

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD MACENE,

Plaintiff-Appellant,

v

COUNTY OF WAYNE, a municipal corporation,

Defendant-Appellee.

UNPUBLISHED

April 8, 1997

No. 182966

Wayne Circuit Court

LC No. 93-312689

Before: Holbrook, Jr., P.J., and White and S. J. Latreille*, JJ.

PER CURIAM.

Plaintiff appeals the circuit court's order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(10) in this inverse condemnation action. We affirm.

I

The facts are not in dispute. Plaintiff was a shareholder in MJW, Inc., a now defunct corporation, which had obtained a license from the Michigan Department of Natural Resources (MDNR), valid from 1976 until 1978, to operate a seventy-five acre landfill in Sumpter Township, Wayne County. That license was issued pursuant to the Garbage and Refuse Disposal Act, 1965 PA 87, which was repealed effective January 11, 1979, at which time the Solid Waste Management Act ("Act 641"), MCL 299.401 *et seq.*; MSA 13.29(1) *et seq.*, took effect. MJW did not renew this license, and did not construct or operate a landfill on the property due to Sumpter Township's objection.

In December 1980, the MDNR granted MJW a solid waste disposal area license under Act 641 to operate a solid waste disposal area on ten of the seventy five acres.¹ The license was renewed in April 1983 for two additional years. MJW never undertook construction or operation of the landfill.

Act 641 requires that each county formulate its own Solid Waste Management Plan (SWM Plan), MCL 299.425; MSA 13.29(25), and provides that a waste disposal facility may not operate

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

unless it is included in the applicable SWM Plan. MCL 299.430(3); MSA 13.29(30)(3). Pursuant to Act 641, the Wayne County Commission (Commission) established a Solid Waste Management Planning Committee (Committee) to facilitate development of the County's SWM Plan. The Committee was a recommending body whose recommendation had to be approved by the Commission, two thirds of the municipalities that make up Wayne County and, ultimately, by the MDNR, which had final authority over the plan. MCL 299.428-429; MSA 13.29(28)-(29).

MJW submitted an application to the Committee requesting that defendant's SWM Plan include MJW's proposed seventy-five acre landfill. Representatives of MJW appeared before the Committee several times to request and submit information to support MJW's proposal. The Committee rejected MJW's application. In April 1984, the Commission required the Committee to reconsider the seventy-five acre plot. After reconsideration, the Committee in May 1984 again denied inclusion of MJW's landfill site and submitted the proposed plan to the Commission for approval.

On August 23, 1984, the Commission adopted the Committee's proposed SWM Plan. By letter dated August 27, 1984, MJW's president wrote the MDNR and requested that its cash bond in the amount of \$20,000, with accrued interest, be returned "forthwith." By letter dated September 21, 1984, the MDNR responded that in order to have the bond returned, MJW had to request in writing that its current operating license be withdrawn and, following withdrawal of the license, if no construction had taken place, the bond would be returned. By letter dated September 26, 1984, MJW requested that the MDNR terminate all its licenses and reiterated its demand for return of its cash bond. MJW at no time argued its case directly to the Commission or the MDNR.

In November 1984, the director of the MDNR approved defendant's Plan. MJW did not request a contested case hearing before the MDNR.

In October 1987, plaintiff instituted a suit on behalf of MJW in federal district court, alleging that defendant violated MJW's due process rights by excluding MJW's site from the SWM Plan. In November 1990, the district court granted summary judgment in favor of defendant, based on plaintiff's failure to establish the inadequacy of existing state law remedies and other procedural grounds. The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision, noting that plaintiff was required to attempt to use Michigan's inverse condemnation procedure or establish the inadequacy of that state remedy before seeking redress in federal court. *Macene v MJW, Inc, and Wayne County*, 951 F2d 700, 704 (CA 6, 1991).

Plaintiff filed the instant action in May 1993 in propria persona, alleging that because its proposed seventy-five acre landfill was not included in defendant's SWM Plan, MJW could not operate its landfill and its license became virtually worthless, as did the ten-acre and seventy five-acre plots.

Plaintiff further alleged that because of the above facts, MJW had been dissolved and on May 1, 1987, had conveyed the landfill site to the State of Michigan for non-payment of taxes. Plaintiff alleged that defendant's exclusion of MJW's site was "arbitrary, capricious, unreasonable and a violation of MJW's substantive due process rights, arising out of, inter alia, the inherent conflict of interest caused by actual competitors sitting as board members on the Solid Waste Plan Committee." Plaintiff further alleged that MJW was "afforded little opportunity for minimal due process notice and hearing concerning the deprivation of MJW's property rights in its Act 641 license," and that defendant's actions violated plaintiff's right under the Michigan Constitution regarding the taking of property without just compensation.

Defendant moved for summary disposition on several bases, including ripeness and failure to exhaust administrative remedies.² The circuit court held that plaintiff's claim was not ripe because MJW voluntarily surrendered its license prior to the MDNR's approval of the Commission's SWM Plan, and there was a failure to exhaust administrative remedies because MJW failed to pursue any action before the Commission to contest the formulation of the Plan or to contest the adoption and approval of the Plan by the MDNR. The circuit court rejected plaintiff's arguments that exhaustion was not required because administrative efforts would have been futile and that MJW surrendered the license under duress, finding the arguments insufficiently supported.

II

When reviewing a grant of summary disposition, this Court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff first argues that the circuit court erred in granting summary disposition on the basis of ripeness because plaintiff had obtained a "final decision" prior to its license being terminated, i.e., defendant Commission had refused to include MJW's already licensed waste disposal site in defendant's SWM Plan, and defendant's action, not the MDNR's, was the focus of plaintiff's complaint. We cannot agree.

A claim that the application of government regulations affects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Lake Angelo Associates v White Lake*, 198 Mich App 65, 72; 498 NW2d 1 (1993), quoting *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985).³

We agree with the circuit court that since under Act 641 the Commission's SWM Plan was advisory to the MDNR, MJW had not obtained a "final decision" when it surrendered its license well before the MDNR issued a final decision approving the Commission's Plan. Summary disposition was thus proper on the basis of ripeness. *Lake Angelo, supra*.

Plaintiff next argues that it was not required to exhaust administrative remedies because appealing to the MDNR would have been futile.

Generally a party is required to exhaust its administrative remedies before a circuit court may review the decision of an administrative agency. MCL 24.301; MSA 3.560(201); *Michigan Waste Systems, Inc v Dep't of Natural Resources*, 157 Mich App 746, 758; 403 NW2d 608 (1987). However, exhaustion of administrative remedies is not required where the pursuit of administrative remedies would be futile. *Trojan v Taylor Twp*, 352 Mich 636, 638-639; 91 NW2d 9 (1958).

We first note what is obvious; the MDNR issued and had authority over MJW's license and plaintiff surrendered its license to the MDNR, not to defendant. After the Commission adopted the Committee's plan, and before the MDNR approved the plan, MJW requested that the MDNR terminate MJW's operating license for the ten-acre site. Plaintiff argues that it would have been futile to challenge the decision before the MDNR at this point because the MDNR cannot issue a license to a facility not included in an approved SWM Plan and the MDNR has no authority to amend a county's plan. However, plaintiff ignores that the MDNR has authority to disapprove a plan and to withdraw approval of a plan, MCL 299.429; MSA 13.29(29). Further, plaintiff does not dispute that MJW could have requested a contested case hearing before the MDNR pursuant to the Administrative Procedures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, and provides no explanation for MJW's failure to contest the proposed Plan before the Commission. Under these circumstances, we agree with the United States Court of Appeals for the Sixth Circuit, which noted:

. . . . [W]e hold that Macene's claim that the procedures established by PA 641 somehow deprived MJW of its property without due process is wholly without merit.

First of all, Macene centers his complaint on the actions of the Planning Committee. MJW was allowed to argue its case directly to the Committee on at least two occasions. More importantly, however, is the fact that the Committee has no decision making power itself, but can only make recommendations to the Wayne County Commission. The Committee could not deprive MJW of anything. Its only function was to formulate a proposed Plan that would then be evaluated at several levels of County and State Government.

Aside from the opportunities to present information to the Planning Committee, MJW could have argued its case directly to the County Commission, the various municipalities, and/or to the State Department of Natural Resources, before any plan was adopted and, therefore, before any alleged deprivation had finally occurred. [951 F2d at 706-707.]

On the record before us, plaintiff has failed to establish that exhausting administrative remedies would have been futile. The circuit court properly dismissed plaintiff's claims for failure to exhaust administrative remedies.

Finally, plaintiff argues that MJW was acting under duress when it surrendered its license to the MDNR. The only support plaintiff offers for this claim is financial hardship. Fear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully. *Apfelblat v National Bank Wyandotte-Taylor*, 158 Mich App 258, 263; 404 NW2d 725 (1987). Moreover, the person threatened must not have an adequate legal remedy available. *Hungerman v McCord Gasket*, 189 Mich App 675, 677; 473 NW2d 720 (1991). Apart from a general and vague allegation that several Committee members were biased because they were competitors of MJW, plaintiff did not allege that defendant acted unlawfully, nor is there evidence before us that defendant acted unlawfully. Plaintiff's claim of duress thus fails.⁴

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Stanley J. Latreille

¹ Apparently, MJW did not have the requisite bonding for the remaining sixty-five acres.

² Defendant argues for the first time on appeal that the Sixth Circuit Court of Appeals' finding that there was no taking of MJW's property without due process should be given res judicata effect. As the issue was neither raised nor addressed in the circuit court, we decline to address it. *Booth Newspapers, Inc v Univ of Michigan*, 444 Mich 211, 234; 507 NW2d 422 (1993).

³ The Michigan Supreme Court adopted the *Williamson* ruling in *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 61; 445 NW2d 61 (1989), and held that before proceeding under 42 USC § 1983, a property owner must first obtain a final decision from the particular governmental entity that is alleged

to have unconstitutionally taken his property and also attempt to obtain just compensation through inverse condemnation. *Lake Angelo, supra*, expressly extended the finality requirement to regulatory taking claims, whether framed as a violation of the Just Compensation Clause of the Fifth Amendment or of the Due Process Clause of the Fourteenth Amendment, not just to actions based on § 1983. 198 Mich App at 70-71.

⁴ We also agree with the Sixth Circuit's conclusion that plaintiff failed to support his substantive due process claim. 951 F2d at 707.