UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

NORTHVILLE DOWNS, LLC, a Michigan limited liability company,

Plaintiff,

-v-

PLYMOUTH CHARTER TOWNSHIP, a Michigan municipal corporation,

Defendant.

Case No. 24-CV-10492
Hon. Brandy R. McMillion

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PLAINTIFF NORTHVILLE DOWNS, LLC'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR TO DISMISS FOR LACK OF JURISDICTION

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Plaintiff answers: Yes
Defendant answers: No

2. Does Plaintiff's Complaint properly raise a claim under the Unconstitutional Conditions Doctrine where the Township attempted to impose an unconstitutional condition on NVD as part of the PUD application process?

Plaintiff answers: Yes
Defendant answers: No

3. Has Plaintiff alleged a plausible substantive due process claim?

Plaintiff answers: Yes
Defendant answers: No

4. Do Plaintiff's claims under the Michigan Zoning Enabling Act ("MZEA"), Michigan Horse Racing Law and promissory estoppel create questions of fact such that judgement on the pleadings should be denied?

Plaintiff answers: Yes
Defendant answers: No

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PLAINTIFF'S BRIEF IN SUPPORT OF ITS RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR TO DISMISS FOR LACK OF JURISDICTION

NOW COMES, Plaintiff Northville Downs, LLC ("Plaintiff or "NVD"), by its attorneys, Zausmer, P.C., and for its brief in support of its Response to Defendant Plymouth Charter Township's Motion for Judgment on the Pleadings and/or to Dismiss for Lack of Jurisdiction ("Motion"), hereby relies on the attached Brief in Support and Exhibits.

WHEREFORE, Plaintiff respectfully requests this Court DENY Defendant's Motion, and for any other relief this Court deems equitable and just.[1]

INTRODUCTION

The instant case involves an egregious abuse of government power against a landowner. Government and the governed must deal with each other on a level playing field. As the Supreme Court has concluded, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions of the right of the individual not to be injured by the unlawful exercise of governmental power." *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584 (2015). And yet, here, Defendant Plymouth Township, using its brute power, sought to bully Plaintiff in a direct attempt to

[1] It should be noted that contrary to what is stated in Defendant's Motion, concurrence was not sought prior to the filing of the Motion. The Court "requires strict compliance with E.D. Mich. L.R. 7.1(a) regarding concurrence, and the Court may impose costs for failure to comply with the Local Rule." *Id*. Had such concurrence been sought, perhaps the issues could have been narrowed here before the Court.

"mint" money, through their zoning codes, by an act akin to extortion - mandating $4,000,000.00 (originally demanding $5,000,000.00) in cash and making numerous other pet projects (popular, but unfunded items such as pickle ball courts, nature trails (on Plaintiff's property) and Fourth of July drone shows funded by NVD, among other demands), a condition of approval for Plaintiff's project. Such actions constitute unlawful demands that approach extortion. Is this what zoning has come to – "sophisticated as well as simple-minded" schemes to invade protected rights? *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872 (1939).[2]

COUNTER-STATEMENT OF RELEVANT FACTS[3]

It is important to highlight certain facts and the chronology in greater detail in order to emphasize the point that a question of fact exists with regard to Plaintiff's claims and that Defendant's Motion to summarily dismiss NVD's Complaint should be easily denied.

A. The Original Northville Downs Race Facility

NVD is a family-run business that has owned and operated a state licensed and regulated horse-racing facility in Southeast Michigan for more than eighty (80) years. John and Mike Carlo (the "Carlos") are brothers who operate NVD. In late

[2]Some courts have viewed these relationships as so tenuous between the project for which the permit is sought and the conditions and fees demanded that they have described the governmental conduct as "grand theft". See *Collins v City of Bloomington*, 246 N.W.2d 19, 26 (Minn. 1976) and "extortion" (J.E.D. *Assocs., Inc. v. Town of Atkinson*, 432 A. 2d 12, 14 (N.H. 1981).

[3] As Defendant has filed a Motion for Judgment on the Pleadings, all factual statements made by NVD in its Response to Defendant's Motion are based on pled facts in NVD's Complaint.

2020, after decades operating in the City of Northville, NVD began exploring potential relocation sites in several municipalities across Southeast Michigan because the property which NVD leased was being sold and hence their lease not renewed.

B. <u>The Search For Relocation Property & The Plymouth "Pitch"</u>

In January 2021, while NVD was considering different prospective relocation sites, the Carlos attended a meeting with Defendant Plymouth Charter Township's ("Defendant" or "Township") Supervisor, Kurt Heise ("Heise"), and the Township Economic Director, Gary Heitman ("Heitman"), to discuss NVD's potential purchase of a property in the Township for the development of a horse-racing facility (the "Project"). During the meeting, Heise attempted to persuade NVD's owners to site the Project in the Township. Heise represented that he would secure all regulatory approvals for the Project from the Township Planning Commission (the "Planning Commission") and the Township Board of Supervisors (the "Board"), including Planned Unit Development ("PUD") approval, within 60 to 90 days. Heise explicitly told the Carlos that both the Township Planning Commission and Board of Trustees (the "Board") would "absolutely" vote as Heise directed them regarding any necessary approval to relocate the NVD track in the Township. Heise even predicted the vote by the Planning Commission would be unanimous and the Board's

vote would pass by a 6-1 vote as he would not be able to secure the vote of Trustee Chuck Curmi, whom Heise described as his "nemesis."

If the Project was sited in the Township, the Township would receive substantial benefits from the Project (similar to the benefits the City of Northville received from NVD), including breakage fees as required by state law—historically around $200,000 per year—increased economic development, and the preservation of greenspaces. Heise and Heitman were both aware of these breakage fees under Michigan's Horse Racing Law of 1995 ("MHRL") since Heise was a former member of the Michigan Legislature and Heitman was a long-time racehorse owner. Section 28 of the MHRL provides that a municipality that hosts a horse-racing track may "not assess or collect an excise or license tax or fee from a person licensed under this act based upon an activity performed under this act" other than the breakage fees it is entitled to. Mich. Comp. Laws § 431.328.

Heise also referenced a purported community benefits agreement ("CBA") that would be separate from the PUD approval process and described it as a *voluntary* agreement between the Township and NVD to describe the community benefits of having NVD in Plymouth Township. Heise explained to the Carlos that he and Heitman would guide them through the Township's PUD process, which is governed and strictly regulated by Township Ordinances and the Michigan Zoning Enabling Act, Mich. Comp. Laws 125.3101 *et seq*. ("MZEA"). Neither the

Township Ordinances nor the MZEA describe or authorize any type of land-use concept such as a CBA.

C. The Purchase By NVD Of The Property In Plymouth

In September 2022, a 128-acre property located at 5 Mile and Ridge Road (the "Property"), was brought to NVD's attention by the Township. The property had become available after a prior development, which involved the construction of 8 warehouses and 2,000 parking spaces, had fallen through. In December 2022, NVD purchased the Property for almost $10 million after discussions with Heise and Heitman. The purchase was completed through a $5,100,000 cash down payment and financing on the remaining $4,800,000 purchase amount, at an interest rate of 8 percent. This was a significant investment for NVD and one that was made in reliance on Heise and Heitman's representations that all necessary regulatory approvals for the Project could be obtained within 90 days.

D. The Submission Of The PUD Option Application

NVD submitted its PUD Option Application in January 2023. A vote was held on February 15, 2023 by the Township Planning Commission on NVD's Application. Supervisor Heise attended this meeting and just as he represented to NVD, the Planning Commission voted unanimously to approve NVD's PUD Option Application. A week after the vote, Heise and Heitman had lunch with the Carlos and Heise ensured that he would be able to control the rest of the approval process

with the Board. On February 28, 2023, the Board held a meeting to vote on NVD's PUD Option Application. The Board of Trustees voted 6-1 (the one vote against approval came from Trustee Curmi, just as predicted by Heise) to approve the PUD Option Application. After the vote, the Board also voted to authorize Heise and the Township Attorney to create a CBA to be formally approved by both parties at a later Board meeting. Nowhere in the Township Zoning Ordinance did it provide for PUD approval being conditioned on a CBA.

E. The CBA

The next step in the approval process was for NVD to secure approval of a PUD Development Plan, which it had one year to do under Art. XXIII, Sec. 7 of the Township's Zoning Ordinance. On May 3, 2023, the Planning Commission reviewed an initial version of NVD's PUD Development Plan and voted to postpone a vote to allow NVD to make some minor changes to the plan. No discussion of the CBA occurred at this meeting. On June 1, 2023, the Planning Commission voted unanimously to approve the revised version of the PUD Development Plan. However, the approval came with a condition that the revised PUD contract include a provision for a CBA to be submitted to the Township Attorney that was acceptable to the Board and Township Attorney.

F. The Imposition Of The Unconstitutional Conditions In The CBA

On June 14, 2023, Heise added language to the proposed NVD PUD Contract

stating the PUD Agreement "is contingent upon the Owner and the Township entering into a binding Community Benefits Agreement; if the parties do not enter into a binding Community Benefits Agreement, this PUD Agreement shall be null and void." **(See, ECF No. 1-2, Page ID.61)**.[4] In other words, the Township made the CBA a necessary condition for the Project to move forward. Heise knew exactly what he was doing. Over the course of the next few months, the Township pretended to negotiate several terms for the PUD Approval, but it became clear that the only real term that was holding up the approval was the multi-million dollar demands made in the CBA, none of which had anything to do with the operation of a horse-racing facility – and none of which were ever discussed between the parties, including:

- $4,000,000 in cash;
- A Fourth of July drone show funded by NVD (at the cost of $100,000 per year to NVD);
- At least four other community events every year on the NVD grounds;
- Pickleball courts (value of $100,000 per year to Township);
- Youth soccer fields (value of $250,000 per year to Township); and
- A 1.2-mile nature walking site on the NVD grounds ($400,000 for construction and $50,000 per year for maintenance costs to NVD);

Now that Heise had Plaintiff committed to his Township process – he could strike. Some of these terms varied in drafts of the CBA that were later circulated in

[4] The PUD is a separate document from the CBA, but Heise expressly tied them together.

April 2023 but the basic requirements remained the same: the Township demanded that NVD establish a trust fund and pay exorbitant multimillion dollar fees to the Township for 10 years, permit the Township to host 4 unspecified community events per year at the track, use of the infield grass of the race track to host youth soccer to be managed and maintained by a third party soccer club, and for NVD to construct a 1.2 mile walking path to include a pond, sitting area and two 100 foot long boardwalks.[5]

By June 2023, all pretense that the CBA was part of a voluntary negotiation was dropped when Heise explicitly tied approval of the PUD to NVD's agreeing to pay millions to the Township. **Exhibit A**, June 27, 2023 Heise e-mail. Again, the terms the Township was seeking were not tied in any way to the operation of a horse-racing facility or proper land use regulation – but flat-out theft. The Township knew NVD had spent millions on the purchase of the property with the promise of regulatory approval for the Project, and that NVD was in a terrible predicament to try and make the deal work despite the oppressive terms that were being imposed. This was not a secret and Township officials were publicly speaking about trying to squeeze as much out of NVD in order to make the deal work.

G. <u>The Township Board Denial Of The PUD</u>

[5] In short, these "extortionate" demands were nothing more than an illegal attempt to frustrate the Fifth Amendment right to just compensation.

On December 18, 2023, Heise sent another email making clear that the NVD PUD Development Plan would not be approved unless NVD accepted the CBA and negotiations were effectively over unless NVD did so. **Exhibit B**. On January 10, 2024, NVD's counsel sent a letter to the Board explaining that it agreed to the terms of the PUD Contract as they were presently drafted *except* for the term requiring NVD to enter into a CBA because that requirement violated NVD's rights under the United States Constitution. **(See, ECF No. 1-13, Page ID.128-130)**. After additional letter exchanges between the parties, including a second request by NVD for an extension on its PUD Application (in light of the one year time period), Heise pulled his "Ace" from his deck and formally requested that the Board vote to rescind the authority it had previously granted him for combined negotiations on the PUD and CBA, as well as accusing NVD of bad faith (imagine that?) for refusing to allow the Township to violate its constitutional rights, and asking for a combined vote on the PUD and CBA. **(See, ECF No. 1, Page ID.28)**.

And, of course, the Board voted to rescind the resolution authorizing the negotiation of the PUD Contract for the Project and a related CBA on January 23, 2024, and the Board voted to deny NVD's PUD Development Plan Application on February 6, 2024. In other words, the Board denied NVD's application for PUD approval for the Project. The Board justified its decision in part by noting that NVD failed to satisfy the first four conditions identified by the Planning Commission when

it recommended conditional approval of the PUD Development Plan Application. But after the Township denied the PUD Development Plan Application, Heise told the Detroit News in an article dated January 25, 2024, that the denial "boil[ed] down to the community benefits agreement.' " **(See, ECF No. 1-17, Page ID.172-175)**. He also told Crain's Business Detroit on January 24, 2024: "We wanted more money, more community benefits from this facility because we knew it was going to be a disruptor and we knew it was going to be controversial." **(See, ECF No. 1-18, Page ID.177-179)**. This was no negotiation. It was a shake down. The Township's vote on January 23, 2024 to end negotiations of the PUD and February 6, 2024 vote by the Board to deny NVD's PUD Application was the end to the regulatory process of the NVD Project.

Defendant's Motion flippantly states NVD "came up lame" and failed to "cross the finish line" of getting the Project approved by the Township. That is indeed "rich" and NOT what happened. What actually happened was the Township, through Heise and Heitman, induced NVD to make a $10 million land purchase with the understanding that the regulatory process by the Township would be completed within 90 days with approval for the race track. However, it became abundantly clear that the only thing that mattered to the Township was a bait and switch to extort the CBA from NVD. NVD was induced and mislead by Township officials who got NVD to commit to investing in the Project under one set of terms, and later attempted

to impose new (and illegal) terms under the guise of a CBA which added millions of dollars to the deal. NVD tried to negotiate with the Township in an effort to salvage the deal since they were between a rock and a hard place, either get stuck with a $10 million piece of land with no race track (and the loss of their decades old livelihood) or succumb to the Township's money grab and pay millions under the CBA. There was no good outcome for NVD. The Township knew it and they exploited it. The Township's unconstitutional and extortionate demands have forced NVD to shut down, laying off dozens of employees and causing it to lose millions of dollars. NVD has been left without a physical race track to operate from and with a substantial reduction in its liquidity after making a $10,000,000 purchase for a relocation site for its race track which now sits empty.

H. The Township's Motion

The Township has now moved for judgment on the pleadings and for dismissal for lack of subject matter jurisdiction as to all of NVD's claims pursuant to Rule 12(c) and 12(b)(1) of the Federal Rules of Civil Procedure. No doubt this is because they know discovery will be devastating. There is no question that there exist multiple fact questions that cannot be resolved at this early stage of the proceeding. As such, the Township's Motion should be denied in its entirety.

LEGAL STANDARD

Pursuant to Rule 12(c), "[a]fter the pleadings are closed – but early enough

not to delay trial – a party may move for judgment on the pleadings." A Rule 12(c) motion is assessed using the same standard that applies when reviewing a motion to dismiss under Rule 12(b)(6). *Barber v. Charter Twp. of Springfield*, 31 F.4th 382, 386 (6th Cir. 2022). Thus, a Rule 12(c) motion may be granted only when the operative complaint does not contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (quoting *Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017)). When ruling on a defendant's Rule 12(c) motion, the court "must construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." Id. (quoting *Engler*, 862 F.3d at 574-75).

A motion to dismiss filed pursuant to Rule 12(b)(1), "allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case." In a rule 12(b)(1) motion, the burden of proving that jurisdiction does exist falls to the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The motion to dismiss should only be granted "if it appears certain that plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Id.*

ARGUMENT

I. NVD's Claims Are Ripe.

A. The Township's Decision On The PUD Application Was Final.

Defendant states "it cannot be disputed that Plaintiff did not obtain a final decision of the Township on a final PUD Development Plan and PUD Contract." (Defendant's Motion, p. 10). Defendant is wrong. For claims raised under the Takings Clause, the finality requirement of a governmental action is "relatively modest" and requires only a showing that there is "no question" regarding how the governmental action applies to the particular land in question. *Pakdel v. City of San Francisco*, 594 U.S. 474, 478, 141 S. Ct. 2226 (2021). In *Pakdel*, the Court explained the Ninth Circuit's approach to finality, holding that the requirement "that a conclusive decision is not 'final' unless the plaintiff also complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits." *Id.* The rationales for the finality requirement underscore that nothing more than *de facto* finality is necessary. Because a plaintiff who asserts a regulatory taking must prove that the government "regulation has gone 'too far,' the court must first "know how far the regulation goes." *MacDonald, Summer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561 (1986). Once the government is committed to a position, however, these potential ambiguities evaporate and the dispute is ripe for judicial resolution." " *Id*. at 479.[6]

[6] Under the Township Ordinance, the Township's Zoning Board of Appeals lacks the authority to modify the Board's decision regarding a PUD or to grant a variance. **Exhibit C**, Township Ordinance No. 99, §31.13. Under Michigan law, where a zoning board of appeals lacks the authority to review or modify a

Here, the Township's decision on NVD's PUD Development Plan Application became final upon approval of its February 6, 2024 meeting minutes on March 12, 2024. This decision foreclosed further review by the Board or any possibility of an extension and was an end to the regulatory process of the NVD Project. NVD satisfies the "relatively modest" finality requirement. The Township's actions and express statements that NVD's refusal to pay millions per the Township's added CBA terms meant the Project would never be approved. Under the *Pakdel* analysis, this was the "government's committed position," and any potential ambiguities had evaporated, making the dispute ripe for judicial resolution.

Finally, even if there were something more Plaintiff could have done administratively – (there was not) – such actions would be futile. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1013 (1992) (explaining the courts have discretion over the use of the finality doctrine). *Wineries of the Old Mission Peninsula Ass'n v Peninsula Twp*, No. 1:20-CV-1008, 2024 WL 1152556, at *3 (WD Mich, March 12, 2024). The finality requirement does not "require a citizen to undertake a vain and useless act. The law does not require useless expenditures of effort. Where it is clear that resort to the administrative body is but a formal step on the way to the court house, the law will not require such step to be taken." *Trojan v. Taylor Twp*., 352

PUD decision, the responsible decision-making body's decision becomes a final decision. Thus, there was nowhere else for Plaintiff to go.

Mich. 636, 91 N.W.2d 9 (Mich. 1958). Here, there is no question that further attempts were futile. The Township made that abundantly clear. Indeed, the Supreme Court's 2019 recognition that "the settled rule" that "exhaustion of state remedies 'is *not* a prerequisite to an action under [42 U.S.C.] § 1983' " also applies in taking cases. *Knick v. Twp. of Scott*, 588 U.S. 180, 139 S.Ct. 2162 (2019) (quoting *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994)).[7] As such, Defendant's ripeness and finality arguments must fail.

II. The Township Imposed An Unconstitutional Condition On The PUD Approval Process.

A. <u>The Imposition Of The Unconstitutional Condition Was A Taking.</u>

Municipalities and governmental agencies unconstitutionally take property when they place conditions on land-use permit approvals that lack a reasonable nexus and rough proportionality to the land-use project at issue. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595; 133 S. Ct. 2586 (2013). Conditions that do not bear these characteristics are called "unconstitutional conditions." *Id*. Examples of such unconstitutional conditions include demands for easements, licenses, and other land-use rights by a governmental entity in exchange for permit approvals,

[7] While *Knick* overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108 (1985), to hold that exhaustion is not required, it indeed "left untouched *Williamson County*'s alternative holding that plaintiffs may challenge only 'final' government decisions." *Pakdel v. City & Cty. of San Francisco*, 594 U.S. 474, 4777 (2021) (quoting *Knick*, 588 U. S. at 188). But again, the Court further explained that the "finality requirement is relatively modest. All a plaintiff must show is that there is no question about how the regulations at issue apply to the particular land in question."

where the governmental entity would otherwise need to exercise its eminent-domain authority to obtain the easement, license, or other land-use right. *Id*. at 604-605.

The Supreme Court of the United States has held that a monetary exaction from a property owner seeking a discretionary permit related to a particular piece of land is a *per se* taking. *Id*. at 615. The Court explained that this type of monetary exaction is akin to the taking of an easement or lien against a particular piece of property. *Id*. As such, a monetary exaction is a "taking" under the Takings Clause. *Id*. **This type of claim vests even when a permit, which is subject to an unconstitutional condition is denied and no monetary exaction was completed because there was still an attempt to burden a constitutional right**. *Id*. at 608-609.

Under the unconstitutional-conditions doctrine, "the government may not deny a benefit to a person because he exercises a constitutional right." *FP Dev, LLC v Charter Twp. of Canton, Michigan*, 16 F4th 198, 205 (6th Cir. 2021) (quotation marks and citation omitted). This doctrine "vindicates the Constitution's enumerated rights" by preventing a governmental entity from coercing a person into giving them up. *Id*. (quotation marks and citation omitted). "Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights." *Nollan v. California Coastal Com'n*, 483 U.S.

825, 836-837, 107 S.Ct. 3141 (1987). In short, "[e]xtortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Koontz*, 570 U.S. at 604. Here, NVD's claim does not depend upon allegations that NVD had a protected property interest in the PUD application, but rather, that the Township attempted to impose unconstitutional conditions as part of the PUD application process. **(See, ECF No. 1, PageID.31 and 32)**. And with respect to that – there can be no question.

B. <u>Unconstitutional Conditions With Land-Use Cases.</u>

In the context of land use cases, there is a "special application" of the unconstitutional-conditions doctrine that protects the right to just compensation under the Takings Clause when a government demands property in exchange for land-use permits. *FP Dev, LLC* at 206. While a government may "choose whether and how a permit applicant is required to mitigate the impacts of a proposed development," a government "may not leverage its legitimate interest in mitigation to pursue governmental ends" where there is a lack of: (1) an essential nexus between a legitimate state interest and the permit condition exacted by the government, and (2) a rough proportionality in terms of the required relationship between the proposed impacts and the permit's conditions. *Id.* (quotation marks and citation omitted); See *Dolan v Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994). Under the first prong of the unconstitutional-conditions doctrine, there is no nexus between the

Township's conditions for approval here and a legitimate state interest. The Township sought various benefits—including an immense cash payment under the demanded CBA—that bore no relation to the anticipated impacts of the Project and was far in excess of the breakage fees governed by statute. Instead, the Township was apparently seeking to have NVD subsidize various other programs, projects and funds that were entirely unrelated to the Project.

And for the second prong, even if there were such a nexus, the Township's attempted exaction of millions of dollars from NVD fails the rough proportionality test. The Supreme Court recently clarified that, with regard to rough proportionality, a "permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose." *George Sheetz v. County of El Dorado, California*, 601 U.S. 267, 144 S Ct. 893 (2024). Here, the Township was seeking millions of dollars (over half the amount of what NVD paid for the property) and beyond the estimated annual payment of $200,000 in breakage fees it would have been entitled to under state law, which the Michigan Legislature intended as an offset of any potential community impacts of regulated racetracks. More than that, the Township also sought forfeiture of Plaintiff's property rights by imposing community events on their property as well as public trails, etc.

The threshold for showing a constitutionally sufficient "rough proportionality" is not trivial, as illustrated in *Dolan*. There, the Supreme Court held that a city's requirement that a commercial property developer create a dedicated public pedestrian/bicycle pathway easement was not proportional to the projected traffic impacts of the development where the city failed to show that the demanded easement was likely to offset traffic demand. *Dolan*, 512 U.S. at 395. Here, the City cannot show justification or proportionality to support its CBA conditions for approval of the PUD. Instead, the demands were completely arbitrary to fulfill the Township's "wish list".[8]

Further, neither the MZEA nor the Township's own zoning Ordinances authorized the Township to impose such outrageous conditions in this case. Both the MZEA and the Ordinances are subject to the provisions of the Constitution, and thus, the discretion provided to the Township in the PUD process is not unlimited. Instead, the Township must comport with the restrictions imposed by the Constitution, which they clearly did not.

One does not have to look further than basic reason to know that all of these conditional demands of the Township constitute unconstitutional conditions since the intent and purpose of the unconstitutional-conditions doctrine is to protect

[8] In point of fact, what was being proposed by the Township was not really a "CBA" at all, but rather a mandatory condition imposing demands and requirements that went far beyond anything in typical "development agreements" as a so-called "*quid pro quo"* for Township approval.

landowners from "extortionate demands for money by land-use authorities." *Id*. at 619. As such, judgment on the pleadings in favor of Defendant should be denied.

III. NVD Has Pled A Viable Substantive Due Process Claim.

An individual's right to due process of law when facing certain kinds of adverse action at the hands of the state is guaranteed under both the United States and Michigan Constitutions. See U.S. Const. amend. XIV, § 1; Mich. Const. art. 1, § 17.4. In addition to ensuring fair procedures, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990) (quotation omitted). As such, "[c]itizens have a substantive due process right protecting them from arbitrary or irrational zoning decisions." *Tollbrook, LLC v. City of Troy*, 352 Mich. 636, 91 N.W.2d 9 (Mich. 1958) (quotation omitted). Substantive due process claims are factually driven. The regulation may be unreasonable either because it does not advance a legitimate governmental interest *or* because it does so unreasonably. *Conlin v. Scio Twp*., 262 Mich. App. 379, 686 N.W.2d 16 (Mich. App. 2004). A party alleging a substantive due process violation resulting from a zoning decision must show (1) the existence of a constitutionally protected property interest, and (2) that the protected interest has been deprived through arbitrary and capricious action. *Id*. at 934. NVD's constitutionally protected interest was taken when the Township arbitrarily and

capriciously demanded millions of dollars from NVD in order to approve the PUD Application, among other demands. The denial of NVD's PUD Application for its refusal to satisfy the unconstitutional conditions imposed by the Township was inherently arbitrary, capricious and shocks the conscience.

A. It Is A Question Of Fact Whether The Township Deprived NVD Of Its Rights Through Arbitrary And Capricious Action.

Whether NVD was deprived of its right to substantive due process through arbitrary and capricious action by the Township, presents a question of fact that cannot properly be decided on a rule 12(c) motion. "The determination whether a land use decision substantially advances legitimate state interests is 'essentially fact-bound in nature.'" *Tandy Corp. v. City of Livonia*, 81 F.Supp. 2d 800, 814 (E.D. Mich. 1999) (quoting *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999)). In *Tandy*, the court concluded that summary judgment was inappropriate on the second element of plaintiff's substantive due process claim because there remained a triable fact question as to whether the City's proffered explanations for its rezoning held water. *Id*. at 810-811, 813-814. In this case, discovery has only just begun.

Here, the Township describes the events as a simple "breakdown in negotiations of a contract and the failure of Plaintiff to complete the tasks requiring to advance to final PUD approval within a year." (Defendant's Motion, p. 19). This version of events is not just a simplification of what occurred, it is a false narrative

that leaves out the inducements made to NVD to purchase the $10 million property, the imposition of a condition for payment of millions of dollars and the funding of multiple of events (none of which had anything to do with horse-racing or the project impact). The rationale the Township recites to explain the rescission of PUD approval flies in the face of common sense and logic and is grossly insufficient at this stage of the proceeding.

At this time, without discovery having been exchanged, the details surrounding Heise, Heitman and the Township's actions and tactics have not been fully revealed. At a minimum, discovery should be taken before any ruling is made by the Court. To resolve the case on briefs without entertaining any documents or testimony would be premature and inappropriate.

IV. NVD's Claim Under The MZEA Is Viable.

Section 503 of the MZEA, Mich. Comp. Laws 125.3503, governs Michigan municipalities' ability to approve PUDs within their boundaries. Section 504(3) of the MZEA makes clear that "a request for approval of a land use or activity shall be approved if the request is in compliance with the standards stated in the zoning ordinance." Nowhere does it contemplate a CBA as a condition of PUD approval. Section 503(3) of the MZEA provides: "The planned unit development regulations need not be uniform with regard to each type of land use *if equitable procedures recognizing due process principles and avoiding arbitrary decisions are followed* in

making regulatory decisions." Because the Township denied NVD's approval in an arbitrary manner, in violation of due process principles, and based on regulations and standards that are not included in its Zoning Ordinance, the Township's decision was in direct violation of the MZEA.

As such, it is only appropriate that NVD is seeking declaratory relief pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 65.

V. NVD Is Entitled To Injunctive Relief Under 42 U.S.C. § 1983 And Has Standing To Request Injunctive Relief.

Raising a request for injunctive relief as a separate count in a complaint is proper, and such a count will survive a motion to dismiss so long as the complaint contains sufficient allegations which would support the requested relief. See *GC Franchising Sys, Inc v Kelly*, No. 1:19-CV-49, 2021 WL 1209263, at *10 (SD Ohio, March 31, 2021) (denying a request to dismiss a count for specific forms of relief—including injunctive relief—because the complaint raised sufficient allegations to support the requested relief). Attached hereto as **Exhibit D**.[9]

VI. NVD Has Pled A Valid Estoppel Claim.

Equitable estoppel arises where (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the

[9] Moreover, even if this Court were to dismiss this independent count, such a dismissal would have little practical effect. Each count of the complaint contains a separate request for injunctive relief, and thus dismissal of this count would be immaterial because NVD could continue to seek injunctive relief as a remedy for its remaining claims.

other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. *Howard Twp. Bd. Of Trustees v. Waldo*, 168 Mich. App. 565, 425 N.W.2d 180 (Mich. App. 1988). The Township argues that a promissory estoppel claim is not valid since Plaintiff is "charged with knowledge that the PUD approval process is within the realm of the PC and the Board" and that the "Supervisor lacks the independent authority to bind the Township to a promise guaranteeing a particular outcome." (Defendant's Motion, p. 22). Defendant's argument completely misses the boat. The issue here is not whether NVD had knowledge that the PUD approval process is within the realm of the Planning Commission and the Board, but rather that it purchased a $10 million property under the promise that these bodies, with the power to greenlight the Project, would do so and would do so in a 90-day time frame. This was not "casual private advice" as Defendant states, but rather a full court press by the Township's Supervisor (it's lead Executive) and the Economic Development Director to get NVD to purchase the property under a clear and unambiguous promise to get the Project approved. There was nothing "casual" about these conversations and actions of Heise and Heitman. Heise and Heitman initiated and pursued NVD to build their new race track in the Township and then pulled the rug out from under them. NVD's reliance on Heise and Heitman's promises was reasonable as every step of the process played out the way Heise and Heitman

promised (other than the CBA). NVD justifiably relied on Heise and Heitman's promises and has been greatly prejudiced and damaged by the "denial of the existence of these facts".

VII. NVD's cause of action under the MHRL is valid.

The Township denied the NVD PUD Development Plan because NVD refused to pay the Township any amounts above the breaks obtained through licensed horse racing under the MHRL – to the tune of over $5,000,000.00. The Township's imposition of the CBA, mandating massive payments to the Township, would have meant acting in violation of the MHRL – in essence imposing an excise or license tax on Plaintiff. Such action, aside from being unconstitutional as discussed above, was also illegal under the MHRL. Thus, the Township's decision to deny the NVD PUD application is a violation of the MHRL.

CONCLUSION

For the foregoing reasons, the Court should deny the Township's Motion in its entirety.

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