

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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J.M.B. ASSOCIATES, INC., a Michigan  
corporation, and JAMES M. BURROUGHS

UNPUBLISHED  
September 20, 1996

Plaintiffs-Appellants,

v

No. 176170  
LC No. 93453369 NZ

CITY OF FARMINGTON HILLS,

Defendant-Appellee.

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Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,\* JJ.

PER CURIAM.

In this zoning case, plaintiffs appeal as of right from the trial judge's grant of summary disposition for defendant pursuant to MCR 2.116(C)(8). Plaintiffs argue that the judge erred in dismissing the case, because they failed to seek a final decision from defendant's zoning board of appeals. We affirm.

I

Plaintiffs proposed to build a condominium complex in Farmington Hills in an area which was zoned for single family residences. Defendant's planning department indicated that it would be willing to change the zoning classification to multiple family as long as the property remained an RCE classification. An RCE zoning district requires residents or owners of the property to be over the age of 62.

Plaintiffs bought the property and defendant granted their request to rezone it. Later, after they encountered difficulties in selling the condominium units, plaintiffs requested the planning commission to lower the minimum age requirement on the RCE restriction to persons aged 55 or older. Plaintiffs attempted to secure the change by requesting an amendment to the definition "housing for the elderly" as defined in the city code. The request was denied.

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

In March, 1991, plaintiffs' mortgagee foreclosed on the property. In April, 1993, the RCE zoning restriction was removed from the city's ordinance.

Plaintiffs brought suit, claiming that defendant violated 42 USC 1983 and denied them substantive due process when it arbitrarily denied their request to lower the age restrictions placed on the property. Plaintiffs alleged that the impact of the zoning regulation constituted a taking which required just compensation. The trial judge dismissed plaintiffs' case, because plaintiffs did not obtain a final decision from the zoning board of appeals.

## II

We agree with defendant that there is no requirement that a plaintiff exhaust administrative remedies before bringing a takings or substantive due process claim. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 79; 445 NW2d 61 (1989). However, a judicial challenge to the constitutionality of a zoning ordinance, as applied to a particular situation, is not ripe until the plaintiff has received a final nonjudicial determination regarding the permitted use of the land. *Williamson Co Regional Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985); *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996); *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65, 73; 498 NW2d 1 (1993). The purpose of the finality requirement is to ensure that there actually was a taking. *Electro-Tech, supra*, p 81.

In the instant case, plaintiffs never sought a variance to change the permitted use of its land under the RCE zoning regulation. Instead, they attempted to amend the zoning code definition of "housing for the elderly." The city council rejected the request. The city council's decision does not allow the court to accurately determine the extent to which plaintiffs' land retained any beneficial use. *Paragon, supra*; *Electro-Tech, supra*, p 85. It is not the property-specific administrative determination that is required before review by the courts is permitted. A zoning determination cannot be deemed final until the plaintiffs have applied for, and been denied, a variance. *Paragon, supra*.

## III

Furthermore, we reject plaintiffs' claim that it would have been futile to seek a variance. Plaintiffs failed to make a meaningful application for a variance from the challenged zoning regulation. *Bannum, Inc v City of Louisville*, 958 F2d 1354, 1363 (CA 6, 1992). They had the ability to seek a variance that would have allowed use of the property that was not age restricted or that allowed the lesser age restriction of 55 years instead of 62. See *Electro-Tech, supra*, p 87. Just because the city council did not approve an across-the-board change in the definition of "housing for the elderly" in the city code does not mean that it would have refused to grant a variance for plaintiffs' property. There is no indication that city officials informed plaintiffs that a variance from the RCE zoning restriction would not be granted. Therefore, we will not waive the finality requirement in the instant case.

We conclude that the trial judge properly granted summary disposition for defendant where plaintiffs failed to obtain a final decision with regard to the application of the zoning restriction on their property.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Marilyn Kelly

/s/ J. Richardson Johnson