

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH CALLAHAN and HALINA CALLAHAN,

UNPUBLISHED

August 16, 1996

Plaintiffs–Appellants,

v

No. 173308

LC No. 93-329759-AS

VILLAGE OF GROSSE POINTE SHORES and
GROSSE POINTE SHORES ZONING BOARD OF
APPEALS,

Defendants–Appellees.

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

In this zoning dispute, plaintiffs appeal as of right the trial court’s order granting summary disposition to defendants. We affirm in part, reverse in part, and remand.

Plaintiffs are the owners of real property located in the Village of Grosse Pointe Shores. After their application for a variance was denied by the Village Board of Zoning Appeals (“ZBA”), plaintiffs filed a seven-count complaint against the Village and the ZBA. The trial court dismissed the complaint, holding that plaintiffs failed to properly challenge the ZBA’s decision.

The trial court’s holding was based, in part, on its determination that plaintiffs’ complaint constituted a writ of superintending control. We disagree. The words “superintending control” do not appear anywhere in the pleading, nor does the complaint ask the circuit court to take control over the ZBA. The only reference to superintending control in the complaint is the case classification code. We are unaware of any authority standing for the proposition that a case classification code conclusively determines the nature of the action. Based on the substance of the complaint, we conclude that the pleading was not an application for superintending control. Accordingly, it is not necessary for this Court to consider whether superintending control is still a viable method by which to challenge a zoning

* Circuit judge, sitting on the Court of Appeals by assignment.

board of appeals decision. See MCL 125.585(11); MSA 5.2935(11); *Krohn v Saginaw*, 175 Mich App 193, 197-198; 437 NW2d 260 (1988).

The next issue to consider is whether it was appropriate for plaintiffs to seek redress for their claims by filing an original complaint in the circuit court. Generally, the proper method by which to challenge a zoning board of appeals decision is to file a claim of appeal or application for leave to appeal. See *Macena v Village of Michiana*, 433 Mich 380, 387-388; 446 NW2d 102 (1989); *Schlega v Detroit Board of Zoning Appeals*, 147 Mich App 79, 81; 382 NW2d 737 (1985). Plaintiffs concede that the pleading which they filed was a “Complaint and Jury Demand” and not an appeal. However, plaintiffs contend that the issues raised in their complaint did not have to be asserted by way of appeal because they were constitutional challenges to the Village of Grosse Pointe Shores Zoning Ordinance. To the extent that the complaint actually asserted constitutionally-based challenges to the zoning ordinance, we agree.

Constitutional challenges to a zoning ordinance may be brought in the circuit court by way of an original complaint once the appropriate governmental agency has made a final determination on the matter. *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65, 73; 498 NW2d 1 (1993); see *Bevan v Brandon Twp*, 438 Mich 385, 388; 475 NW2d 37, modified 439 Mich 1202 (1991); *Hecht v Niles Twp*, 173 Mich App 453, 457; 434 NW2d 156 (1988) (reviewing, without comment, challenges to the constitutionality of zoning ordinances raised by way of complaints filed in the circuit court). Here, the ZBA made a final determination on the matter by denying plaintiffs’ application for a variance and refusing to reconsider the request.

The final issue which must be resolved is whether the issues raised in plaintiffs’ complaint are constitutional in nature, or whether plaintiffs merely sought to challenge the validity of the board’s decision by steeping their complaint in constitutional language. Despite repeated references to constitutional violations, Counts I, IV, V, VI and VII of plaintiffs’ complaint actually concern alleged improprieties in the procedure employed by the ZBA and the result reached by the board. Moreover, in each of these counts, the relief sought by plaintiffs was reversal of the ZBA’s decision denying the variance. Because these are issues that had to be raised in an appeal from the decision of the zoning board, and an appeal was not timely filed, the trial court’s dismissal of such claims was proper. *Krohn, supra*, p 198.

Counts II and III, however, raise issues relative to the constitutionality of the Village of Grosse Pointe Shores Zoning Ordinance. In these counts, plaintiffs alleged that the ordinance had no reasonable relation to the public health, safety and welfare, and that the ordinance was arbitrary, discriminatory and unreasonable. Furthermore, in both counts, plaintiffs sought to have the ordinance declared unconstitutional. We hold that the trial court erred in dismissing counts II and III of plaintiffs’ complaint. *Lake Angelo, supra*, p 73.

Defendants argue that the constitutional issues raised in plaintiffs’ complaint have already been litigated by the parties and decided by the trial court. We are unable to address this issue, as our review is limited to the record developed by the trial court. *Harkins v Dep’t of Natural Resources*, 206 Mich

App 317, 323; 520 NW2d 653 (1994). Accordingly, on remand, the trial

court is directed to consider the doctrines of res judicata, collateral estoppel and waiver with regard to issues previously decided in lower court #94-407409.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Myron H. Wahls

/s/ Robert A. Young, Jr.

/s/ Harry A. Beach