayfield Heights, Ohio 44124.

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S. Strickland Saffold, Judge