STATE OF MICHIGAN

COURT OF APPEALS

DANIEL JAYNE and JUDY JAYNE,

Plaintiff-Appellants,

v

VILLAGE OF SPRING LAKE and McDONALD'S CORPORATION,

Defendant-Appellees.

UNPUBLISHED
December 20, 1996

No. 190339
LC No. 95-022568-CE

Before: Hood, P.J., and Neff and M. A. Chrzanowski,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from a decision of the circuit court finding that defendant Village of Spring Lake (Village) did not act arbitrarily when rezoning a single parcel of land from residential to commercial following defendant McDonald's Corporation (McDonald's) application requesting the modification in order to accommodate the construction of a drive-thru restaurant facility. We affirm.

The present controversy arose when the Village council adopted an ordinance modifying its 1990 zoning map to include a small parcel of property within the Village's central business district. Prior to the modification the parcel at issue, 109 South Park Street, was designated as a "single family residential" plot, and was situated directly south of and adjacent to the central business district, or "commercial corridor," that lined Savidge Street (M-104). The property was one of three adjoining parcels to be utilized by McDonald's as a restaurant site, and was the only one that was not already designated "commercial."

Plaintiffs' home was located on South Park Street directly south of the parcel at issue, and, as a result of the rezoning, would abut the rear parking area of the proposed restaurant. On appeal, plaintiffs argue that the trial court erred in affirming the Village's decision to rezone the parcel, arguing that the rezoning was arbitrary, capricious, and unreasonable, and that the court disregarded legal precedent regarding zoning changes. We disagree.

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

When deciding the merits of a zoning scheme, this Court is called to conduct a de novo review of the trial court record to determine the reasonableness of the rezoning ordinance. *Kropf v City of Sterling Heights*, 391 Mich 139, 152, 157-158; 215 NW2d 179 (1974). In doing so, we do not sit as a "superzoning commission," and are not concerned with the wisdom or desirability of the zoning decision. *Brae Burn, Inc. v City of Bloomfield Hills,* 350 Mich 425, 430-431; 86 NW2d 166 (1957). A zoning ordinance comes before the Court "clothed with every presumption of validity," and will not be altered or modified unless the challenging party proves that the ordinance is arbitrary and unreasonable. *Id.* at 432. We require more than a debatable question or fair difference in opinion; "[i]t must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness." *Id.*

Evidence was presented at trial that the small parcel that was subject to rezoning was one of only nineteen lots occupied by residential homes within a ten-block area, and although that area had been designated as residential, it was surrounded by commercial properties and had itself already undergone a transition from residential to commercial in many places. There was also evidence presented that the Village's master zoning plan included a provision for eventually converting the entire South Park Street area into a commercial zone. Considering that evidence, we conclude that the rezoning, although individual in nature, would be consistent and of little detriment to the already "mixed" neighborhood.

The lower court record also establishes that in the past the Village had numerous empty store fronts on Savidge Street and suffered from repeat financial failures, including the abandoned restaurant that occupied the two northern parcels also to be acquired by McDonald's. Several witnesses, including both experts and members of the Village council and planning commission, agreed that the construction of a McDonald's restaurant would benefit the Village by not only filling an existing vacancy, but also by attracting customers and other businesses with financial viability. The Village manager of thirteen years opined that McDonald's would provide an anchor investment, that it would provide employment of the youth, that it would contribute resources to the community, and would encourage other businesses to help redevelop the Village's struggling commercial corridor.

Aside from the financial advantage McDonald's would bring to the Village, the evidence also established that the rezoning decision came only after long hours of debate, numerous investigations, and serious consideration of not only plaintiffs' concerns, but also those of the entire Village. Before approving the construction of a restaurant, the Village went through several proposed site plans, and included within its final special land use resolution many restrictions and conditions (i.e., a six-foot high evergreen buffer, traffic control, outdoor lighting restrictions, and a fence around the refuse area). Plaintiffs have failed to present any evidence of unreasonableness or arbitrary action on behalf of the Village that would overcome the presumption of the amendment's validity.

Plaintiffs mistakenly rely on *Raabe v City of Walker*, 383 Mich 165; 174 NW2d 789 (1970) and *Schilling v City of Midland*, 38 Mich App 568; 196 NW2d 846 (1972), to support their contention that property may be rezoned only where there is a mistake in the original ordinance or a change in circumstances. In *Schilling*, this Court dealt with an ordinance that specifically contained

such preconditions to zoning changes. *Id.* at 572-573. In the present case, there is no evidence to suggest that the Village's city zoning ordinance contained a similar requirement.

Furthermore, in *Raabe*, our Supreme Court invalidated the rezoning of a 180-acre tract from residential/agricultural property to "heavy industry," finding that the zoning was contrary to surrounding uses and was not made in accord with any adopted master plan for that area. *Raabe, supra,* at 176-179. In contrast, this case involves a small parcel that is being modified to a use that is in many respects not foreign to the area as it already exists, and an amendment that was adopted in accordance with a master zoning plan.

Moreover, this Court has determined that the *Raabe* opinion merely emphasizes the need for caution in rezoning in order to protect the stability of existing zones and stresses the importance of procedural safeguards. *Baker v Algonac*, 39 Mich App 526, 533; 198 NW2d 13 (1972). In *Baker*, we explained that the basis for the *Raabe* decision was that the rezoning in that case did not serve the public interest, which is the essential question of inquiry:

> " . . . [W]here a rezoning amendment is reasonably related to the public health, safety or welfare the fact that there has been no change in conditions may be immaterial, and it may be unnecessary to consider whether there has been a mistake in the original zoning or change in conditions in the zoned area." [*Id.* at 534, quoting 8 *McQuillin, Municipal Corporations* (3d ed), § 25.94, p 267.]

We conclude that zoning laws should be progressive and not static, and also reaffirm that *Raabe, supra*, does not preclude rezoning, but instead emphasizes that rezoning should be done with utmost caution and should be reasonable. Each zoning case must be considered on its own particular facts, *Brae Burn, supra,* at 432, and it is well established that no property owner has a right to the continuance of zoning once established, *Baker, supra,* at 535.

In the present case, plaintiffs do not challenge the procedural course that the Village took in passing the rezoning ordinance. Our review of the record convinces us that the decision to rezone 109 South Park Street was not taken lightly or done in haste, and that the change was done in the best interest of the Village as a whole.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski