UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHVILLE DOWNS, LLC, a
Michigan limited liability company,

Plaintiff,

Case No. 2:24-cv-10492
Hon. Brandy R. McMillion

v.

PLYMOUTH CHARTER TOWNSHIP,
a Michigan municipal corporation,

Defendant.

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR TO DISMISS FOR LACK OF JURISDICTION

****Oral Argument Requested****

Defendant, PLYMOUTH CHARTER TOWNSHIP, by and through its counsel, ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C., moves for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), or alternatively to dismiss the Complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), for the reasons stated in the accompanying brief in support of this motion.

The undersigned counsel certifies that, pursuant to L.R. 7.1, concurrence in this motion was sought from Plaintiff through a phone call with Plaintiff's counsel on August 16, 2024, but concurrence was affirmatively denied.

WHEREFORE, Defendant, PLYMOUTH CHARTER TOWNSHIP, respectfully requests that this Honorable Court grant its motion for judgment on the pleadings and/or to dismiss the Complaint, dismiss the Complaint with prejudice, enter judgment in Defendant's favor, award Defendant attorney fees and costs so wrongfully incurred in defending this action, and grant any other relief deemed appropriate.

Respectfully submitted,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER, P.C.

/s/Matthew J. Zalewski
MATTHEW J. ZALEWSKI (P72207)
Attorneys for Defendant
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
mzalewski@rsjalaw.com

DATED: September 11, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHVILLE DOWNS, LLC, a Michigan limited liability company,

Plaintiff,

Case No. 2:24-cv-10492
Hon. Brandy R. McMillion

v.

PLYMOUTH CHARTER TOWNSHIP, a Michigan municipal corporation,

Defendant.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR TO DISMISS FOR LACK OF JURISDICTION

****Oral Argument Requested****

TABLE OF CONTENTS

INDEX OF AUTHORITIES iv

STATEMENT OF ISSUES PRESENTED viii

CONTROLLING OR MOST APPROPRIATE AUTHORITIES FOR RELIEF REQUESTED x

INTRODUCTION 1

STATEMENT OF FACTS 3

I. The Subject Property and Development Project 3

II. The PUD Ordinance and Process 3

III. Plaintiff's PUD Option Application and Pursuit of a Development Plan 5

STANDARD OF REVIEW 8

ARGUMENT 10

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE FEDERAL CLAIMS BECAUSE THEY ARE NOT RIPE. 10

II. THE DUE PROCESS, UNCONSTITUTIONAL CONDITIONS, AND TAKINGS CLAIMS FAIL FOR LACK OF CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN PUD APPROVAL 12

III. PLAINTIFF'S SUBSTANTIVE DUE PROCESS CLAIM IS NOT AVAILABLE, AND OTHERWISE LACKS MERIT. 16

A. A Substantive Due Process Claim is not Available where, as here, the Constitution Provides an Explicit Textual Source of Protection. 16

B. The Complaint does not Allege Conduct that Shocks the Conscience. 17

IV. INJUNCTIVE RELIEF IS NOT AN INDEPENDENT CLAIM. 19

V. PLAITNIFF FAILS TO STATE A ZONING ENABLING ACT CLAIM, AS THE TOWNSHIP IS AUTHORIZED TO NEGOTIATE BENEFITS AS A COMPONENT OF THE PUD CONTRACT. 19

VI. THE PROMISSORY ESTOPPEL CLAIM IS NOT VIABLE, AS PLAINTIFF'S CLAIMED RELIANCE WAS UNREASONABLE. 21

VII. PLAINTIFF LACKS A PRIVATE CIVIL CAUSE OF ACTION UNDER THE MICHIGAN HORSE RACING LAW. 22

CONCLUSION 23

CERTIFICATE OF SERVICE 24

INDEX OF AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 9

Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008) 9

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 9

Bevan v. Brandon Township, 475 N.W.2d 37 (Mich. Sup. Ct. 1991) 13, 14

Board of Regents v. Roth, 408 U.S. 564 (1972) 12

Braun v. Ann Arbor Charter Twp., 519 F.3d 564 (6th Cir., 2008), *cert. denied*, 555 U.S. 1062 (2008) 12, 16

City/Village of Douglas v. Von Der Heide, No. 292948, 2010 WL 4679529 at *2 (Mich. Ct. App. Nov. 18, 2010) ..... x, 20

Cummins v. Robinson Twp., 770 N.W.2d 421 (Mich. Sup. Ct. 2009) 12, 17

EJS Properties, 698 F.3d 845 (6th Cir. 2012) 18

EJS Properties, LLC v. City of Toledo, 698 F.3d 845 (6th Cir. 2012) 12, 13

Fass v. Highland Park, 326 Mich. 19, 39 N.W.2d 336 (1949) 22

Gentek Bldg. Products, Inc. v. Sherwin-Williams Co, 491 F3d 320 (6th Cir 2007) 9

Golf Village North, LLC v. City of Powell, Ohio, 42 F.4th 593 (6th Cir. 2022.) 18, 19

Gora v. City of Ferndale, 576 N.W.2d 141 (Mich. Sup. Ct. 1998) 17

Goryoka v. Quicken Loan, Inc., 519 Fed.Appx. 926 (6th Cir. 2013) ..... ix, 19

Graham v. Connor, 490 U.S. 386 (1989) 17

Green Genie, Inc. v. City of Detroit, MI, 63 F.4th 521 (6th Cir. 2023) ix

Hughes v. Almena Twp., 77 N.W.2d 453 (Mich. Ct. App. 2009) ..... x, 21, 22

Koontz v. St. Johns River Water Management Dist., 570 U.S. 595 (2013) 16

Larry E. Parrish P.C. v. Bennett, 989 F.3d 452 (6th Cir. 2021) x

MacDonald, Sommer & Frates v. Yolo County, 477 US 340 (1986) 10

Mason v. Mountain River Estates, 73 Or.App. 334, 698 P.2d 529 (Or. App. 1985) 15

McCarthy v. Middle Tennessee Elec. Membership Corp., 466 F.3d 399 (6th Cir. 2006) ..... ix, 13

Mettler-Walloon, LLC v. Melrose Twp., 761 N.W.2d 293 (Mich. Ct. App. 2008) 17

Montgomery v. Carter County, Tenn., 226 F.3d 758 (6th Cir. 2000)..... ix, 17

Moskovic v. City of New Buffalo, 638 F.Supp.3d 770 (W.D. Mich. 2022) .. x, 13, 20

Muslim Community Ass'n of Ann Arbor and Vicinity v. Pittsfield Charter Tp., 947 F.Supp.2d 752 (E.D. Mich. 2013) ..... ix, 16

Musson Theatrical, Inc. v. Federal Express Corp., 89 F3d 1244 (6th Cir 1996) 19

Norris v. Stanley, 73 F.4th 431 (6th Cir. 2023) ix

Norris v. Stanley, No. 1:21-cv-756, 2022 WL 247507 at *4 (W.D. Mich. Jan. 21, 2022), *aff'd by Norris v. Stanley,* 73 F.4th 431 (6th Cir. 2023) 16

Novak v. Nationwide Mut. Ins. Co., 599 N.W.2d 546 (Mich. Ct. App. 1999) 21

Pamela B. Johnson Tr. ex. re. Johnson v. Anderson, No. 315397, 2014 WL 4087967, at *9 (Mich. Ct. App. Aug. 19, 2014).....14

Paragon Properties v. City of Novi, 452 Mich 568, 550 N.W.2d 772 (1996) 10

Richardson v. Township of Brady, 218 F.3d 508 (6th Cir. 2000).....14

Saginaw Co. v. Kent, 209 Mich. 160, 176 N.W.601 (Mich. 1920) 22

Sau-Tuk Industries, Inc. v. Allegan County, 892 N.W.2d 33 (Mich. Ct. App. 2016) 21

Seguin v City of Sterling Heights, 968 F.2d 584 (6th Cir. 1992)..... ix, 10, 13, 14

Shepherd Montessori Center Milan v. Ann Arbor Chtr. Twp., 783 N.W.2d 695 (Mich. Sup. Ct. 2010) 12

Silver v. Franklin Tp. Bd. of Zoning Appeals, 966 F.2d 1031 (6th Cir. 1992) .. 13, 15

Skidmore v. Access Group, Inc. 149 F.Supp.3d 807 fn. 1 (E.D. Mich. 2015).....19

Thomas v. City of Detroit, No. 06-10453, 2007 WL 674593 at *9 (E.D. Mich. 2007)..... ix, 17

Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).....12

U.S. v. Ritchie, 15 F3d 592 (6th Cir 1994) 8

v. St. Johns River Water Management Dist., 570 U.S. 595 (2013) ix

Women's Medical Professional Corp. v. Baird, 438 F.3d 595 (6th Cir. 2006).....13

Ziegler v. IBP Hog Market, Inc., 249 F.3d 509 (6th Cir. 2001) 9

Statutes

Mich. Comp. Laws § 125.3503(1)-(2) 3
Mich. Comp. Laws § 125.3503(2) 3
Mich. Comp. Laws § 125.3503(2), (4), (8) ..... xi, 20
Mich. Comp. Laws § 431.238 22
Mich. Comp. Laws § 431.301 et. seq. xi
Mich. Comp. Laws § 431.302 22
Mich. Comp. Laws § 431.314(6) 23
Mich. Comp. Laws § 431.321 22
Mich. Comp. Laws § 431.328 22
Mich. Comp. Laws § 431.329 23

Rules

Fed. R. Civ. P. 12(b)(6) 11
FRCP 12(b)(1) 10

Ordinances

ZO § 23.1, 23.4 4
ZO § 23.4 4
ZO § 23.5 4
ZO § 23.7 3
ZO § 23.7 (2)(b) 15
ZO § 23.7(1)(a) 15
ZO § 23.7(1)(b) 11, 15
ZO § 23.7(1)(b)(3) 4, 11
ZO § 23.7(10)(b)(3) 5
ZO § 23.7(2)(b) 5
ZO § 23.7(2)(c) 5, 19
ZO § 23.8 4

ZO § 23.8(7)..... xi, 4, 18, 20
ZO §§ 23.1, 23.6, 23.7 4
ZO §§ 23.5, 23.7(1)(b)(1) 4
ZO §23.12 5
ZO §23.7(2)(a) 5
ZO Art. 23 3

STATEMENT OF ISSUES PRESENTED

I. Should Plaintiff's federal claims be dismissed for lack of subject matter jurisdiction based on lack of ripeness, where the Township's decision to rescind Plaintiff's PUD Option approval does not constitute a final decision on the applicability of the Zoning Ordinance to Plaintiff's property?

Defendant answers: Yes
Plaintiff answers: No

II. Should judgment as a matter of law be entered in favor of Defendant on Plaintiff's due process, unconstitutional conditions, and takings claims (Counts I, II, V, and VI), where Plaintiff lacks a constitutionally protected property interest in the approval of its PUD application?

Defendant answers: Yes
Plaintiff answers: No

III. Should judgment as a matter of law be entered in favor of Defendant on the substantive due process claim (Count VI), where the claim is duplicative of the takings claim, and Plaintiff fails to allege conduct that shocks the conscience?

Defendant answers: Yes
Plaintiff answers: No

IV. Should judgment as a matter of law be entered in favor of Defendant on Count VII, "Injunctive Relief," where injunctive relief is not an independent substantive cause of action?

Defendant answers: Yes
Plaintiff answers: No

V. Should judgment on the pleadings be entered in favor of Defendant on the Michigan Zoning Enabling Act Claim (Count III), where the MZEA does not provide a cause of action for damages, and the negotiation of benefits within a PUD Contract is consistent with the Township's authority under the MZEA and Zoning Ordinance?

Defendant answers: Yes
Plaintiff answers: No

VI. Should judgment on the pleadings be entered in favor of Defendant on the promissory estoppel claim (Count IV), where Plaintiff's claimed reliance was unreasonable as a matter of law?

Defendant answers: Yes
Plaintiff answers: No

VII. Should judgment on the pleadings be entered in favor of Defendant on Plaintiff's Michigan Horse Racing Law claim (Count VII), where the statute does not provide a civil cause of action?

Defendant answers: Yes
Plaintiff answers: No

CONTROLLING OR MOST APPROPRIATE AUTHORITIES FOR RELIEF REQUESTED

Issue I

Seguin v City of Sterling Heights, 968 F.2d 584, 588 (6th Cir. 1992).

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)

Issue II

Green Genie, Inc. v. City of Detroit, MI, 63 F.4th 521, 526 (6th Cir. 2023)

Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 604 (2013)

McCarthy v. Middle Tennessee Elec. Membership Corp., 466 F.3d 399, 412 (6th Cir. 2006)

Muslim Community Ass'n of Ann Arbor and Vicinity v. Pittsfield Charter Tp., 947 F.Supp.2d 752, 763 (E.D. Mich. 2013)

Seguin v. City of Sterling Heights, 968 F.2d 584, 591 (6th Cir. 1992)

Norris v. Stanley, 73 F.4th 431 (6th Cir. 2023)

Issue III

Montgomery v. Carter County, Tenn., 226 F.3d 758, 769 (6th Cir. 2000)

Thomas v. City of Detroit, No. 06-10453, 2007 WL 674593 at *9 (E.D. Mich. 2007)

Issue IV

Goryoka v. Quicken Loan, Inc., 519 Fed.Appx. 926, 929 (6th Cir. 2013)

Issue V

City/Village of Douglas v. Von Der Heide, No. 292948, 2010 WL 4679529 at *2 (Mich. Ct. App. Nov. 18, 2010)

Moskovic v. City of New Buffalo, 638 F.Supp.3d 770, 783 (W.D. Mich. 2022)

Mich. Comp. Laws § 125.3503(2), (4), (8)

ZO § 23.8(7)

Issue VI

Hughes v. Almena Twp., 77 N.W.2d 453, 469-470 (Mich. Ct. App. 2009)

Issue VII

Larry E. Parrish P.C. v. Bennett, 989 F.3d 452, 457 (6th Cir. 2021)

Mich. Comp. Laws § 431.301 et. seq.

INTRODUCTION

Plaintiff was off to the races attempting to establish a new location for its horseracing track in Plymouth Township, but it came up lame and now blames the Township for its failure to cross the finish line. Plaintiff acquired property in the Township that it envisioned as a new location for the racing facility it was closing in the City of Northville. As the project would exceed the normal boundaries of the Township's Zoning Ordinance ("ZO") Plaintiff sought to pursue approvals under the more flexible terms of the Planned Unit Development ("PUD") option of the ZO. The PUD process is a multifaceted one, consisting of preliminary "PUD Option" approval, followed by development of a PUD Development Plan, and negotiation of a PUD Contract with the Township. Upon obtaining initial PUD Option authorization, Plaintiff moved on to pursuing its final plans and PUD Contract. But nearly a year after obtaining PUD Option approval, Plaintiff still had not submitted a final plan, landscape plan, or engineering escrow, nor agreed on terms of the PUD Contract. Plaintiff also decided that it had reached an impasse with the Township on negotiating terms of community benefits, and declared that it would not continue negotiating them. As it was clear that Plaintiff was not making good faith progress toward achieving final PUD approval (and did not plan to), the Township ultimately denied an extension of time for Plaintiff to pursue final PUD approval, and rescinded its initial PUD Option authorization.

Plaintiff sues on federal theories of a taking by unconstitutional conditions, a regulatory taking, and alleged violations of due process. But these claims are not ripe, as Plaintiff never made it past the PUD Option approval, so never obtained a final decision on final PUD approval, nor on any conditions that might have been included in the PUD Contract, nor on the applicability of the general ZO regulations to Plaintiff's property. Moreover, lacking a final decision, building permit, or substantial completion of the project, Plaintiff lacks the protected property right necessary to pursue its due process and takings claims.

Plaintiff's state claims also fail. It alleges that the Township's requirement for negotiating community benefits violates the MZEA, but it is consistent with the MZEA's authorization to condition a PUD approval, and also consistent with the ZO's authority to include conditions to advance the public health, safety, and welfare to minimize the impact of the project. Plaintiff also claims a violation of the Michigan Horse Racing Law, but fails to identify any authority for relying upon that statute to pursue a private civil cause of action. It also includes a claim styled as "promissory estoppel," claiming that Plaintiff relied upon expressions of hope of certain Township officials, but the law is clear that, when dealing with a municipality, reliance on expressions of any one official is unreasonable. As no discovery can change the fact that all of Plaintiff's claims fail for lack of subject matter jurisdiction and/or as a matter of law, the Complaint must be dismissed.

STATEMENT OF FACTS

I. The Subject Property and Development Project

Plaintiff owns an approximately 128-acre parcel at the southwest corner of Ridge Road and Five Mile Road, in the Plymouth Township. (Compl. ¶¶ 38, 46.) It sought to develop the parcel as the new location for its horseracing track that had previously been located in the City of Northville. (Compl. ¶¶ 9-12.)

Plaintiff determined that it wished to pursue the development as a Planned Unit Development ("PUD") under the Township's Zoning Ordinance ("ZO"). PUDs are intended to allow flexibility in land use regulation by allowing the development of projects that might otherwise not conform to the ZO, but which, through the PUD process, integrate the PUD development into the surrounding area in a manner that comports with the objectives of the ZO. Mich. Comp. Laws § 125.3503(1)-(2); ZO Art. 23, "Purpose," ECF No. 1-3, PageID.68. Municipalities are empowered by the Michigan Zoning Enabling Act to offer a PUD process. Mich. Comp. Laws § 125.3503(2). Notably, where an applicant is denied approval for a PUD, it remains free to pursue development "in accordance with the provisions of the Zoning Ordinance for the district where the property is located." ZO § 23.7.

II. The PUD Ordinance and Process

The Township's PUD regulations are within Article XXIII of its ZO. (ZO Art. 23, ECF No. 1-3, PageID.68-88.) The PUD process starts with an application for a

"PUD Option." ZO § 23.1, 23.4.) This application goes through a public hearing and review before the Planning Commission ("PC"), which makes a recommendation on the PUD Option to the Township Board ("Board"). ZO §§ 23.1, 23.6, 23.7. The PUD Option phase is merely preliminary, as it elicits general information about the property, a conceptual development plan, and other information geared toward the PC's and Board's consideration of "the desirability of applying the provisions of" the PUD article of the ZO. ZO § 23.4. PUD Option approval does "not constitute approval of a . . . final site development plan." ZO § 23.7(1)(b)(3).

If the PUD Option is approved by the Board, then the PUD process begins in earnest. The applicant must submit a Development Plan for review and approval by the PC and Board within one year of PUD Option approval. ZO §§ 23.5, 23.7(1)(b)(1). Approval of a Development Plan is contingent upon requirements including a final site plan, a description of the PUD, and a PUD Contract. ZO § 23.5. The PUD Contract sets forth "the conditions upon which approval of the PUD is based." ZO § 23.8. Among other components, the PUD Contract includes "provisions reasonably and necessarily intended to affect the intent of this Article, or the conditions of the approval of the plan for the public health, safety, morals and general welfare of the Township." ZO § 23.8(7).

The PC performs the initial review of the Development Plan and makes a recommendation to the Board to either approve, approve with conditions, or deny

the plan. ZO §23.7(2)(a). The Board is then charged with review of the Development Plan and PUD Contract, with the same approval or denial choices. ZO § 23.7(2)(b). While an applicant is expected to receive Board approval within one year of the PUD Option approval (ZO § 23.7(10)(b)(3)), a one-year extension may be granted by the PC "upon a showing of good faith and effort by the applicant." ZO § 23.7(2)(c). Board approval of the Development Plan and PUD Contract "signifies the completion of the PUD application process." ZO §23.12.

III. Plaintiff's PUD Option Application and Pursuit of a Development Plan

Plaintiff submitted its PUD Option application on January 16, 2023. (Compl. ¶ 52.) The PC considered the application at its February 15, 2023 meeting. (2-15-23 PC Minutes, ECF No. 1-4, PageID.85.) The PC unanimously approved a motion to recommend approval of the PUD Option, subject to the Plaintiff addressing numerous additional items prior to Board review, including fire access, a traffic impact study, rain garden, lighting and mitigation plan and other site development items. *Id.*, at ECF No. 1-4, PageID.90.

The Board considered the PUD Option at its February 28, 2023 meeting. (2-28-23 Board Minutes, ECF No. 1-6, PageID.96.) By a vote of 6-1, the Board approved the PUD Option for Plaintiff, subject to the further refinements provided for in the PC's February 25, 2023 motion. *Id.*, ECF No. 1-6, PageID.98.)

In connection with the PUD Option vote, the Board unanimously approved a motion authorizing "the Township Attorney and Supervisor to develop and draft a Community Benefit Agreement" ("CBA") between the Township and Plaintiff to be approved at a future meeting. (ECF No. 1-6, PageID.98.) In a memorandum included in the public agenda packet for the February 25, 2023 Board Meeting, the Township Supervisor identified a variety of benefits that might be negotiated to flow between the parties, but no specific proposals were actually up for a vote at that meeting. (2-28-23 Heise Memo, Ex. 1.) The memo also noted that the Supervisor had invited the Carlos (of Northville Downs) and their legal representative to the meeting to discuss the CBA. *Id.* As reflected in the minutes, nobody ultimately participated in discussion of that agenda item. (2-28-23 Board Minutes, ECF No. 1-6, PageID.98.)

With the PUD Option authorization, Plaintiff proceeded into the Development Plan and PUD Contract stage. Plaintiff first presented a proposed Development Plan to the PC at a special meeting held on May 3, 2023. (5-23-23 PC Minutes, ECF No. 1-8, PageID.103.) The PC postponed a decision on the Development Plan for up to 90 days so that Plaintiff could address items in staff reports. *Id.*, at PageID.105. Then, at its June 1, 2023 meeting, the PC voted to recommend approval of the Development Plan to the Board, with conditions including: addressing outstanding items in the planner's and engineer's reports; providing a revised PUD Contract that

includes a provision for a community benefits agreement; and, submitting a final landscape plan. (6-1-23 PC Minutes, ECF No. 1-9, PageID.110.)

Over the following months, the parties attempted to negotiate the terms of the PUD Contract and related community benefits agreement ("CBA"), but by the end of the year, those negotiations reached an impasse. On January 10, 2024 Plaintiff's attorney sent a letter to the Township expressly stating that Plaintiff refused to enter into a CBA. (1-10-24 Cox Letter, ECF No. 1-13, PageID.128.) As such, Plaintiff's counsel indicated an express intention not to comply with that condition of the Board's PUD Option approval, and the PC's conditional recommendation for approval of the PUD Development Plan. Plaintiff's counsel sought approval of a PUD Contract draft that excluded reference to a CBA, or alternatively that it be granted a one-year extension of its pursuit of final PUD Development Plan and Contract approval without a CBA. *Id,* at ECF No. 1-13, PageID.129-130.)

The Board first addressed this letter at its January 23, 2024 meeting, with the result that it passed a motion to rescind its prior resolution authorizing negotiation of a PUD Contract and CBA. (1-23-24 Board Minutes, ECF No. 1-14, PageID.143.) The matter then went to the PC at its January 29, 2024 meeting for a recommendation on Plaintiff's request for an extension of its PUD Option approval. (1-29-24 PC Minutes, ECF No. 1-15, PageID.152.) During that meeting, the Township Planner and Township Attorney called out the fact that it was not just the CBA that was a

problem for Plaintiff. Rather, Plaintiff had not satisfied four out of six of the conditions that the PC attached to its recommendation to approve the PUD Development Plan, as it had not finalized: 1) the site plan; 2) the site development plan; 3) the PUD Contract; or, 4) the CBA. (1-29-24 PC Minutes, ECF No. 1-15, PageID.153.) Plaintiff's failure to timely comply with these conditions became the basis for the PC's ultimate decision to rescind its prior recommendation to approve the site plan and PUD Contract, and to deny Plaintiff's request for a one-year extension due to lack of good faith progress. *Id,* at ECF No. 1-15, PageID.154-155. The Board approved a motion at its February 6, 2024 meeting confirming the PC's decision for the reasons stated by the PC, and also because Plaintiff had failed to submit a landscaping plan and had not submitted the engineering escrow that was to be paid within seven days. ECF No. 1-16, PageID.161-163.)

STANDARD OF REVIEW

A motion to dismiss for lack of subject matter jurisdiction brought under Fed. R. Civ. P. 12(b)(1) can be presented as a facial attack challenging the sufficiency of the pleading, or a factual attack challenging the factual existence of subject matter jurisdiction. *U.S. v. Ritchie,* 15 F.3d 592, 598 (6th Cir 1994). This motion presents a factual attack. Plaintiff's allegations are not presumed to be true, and "the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Ritchie,* 15 F.3d at 598. The court "has wide discretion" to consider

affidavits and documents "to arrive at the factual predicate that subject-matter jurisdiction does or does not exist." *Gentek Bldg. Products, Inc. v. Sherwin-Williams Co*, 491 F3.d 320, 330 (6th Cir 2007).

Motions for judgment on the pleadings under Fed. R. Civ. P. 12(c) are reviewed under the Fed. R. Civ. P. 12(b)(6) standard, which tests the sufficiency of a complaint. *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511-512 (6th Cir. 2001). The court will "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008). The court "may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims." *Id*. Each claim for relief must be "plausible on its face," by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Legal conclusions and "threadbare recitals of the elements of a cause of action supported by mere conclusory statements," are not entitled to deference. *Id.*, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Where "the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief," dismissal is appropriate. *Ziegler*, 249 F.3d at 512.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE FEDERAL CLAIMS BECAUSE THEY ARE NOT RIPE.

Before a takings claim can be ripe, Plaintiff must show that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002), *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (overruled on other grounds, *Knick v. Township of Scott*, 139 S.Ct.2162 (2019)); *Electro-Tech, Inc. v. H.F. Campbell, Co*, 445 N.W.2d 61, 62-63 (1989); *Paragon Properties v. City of Novi*, 550 N.W.2d 772, 775 (1996). If the finality requirement is not satisfied, the takings action cannot be considered complete and ripe for review. *Arnett*, 381 F.3d at 562. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-350 (1986). "If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Arnett*, 281 F.3d at 562.

Where, as here, an as-applied takings claim is joined with due process claims related to the alleged taking, those claims must also satisfy the *Williamson* finality requirement. *Seguin v City of Sterling Heights*, 968 F.2d 584, 588 (6th Cir. 1992).

Here, it cannot be disputed that Plaintiff did not obtain a final decision of the Township on a final PUD Development Plan and PUD Contract, nor regarding the

applicability of the default provisions of the ZO to its property. While Plaintiff catalogues subjects of bargaining that it believed were unreasonable, none of the so-called "conditions" were actually imposed by the Township, but were simply negotiable items for a contract that was never finalized. To the extent that the Board and PC rescinded its approval of the PUD Option, the only effect of that decision was to rescind the preliminary authorization to pursue the PUD process, which by itself is not a determination on the ultimate applicability of the ZO to Plaintiff's property, and is expressly deemed to "not constitute approval of a . . . final site development plan." ZO § 23.7(1)(b)(3). Moreover, the PUD regulations provide that, where the PUD Option is denied, "development of the subject property can be made only in accordance with the provisions of the Zoning Ordinance for the district where the property is located." (ZO § 23.7(1)(b)). Thus, in the absence of PUD approval, Plaintiff continues to have the ability to pursue a final decision on a project in accordance with the standard procedures of the ZO, which it has not done. Likewise, to the extent that the PC recommended approval (with conditions) of the Development Plan and PUD Contract, that was merely a recommendation, as the Board is the final decision maker. Lacking a final decision, the Complaint's takings claims (Counts I and II) and related due process claims (Counts V and VI) are unripe, and the Court lack subject matter jurisdiction over those claims.

II. THE DUE PROCESS, UNCONSTITUTIONAL CONDITIONS, AND TAKINGS CLAIMS FAIL FOR LACK OF CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN PUD APPROVAL.

Counts V and VI allege procedural and substantive due process claims, respectively. To prevail on either of these claims, Plaintiff must first prove that it has a constitutionally protected property right. *Green Genie, Inc. v. City of Detroit, MI,* 63 F.4th 521, 526 (6th Cir. 2023); *EJS Properties, LLC v. City of Toledo,* 698 F.3d 845, 855 (6th Cir. 2012).[1] The Due Process Clause "does not protect everything that might be described as a benefit." *Green Genie,* 63 F.4th at 526, citing *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 756 (2005). Plaintiff must have more than an abstract desire for it or unilateral expectation of the alleged property interest; rather, it must have a "legitimate claim of entitlement to," in this case, approval of its PUD application. *R.S.W.W. Inc. v. Keego Harbor,* 397 F.3d 427, 435 (6th Cir. 2005), citing *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972)); *Braun v. Ann Arbor Chtr. Twp.,* 519 F.3d 564, 573 (6th Cir. 2008).

The Sixth Circuit recognizes that this analysis also applies to takings claims, such that a takings claim is not viable where a property right does not exist. *McCarthy v. Middle Tennessee Elec. Membership Corp.,* 466 F.3d 399, 412 (6th Cir.

[1] As the Michigan Constitution's provisions are construed coextensively with their federal counterparts, they are appropriately considered together. *Shepherd Montessori Center Milan v. Ann Arbor Chtr. Twp.,* 783 N.W.2d 695, 698 (Mich. 2010); *Cummins v. Robinson Twp.,* 770 N.W.2d 421, 438 (Mich. 2009).

2006); *See, also, Moskovic v. City of New Buffalo, Michigan*, No. 23-1165, 2023 WL 8651272 at *5 (6th Cir. Dec. 14, 2023) (Ex. 2). Thus, whether Plaintiff has a protected property right is also relevant to evaluating the takings claims (Counts I and II).

"Constitutionally protected property interests are not created by the Constitution itself but rather by 'existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *R.S.W.W. Inc. v.* 397 F.3d at 435. "Whether a person has a 'property' interest is a traditionally a question of state law." *EJS Properties,* 698 F.3d at 855.

In Michigan, a protected property interest in a development does not vest until a permit has been issued and substantial construction commenced. *Seguin v. City of Sterling Heights*, 968 F.2d 584, 591 (6th Cir. 1992). Even where substantial sums of money have been expended, merely applying for a permit is not enough to vest a property right. *Seguin*, 968 F.2d at 591, citing *Bevan v. Brandon Township,* 475 N.W.2d 37, 46 (Mich. Sup. Ct. 1991). There is no protected property right in the approval of a first-time permit. *Wojcik v. Romulus*, 257 F.3d 600 (6th Cir. 2001); *Women's Medical Professional Corp. v. Baird,* 438 F.3d 595, 611 (6th Cir. 2006). Nor does a protected property right exist in an approval that is discretionary. *Silver v. Franklin Tp. Bd. of Zoning Appeals,* 966 F.2d 1031, 1036 (6th Cir. 1992).

In addition, there is no protected property right in procedures themselves. *Green Genie,* 63 F.4th at 527 (6th Cir., 2023); *Pamela B. Johnson Tr. ex. re. Johnson v. Anderson,* No. 315397, 2014 WL 4087967, at *9 (Mich. Ct. App. Aug. 19, 2014) (Ex. 3).

Here, Plaintiff's claims center on a claimed "protectable property interest in its PUD *application*." (Compl. ¶ 165, emphasis added.) As explained in Argument Section I, *supra,* the Board was not presented with a final Development Plan or PUD Contract for an up or down vote. Thus, Plaintiff never obtained a final decision on its Development Plan or PUD Contract, nor obtained a building permit, nor commenced substantial construction. Thus, Plaintiff's claim of a protected property right fails, as it is not claiming a protected property right in an issued permit with respect to which substantial construction has commenced, but rather is claiming it relative to an application for an unissued first-time permit, contrary to entrenched law providing that such claims do not open the door to a due process cause of action. *Seguin, Bevan, Wojcik.* Plaintiff tries to bolster its claim by stating that it has spent enormous time and money on preparations for the project (Compl. ¶161), but this is precisely the type of claim of a property right that the Courts reject. *Seguin, supra.*

Plaintiff also claims that neither the MZEA nor the ZO grant the Township discretion "to deny land-use applications" such as its "PUD application" (Compl. ¶ 165), but Plaintiff is wrong. Whether or not to authorize the PUD Option – which is

as far as this Plaintiff got in the process – is expressly presented in the terms of discretion relative to the PC's decision (e.g. "Following the public hearing and having a complete PUD option application, the Planning Commission **may**, recommend approval, table, disapproval, or approval with conditions." (ZO § 23.7(1)(a), emphasis added). Upon receipt of the recommendation, the Board's only duty is to review the application and act upon it; it does not mandate approval under any particular circumstances. (ZO § 23.7(1)(b)). Similarly, even in the case of review of a final Development Plan and PUD contract, the ZO only requires the Board to review and make a decision on the application; it does not mandate approval in any given situation. (ZO § 23.7 (2)(b).) As such, the ZO's PUD procedures are comparable to the conditional zoning procedures found to be discretionary in *Silver*, *supra*, (and thus not supportive of a due process protected property right), where it could not be shown that the municipality "did not have the discretion to deny Silver's use of land . . . if [the applicant] complied with certain minimum, mandatory requirements. *Silver, supra*, at 1036. (*Accord, Mason v. Mountain River Estates,* 73 Or.App. 334, 698 P.2d 529, 531-533 (Or. App. 1985), finding that a vested right did not exist in a PUD where the PUD process contained multiple stages, early stages merely consisted of conceptual approval of the project, and a condition precedent to establishing a vested right was absent.) There is no "property right in a future, rezoned land use for the plaintiff's property." *Muslim Community Ass'n of Ann*

Arbor and Vicinity v. Pittsfield Charter Tp., 947 F.Supp.2d 752, 763 (E.D. Mich. 2013), citing *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 573 (6th Cir. 2008).

This also has specific importance to the unconstitutional conditions claim. Plaintiff must cross the threshold of establishing that the alleged conditions coerced Plaintiff into giving up a constitutional right to just compensation for a taking. *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 604 (2013). Put another way, Plaintiff must have had a constitutional entitlement to the benefit sought. See, e.g. *Norris v. Stanley*, No. 1:21-cv-756, 2022 WL 247507 at *4 (W.D. Mich. Jan. 21, 2022), *aff'd by Norris v. Stanley,* 73 F.4th 431 (6th Cir. 2023). Thus, where a plaintiff fails to "plausibly allege any constitutional violation resulting from" the targeted condition, then there is no viable unconstitutional conditions claim. *Norris*, 74 F.4th at 438. Here, as discussed, *supra*, there is no plausibly-pled constitutional violation because Plaintiff's lack of a property right in the PUD approval fails to support a claim for just compensation. Lacking a protected right, judgment for the Township should be entered on Counts I, II, V, and VI.

III. PLAINTIFF'S SUBSTANTIVE DUE PROCESS CLAIM IS NOT AVAILABLE, AND OTHERWISE LACKS MERIT.

A. A Substantive Due Process Claim is not Available where, as here, the Constitution Provides an Explicit Textual Source of Protection.

Regardless of whether Plaintiff has a protected property right, a substantive due process claim is not available here. The U.S. Supreme Court has recognized that,

where a constitutional amendment "provides an explicit textual source of constitutional protection against . . . intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Sixth Circuit and this Court have acknowledged that, because the takings clause of the Fifth Amendment addresses the circumstances under which private property can be taken and what just compensation must be paid, the substantive due process claim is not actionable. *Thomas v. City of Detroit*, No. 06-10453, 2007 WL 674593 at *9 (E.D. Mich. 2007) (Ex. 4.), citing *Montgomery v. Carter County, Tenn.*, 226 F.3d 758, 769 (6th Cir. 2000). Accordingly, Count VI should be dismissed.

B. The Complaint does not Allege Conduct that Shocks the Conscience.

In addition, the conduct alleged in the Complaint does not fall within the universe of conduct that could rise to the level of a substantive due process violation. In evaluating the merits of a substantive due process challenge, an ordinance is presumed to be constitutional. *Gora v. City of Ferndale*, 576 N.W.2d 141, 145 (Mich. Sup. Ct. 1998). Since no fundamental right is alleged in this case, review is under the rational basis test. *Silver* 966 F.2d at 1036. The conduct alleged must be arbitrary in the constitutional sense; that is, it must "shock the conscience." *Cummins*, 770 N.W.2d at 703, citing *Mettler-Walloon, LLC v. Melrose Twp.*, 761 N.W.2d 293, 306 (Mich. Ct. App. 2008). A plaintiff must negate every conceivable

basis that might support the conduct or show that the conduct is based "solely on reasons totally unrelated to the pursuit of the State's goals." *Houdek v Centerville Twp,* 741 N.W.2d 587, 597 (Mich Ct. App. 2007). The Sixth Circuit has recently cautioned that there are very few cases in the land use context that meet this standard. *Golf Village North, LLC v. City of Powell, Ohio,* 42 F.4th 593, 601 (6th Cir. 2022.) The conduct must be "so shocking as to shake the foundations of this country." *Id.,* at 602, citing *EJS Properties,* 698 F.3d 845, 862.

Plaintiff's substantive due process claim alleges that the rescission of the PUD Option was motivated by Township officials' desire to "aggrandize" their political reputations, and to require conditions outside of alleged "published standards." (Compl. ¶¶ 170-171, ECF No. 1, PageID.46-47.) However, as the public record discussed, *supra,* reveals, the rescission was motivated by the failure of multiple conditions of the PC's conditional recommendation for approval nearly a year later, including: failure to submit a final site plan, failure to submit a final landscaping plan, failure to submit the engineering escrow, and failure to reach terms of a CBA. The CBA requirement is consistent with the concept of the PUD Contract including provisions that promote the "public health, safety, morals, and general welfare of the Township." ZO § 23.8(7). Plaintiff's attorney expressly stated that Plaintiff would not comply with the benefits agreement condition, thus justifying rescission of the PUD Option approval and denial of the extension for want of good faith progress

toward satisfying the PC's conditions. (*See, e.g.* ZO § 23.7(2)(c).) The Complaint alleges nothing more than a 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. This rational basis for the PC's and Board's vote to rescind the PUD Option approval cannot be refuted, nor can it be said to reach the level of shocking the conscience at the level envisioned by *Golf Village, supra.* Accordingly, judgment on the pleadings of Count VI should be entered in favor of the Township.

IV. INJUNCTIVE RELIEF IS NOT AN INDEPENDENT CLAIM.

Count VII is styled as "injunctive relief." However, "injunctive relief is a remedy . . . not an independent cause of action. *Skidmore v. Access Group, Inc.* 149 F.Supp.3d 807, 808 fn. 1 (E.D. Mich. 2015). Thus Count VIII should be dismissed. *Goryoka v. Quicken Loan, Inc.*, 519 Fed.Appx. 926, 929 (6th Cir. 2013).

V. PLAITNIFF FAILS TO STATE A ZONING ENABLING ACT CLAIM, AS THE TOWNSHIP IS AUTHORIZED TO NEGOTIATE BENEFITS AS A COMPONENT OF THE PUD CONTRACT.[2]

Count III asserts a seeks damages and equitable relief for an alleged violation of the Michigan Zoning Enabling Act ("MZEA") because it alleges that a CBA is not authorized by the PUD provisions of the MZEA or the Township's ZO. First,

[2] Defendant addresses the merits of the state claims in Counts III, IV, and VIII here if the Court exercises supplemental jurisdiction over them so as to render a decision. Alternatively, If this Court dismisses all federal claims, declining supplemental jurisdiction and dismissing the state claims is appropriate. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d. 1244, 1254-1255 (6th Cir 1996).

Plaintiff does not, and cannot, identify any statutory authority for a civil action for damages under the MZEA, so that portion of Count III should be dismissed. *See, e.g., Moskovic v. City of New Buffalo,* 638 F.Supp.3d 770, 783 (W.D. Mich. 2022).

Count III otherwise fails to state a claim because it is grounded in a mistaken premise. Essentially, Plaintiff takes issue with the idea that the MZEA and ZO do not expressly provide for a "CBA" by that label. Though framed in separate terms, the anticipated CBA was ultimately being negotiated as a component of the PUD Contract negotiation. (Draft Contract ¶ 20, ECF No. 1-2, PageID.61.) The ZO expressly authorizes a PUD Contract to include conditions, provisions to effectuate the intent of the PUD provisions, and to provide for the public health, safety, morals, and general welfare. (ZO § 23.8(7).) This is consistent with the MZEA's authorization for a community to establish PUD requirements in a zoning ordinance, and to impose conditions. Mich. Comp. Laws § 125.3503(2), (4), (8). The Michigan Court of Appeals recognizes that municipalities have authority to impose conditions on a PUD. *See, e.g., City/Village of Douglas v. Von Der Heide*, No. 292948, 2010 WL 4679529 at *2 (Mich. Ct. App. Nov. 18, 2010). When presented to the Board by the Township Supervisor, the CBA was framed as addressing the "potentially socially disruptive" project so as to arrive at an agreement of benefits for both parties. (2-28-23 Heise Memo, Ex. 1.) Thus, while Plaintiff chose to withdraw from the negotiation of benefits in the context of its pursuit of a PUD Contract, the CBA

component is squarely authorized by the MZEA and ZO. Accordingly, Count III fails as a matter of law, and judgment should be entered for the Township.

VI. THE PROMISSORY ESTOPPEL CLAIM IS NOT VIABLE, AS PLAINTIFF'S CLAIMED RELIANCE WAS UNREASONABLE.

Count IV attempts a cause of action for "promissory estoppel," claiming that Plaintiff relied on encouraging conversations with Township officials the point that the Township should be estopped from not approving the PUD. (Compl. ¶ 158.) To prevail, Plaintiff must prove: (1) a promise; (2) that reasonably have expected to induce action of a definite and substantial character on the part of the promise, and (3) that in fact produced reliance or forbearance of that nature in circumstances such as the promise must be enforced if injustice is to be avoided." *Novak v. Nationwide Mut. Ins. Co.*, 599 N.W.2d 546, 552 (Mich. Ct. App. 1999).

Plaintiff grounds this claim on allegations that it purchased the property and pursued the PUD based on alleged promises that the Township Supervisor and Economic Development Director made about the Supervisor's political control over the PC and Board, and about the length of the PUD approval process. (Compl. ¶¶152-154.) It has been repeatedly held by Michigan Courts that such "casual private advice" is not sufficient to support an estoppel claim. *See, e.g., Hughes v. Almena Twp.*, 77 N.W.2d 453, 469-470 (Mich. Ct. App. 2009); *Sau-Tuk Industries, Inc. v. Allegan County*, 892 N.W.2d 33 (Mich. Ct. App. 2016). Those dealing with a

municipality are charged with knowledge of its ordinances. *Hughes,* 771 N.W.2d at 470, citing *Fass v. Highland Park,* 326 Mich. 19, 30-31, 39 N.W.2d 336 (1949).

Here, Plaintiff is charged with knowledge that the PUD approval process is within the realm of the PC and the Board, that these bodies speak collectively through their resolutions and ordinances, and that the Supervisor is just one of seven votes on the Board, such that the Supervisor lacks the independent authority to bind the Township to a promise guaranteeing a particular outcome. *Saginaw Co. v. Kent,* 209 Mich. 160, 167-168, 176 N.W.601, 604 (Mich. 1920). As such, Count IV fails as a matter of law and judgment must be entered for the Township.

VII. PLAINTIFF LACKS A PRIVATE CIVIL CAUSE OF ACTION UNDER THE MICHIGAN HORSE RACING LAW.

Plaintiff also claims a violation of the Michigan Horse Racing Law of 1995, Mich. Comp. Laws § 431.302, et. seq. (Compl. p. 51, Count VII Request for Relief.) Plaintiff points to Mich. Comp. Laws § 431.328 for the proposition that, except for "breaks" retained and paid to the municipality to compensate for public services required to be provided by the municipality to the racetrack under Mich. Comp. Laws § 431.321, no other fees or excises on may be collected by the municipality "based upon an activity under this act." Mich. Comp. Laws § 431.238. However, the Complaint does not identify how the Horse Racing Law supposedly provides Plaintiff with a private civil cause of action for damages or any other relief. The only remedies referenced in the Horse Racing Law authorize appeals of denials of race

meeting licenses by the state (Mich. Comp. Laws § 431.314(6)), and misdemeanor prosecutions. Mich. Comp. Laws § 431.329. Lacking a private civil cause of action, judgment of Count VIII should be entered for the Township.

CONCLUSION

For these reasons, Defendant, PLYMOUTH CHARTER TOWNSHIP, respectfully requests that this Honorable Court grant its motion for judgment on the pleadings and/or to dismiss the Complaint, dismiss the Complaint with prejudice, enter judgment in Defendant's favor, award Defendant attorney fees and costs, and grant any other relief deemed appropriate.

Respectfully submitted,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER, P.C.

/s/Matthew J. Zalewski
MATTHEW J. ZALEWSKI (P72207)
Attorneys for Defendant
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
mzalewski@rsjalaw.com

DATED: September 11, 2024

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the Court's efile system, by selecting efile and eserve, which will send notification all attorneys of record.

/s/ Dawn Hallman