PEP PROPERTIES, and Breadbox Food Stores, Inc.
Plaintiffs-Appellees,
v.
TOWN OF FARRAGUT, Defendant-Appellant.

1991 WL 50211
No. 1399.

Court of Appeals of Tennessee, Eastern Section, at Knoxville.
April 10, 1991.
Permission to Appeal Denied by Supreme Court September 9, 1991

Knox County.

David E. Rodgers, Knoxville, for appellant.

G. Wendell Thomas, Jr. Rebecca B. Murray, Knoxville, for the appellees.

Stokes and Bartholomew, Nashville, for Tennessee Municipal League, amicus curiae.

OPINION

WILLIAM H. INMAN, Special Judge.

**1 PEP Properties is a partnership whose partners own controlling interest in Breadbox Food Stores, Inc., their operating entity. PEP acquired a one-acre tract of vacant land located at the intersection of Farragut Hills Boulevard and Concord Road in Knox County on December 17, 1987 for the construction and operation of a convenience store.

Most of this tract was outside the corporate boundaries of Farragut. It was carved out of an eight-acre tract which had been rezoned, by Knox County, to a commercial designation.

On November 4, 1986 the residents of an extensive area, which included the eight-acre tract, by referendum voted in favor of being annexed by Farragut. This action precipitated litigation between Knoxville and Farragut which delayed the effective date of the annexation until September 2, 1988.

In the meantime, the plaintiffs attended a meeting of the governing body of Farragut, and learned of the strong community opposition to a proposed convenience store at the described intersection. They were essentially warned that the proposed development was ill-advised, but that Farragut was then without governing jurisdiction since the tract was outside its limits.

Nevertheless, the plaintiffs proceeded with their acquisition. It is significant that on September 2, 1988 when the property officially was annexed, no construction activities had commenced. Two days later, Farragut published a notice of a public hearing to be held on September 20, 1988 respecting the zoning of subject property.

On the effective date of the annexation there was in force various ordinances which required as a condition precedent to construction at any location in Farragut the issuance of permits for grading, building, plumbing, gas and mechanical installation, removal of trees, drainage, and signage. Plaintiffs at no time applied for permits for Farragut; they had secured what they deemed to be appropriate permits from Knox County nine months earlier.

On September 14, 1988, the plaintiff's contractor arrived at the location to commence site preparation. He was directed by Farragut to stop work for failure to obtain the requisite permits.

On September 24, 1988 an ordinance adopted by Farragut became effective which extended the existing zoning (residential) to the recently annexed property.

This action was thereupon filed, as a sequence to the stop order, seeking relief upon various theories. The case was submitted to the jury on the issue of whether the plaintiffs had been deprived of vested property rights and whether a taking of their property without compensation resulted from the change in zoning. The jury returned a verdict in favor of the plaintiff for $143,216.61, essentially equatable to the purchase price of the one-acre tract. The motion of Farragut for judgment NOV was denied, as was a host of other motions unnecessary here to be discussed, since we conclude that the judgment must be reversed and the suit dismissed.

II

It was conceded during oral argument that the dispositive issue is whether the plaintiffs acquired a vested right in the permits issued by Knox County prior to the annexation. If so, the plaintiffs would be entitled to continue the development (FN1) had the trial issue been framed accordingly. But the plaintiffs insisted that they were entitled to compensation for the deprivation of a vested right by virtue of the zoning change, and neither the validity, scope, or application of the annexation or zoning ordinances is before us.

**2 The vested rights concept has long been recognized in Tennessee as an appropriate means with which to balance private property interests with those of a public nature. But so far as we are able to determine, Tennessee has consistently adhered to the rule that private rights do not vest until substantial construction or substantial liabilities have been incurred. State ex rel SCA Chemical Waste Services, Inc. v. Konigsberg, 636 SW2d 430 (Tenn.1982); Howe Realty Co. v. City of Nashville, 141 SW2d 904 (Tenn.1940). We know of no reported case which has permitted a recovery for the taking of property in the absence of actual construction on the site; in the case at hand, construction had not commenced, (FN2) but the plaintiffs had incurred $13,000.00 (FN3) in preliminary expenses generally incidental to the project.

We cannot hold that the incurrence of $8,000.00 or $13,000.00 in expenses--not all of which are directly attributable to the project--qualifies as "substantial liabilities" within the purview of the requirement, and accordingly are of the opinion that the appellees cannot claim a vested right on this ground.

In Schneider v. Lazarov 390 SW2d 197, (Tenn.1965), the Court held

> "(T)he annexation of the tract of land into the City of Memphis as residential land would constitute an automatic revocation of any permit for a use or structure prohibited by the new zoning regulations in force."

A strict application of this principle would, of course, tend to neutralize the substantial construction or substantial liabilities rule; but we think it applies here with great force because (1) the subject property adjoined the corporate limits, and (2) was annexed as residential land, and (3) the county permits were thereupon revoked.

For this additional reason we hold that the plaintiffs had no vested rights in the Knox County permits. While the point is not acute, we observe that the plaintiffs were reasonably and fairly on notice that the tract was subject to annexation--since a portion of it was already situated within the corporate limits--and therefore subject to zoning by the Town of Farragut. They can hardly he heard to claim that the action of the Board of Mayor and Aldermen took them by surprise. We have held that when unincorporated territory is annexed, it assumes the status of unzoned property regardless of the prior nature of its zoning. Bimbo's, Inc. v. City of Lenoir City, 11 TAM 44-14, (Ct.App., Knoxville, 1986).

Finally, it is not our prerogative to carve out an exception to the well-understood and workable substantial construction or substantial liabilities rule. So far as we know, this rule fashions a fair balance between the competing interests. We agree that the consideration of indirect or hidden costs would have a negative impact on municipal development, and would frequently work a windfall to individual interests at the public expense. This case, as thus far developed, proves the point: the plaintiffs have nearly recouped their investment, yet still retain the land, which, of course, might be re-zoned to their liking in the future.

**3. The motion for judgment notwithstanding the verdict is well-taken. The judgment is reversed and the case is dismissed at the costs of the appellees.

FRANKS and GODDARD, JJ., concur.

FN1. The stop order was issued because the plaintiffs' failed to comply with in-place ordinances to which they became subject following annexation, not because of the zoning dispute.

FN2. The record indicates some minimum earth moving had begun, too insignificant to consider.

FN3. Arguably, $8,000.00.