

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS KERRY and CAMILLE KERRY,

UNPUBLISHED
April 19, 1996

Plaintiffs–Appellants,

v

No. 171360
LC No. 93-316751-AA

CITY OF DEARBORN and DEARBORN
ENFORCEMENT APPEAL BOARD,

Defendants–Appellees.

Before: Michael J. Kelly, P.J., and Young and N.O. Holowka,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court order granting summary disposition to defendants. We affirm.

I.

Plaintiffs owned several rental properties in Dearborn which were ticketed for ordinance violations. Plaintiffs’ tenants were instructed by the city that they had one month to vacate the premises due to the violations. Plaintiffs sued, asserting that the condition of their properties did not violate the ordinance; the underlying ordinance was unconstitutional; and the city’s action constituted a “taking” without just compensation.

The circuit court granted summary disposition to the city. Noting that the city had an administrative agency set up to determine whether the ordinance had been violated, the court allowed the plaintiffs to file a claim with city’s administrative agency, the Enforcement Appeal Board, to resolve the factual issues. The court specified the issues which could be presented to the Appeal Board, limiting the city’s defense to the Minimum Standards ordinance.

In defending its actions, the city relied on the Minimum Standards ordinance, but also relied on sections of the BOCA code. The Minimum Standards ordinance did not specifically refer to the BOCA

* Circuit Judge, sitting on the Court of Appeals by Assignment

code, but it generally referred to violations of “this ordinance or other applicable building code, zoning regulation, or other local code relating to home maintenance” as being actionable under the Minimum Standards ordinance.

The Enforcement Appeal Board rejected the plaintiffs’ claims and upheld the city’s actions (with one minor exception). It relied on the entire set of ordinances, specifically referring to the BOCA code, in reaching its decision.

A new lawsuit was filed in circuit court. The court upheld the agency decision and rejected the plaintiffs’ argument that the agency exceeded the scope of the circuit court’s prior order by relying in part on the BOCA code.

II.

The parties dispute whether the constitutional issues raised by plaintiffs are barred by the doctrine of res judicata. When the circuit court considered the first case, it dismissed the constitutional claims “with prejudice” and remanded the case for consideration by the appeal board. It entered a final order and did not retain jurisdiction. Because plaintiffs did not appeal the dismissal of their constitutional claims, res judicata bars those claims. *Boatman v Motorists Mutual Ins Co*, 158 Mich App 431, 439-440; 404 NW2d 261 (1987).

Consequently, we do not reach the plaintiffs’ challenge to the facial validity of the Minimum Standards ordinance.

III.

Plaintiffs also complain, without designating it as an issue, that the enforcement board relied on the BOCA code after the circuit court ordered that the case be determined on the basis of the Minimum Standards ordinance. The Minimum Standards ordinance adopts “other applicable building code[s]” as the basis for violations. The BOCA code, being a building code, is thus subsumed within the Minimum Standards ordinance for enforcement purposes.

Plaintiffs also mention, again without designating it as an issue, that the 1987 BOCA code “appears” to have never been adopted by the city. Plaintiffs’ burden on appeal is greater than an “appearance” standard. Ordinances are presumed valid. *Kropf v Sterling Heights*, 391 Mich 156; 215 NW2d 179 (1974).

IV.

Plaintiffs argue that the appeal board’s decision was not based on competent, material and substantial evidence on the record. See Const 1963, art 6, § 28. Plaintiffs point to comments by individual members of the appeal board that some specific sections of the ordinance were “insufficient.”

From this, we gather that plaintiffs are arguing that the Minimum Standards ordinance was too vague, an issue precluded from reconsideration due to res judicata. We have reviewed the transcript of the appeal board hearing, and find the decision was based on competent, material and substantial evidence on the record.

Included in the discussion of the evidence in plaintiffs' brief is an argument that the appeal board was unconstitutionally constituted because city employees were members. Again, this argument was not stated as an issue and is not reasonably related to the issue attacking the sufficiency of the evidence. Nonetheless, we again find the argument barred by res judicata.

V.

Plaintiffs argue that the city's action constitutes a taking without just compensation. We disagree. There is no taking and thus no entitlement to compensation where, as here, the ordinance is a valid exercise of police power and the owner is not deprived of all economically viable uses of the land. *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991).

Affirmed.

/s/ Harold Hood

/s/ Robert P. Young, Jr.

/s/ Thomas L. Brown