STATE OF MICHIGAN

COURT OF APPEALS

PRESTIGE COMMUNITY DEVELOPMENTS,

Plaintiff-Appellee,

v

SUMPTER TOWNSHIP,

Defendant-Appellant.

UNPUBLISHED
August 26, 1997

No. 193390
Wayne Circuit Court
LC No. 94-434469 CE

PRESTIGE COMMUNITY DEVELOPMENTS,

Plaintiff-Appellee,

v

SUMPTER TOWNSHIP,

Defendant-Appellee,

and

COMMITTEE FOR DEMOCRACY IN SUMPTER TOWNSHIP,

Intervening Appellant.

No. 193772
Wayne Circuit Court
LC No. 94-434469 CE

Before: Markman, P.J., and Holbrook, Jr., and O'Connell, JJ.

PER CURIAM.

In No. 193390, defendant, Sumpter Township, appeals as of right from an order of dismissal with prejudice. Specifically, defendant appeals the trial court's previous order declaring that the disputed portion of plaintiff's real property was properly zoned RMH for mobile home use. In No.

193772, intervening appellant, Committee for Democracy in Sumpter Township ("Committee"), appeals as of right from the trial court's denial of its two motions to intervene. The cases were consolidated on appeal. We reverse and remand for further proceedings.

On March 22, 1994, the Sumpter Township Board of Trustees passed a resolution that approved the rezoning of approximately twenty-two acres of plaintiff's property from AG for agricultural use to RMH for mobile home use. On August 2, 1994, the voters of Sumpter Township under the leadership of the Committee passed a referendum that essentially restored the zoning configuration of the township to its state prior to the Board of Trustees' resolution. See Const. Of 1963, Art, 2, §9. Plaintiff filed suit against defendant seeking declaratory, injunctive and other relief enabling it to proceed with the proposed expansion of its existing mobile home park. Plaintiff's complaint alleged that defendant violated its due process rights and that the denial of its rezoning request following the referendum was arbitrary and constituted a temporary taking as well as an exclusionary zoning. The Committee filed its first motion to intervene as of right on March 14, 1995. The motion was denied. The Committee sought to appeal that order by filing a claim of appeal as well as an application for leave to appeal with this Court on April 12, 1995. We denied the Committee's application for leave to appeal in No. 184807. We also dismissed the Committee's claim of appeal for lack of jurisdiction in No. 184806. The Supreme Court subsequently denied the Committee's application for leave to appeal the order in No. 184806.

On February 15, 1996, plaintiff moved for an order declaring his property zoned RMH. Apparently, plaintiff discovered that the Sumpter Township zoning map had been changed in January of 1994 --two months prior to the actual approval of the challenged rezoning by the Board of Trustees-- to reflect the anticipated rezoning of his property from AG to RMH.[1] As a result, plaintiff argued that the referendum, although it reversed the Board's March 22, 1994, resolution approving a rezoning of plaintiff's property from AG to RMH, merely reinstated the pre-existing zoning classification, which, according to the zoning map, was RMH. The trial court agreed and entered an order on February 22, 1996, declaring that plaintiff's property was indeed zoned RMH.[2] The Committee then filed its second motion to intervene on March 12, 1996, which the trial court denied. Upon defendant's motion, we stayed the lower court's judgment pending resolution of this appeal. Since the filing of the present appeals, plaintiff and defendant have entered a stipulation to dismiss appeal No 193390.

We address the Committee's claim of error in No. 193772 first. The Committee argues that the trial court erred in denying its motions to intervene. MCR 2.209(A)(3) states:

> On timely application a person has a right to intervene in an action:
>
> * * *
>
> (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"The decision whether to grant a motion to intervene is within the trial court's discretion." *Neal v Neal*, 219 Mich App 490, 492; 557 NW2d 133 (1996); *Precision Pipe v Meram Construction*, 195 Mich App 153, 156; 489 NW2d 166 (1992). Three requirements must be met in order for an applicant to qualify for intervention as of right under MCR 2.209(A)(3): (1) a timely application; (2) a showing that the action may as a practical matter impair or impede the applicant's ability to protect his interests; and (3) a showing that the representation of the applicant's interests by existing parties is or may be inadequate. See *Oliver v State Police Dep't*, 160 Mich App 107, 114-115; 408 NW2d 436 (1987). While intervention is improper "where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action," *Precision Pipe, supra* at 157, MCR 2.209(A)(3) should be "liberally construed to allow intervention where the applicant's interest may be inadequately represented." *Black v Dep't of Social Services*, 212 Mich App 203, 204; 537 NW2d 456 (1995).

With respect to the first element, timely application, the relevant inquiry is whether the right to intervene was asserted with a reasonable time. *D'Agostini v Roseville*, 396 Mich 185, 188; 240 NW2d 252 (1976); *Prudential v Oak Park Schools*, 142 Mich App 430, 434; 370 NW2d 20 (1985). Here, the Committee filed its first motion at a time when the only pleadings of record were the complaint and defendant's answer. No further proceedings had yet taken place. The second motion was filed only three weeks after the trial court entered its order declaring plaintiff's property to be zoned RMH. Thus, we conclude that both of the Committee's motions were timely.

The second element required by the court rule is a showing that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest. MCL 125.282; MSA 5.2963 (12) provides for citizen invalidation of zoning ordinances by way of a referendum vote following the submission of a valid petition. It is undisputed that the Committee was the principal moving party behind the petition. While plaintiff's lawsuit did not challenge the validity of the Committee's petition itself, disposition of the action in plaintiff's favor would clearly have undone the effect of the referendum, which was to overturn the township board's rezoning resolution. The Committee therefore had an interest in defending the results of that referendum. See *Davidson v Pontiac*, 16 Mich App 110, 114; 167 NW2d 856 (1969). As a result, we find that the Committee met the second requirement for intervention as of right.[3]

The third element required by the court rule is that the applicant's interest is not or may not be adequately represented by the existing parties. An applicant's burden of showing that its representation is or may be inadequate is treated as minimal. *D'Agostini, supra* at 188-189; *Karrip v Cannon Twp*, 115 Mich App 726, 731; 321 NW2d 690 (1982). "Ordinarily a municipality represents the citizen in litigation relating to municipal matters." *School District of the City of Ferndale v Royal Oak Township School District No 8*, 293 Mich 1, 8; 219 NW 199 (1940). However, the theory underlying a referendum is that "public officials may not be sufficiently responsive to the temporary will of the electorate"; accordingly, "a suit challenging the validity of a referendum petition aimed at overturning an act of the city is a peculiarly inappropriate one in which to apply a presumption that the city will adequately defend." *Davidson, supra* at 115. A referendum effectively creates a temporary fourth branch of government that expresses the direct will of the people when they believe that their public officials have either acted-- or failed to act-- contrary to their interests.[4] Whenever the people

act through the referendum device to directly enact public policy, the normal presumption that a municipality adequately represents the litigative interests of its citizens is considerably eroded. This is especially true when the referendum operates, as it does here, to directly overturn policies enacted by the municipality. We do not suggest that a municipality can never adequately represent the interests of its citizens with respect to issues arising out of referendum, even one enacting policies directly contradictory to those enacted by the municipality itself; in such circumstances, however, the courts should carefully consider whether the municipality can fully and adequately represent the interests of the people in the same manner as the referendum leadership. Even in the absence of bad faith or collusion, a municipality may have difficulty representing the interests of the referendum to the same degree of effectiveness as the leadership of the referendum.

Here, defendant passed a zoning resolution making plaintiff's requested changes. The Committee exercised its right to challenge the zoning resolution by spearheading a referendum that was successful in invalidating it. Clearly, defendant and the Committee had genuinely contrary interests regarding the referendum. The present action then put defendant in the position of defending the referendum that had undone its earlier approval of the requested zoning. Under these circumstances, there was reason to question whether defendant could adequately represent the Committee's interest.[5] However, because actions subsequent to the filing of the present appeals clearly demonstrate that the Committee should have been allowed to intervene, as discussed immediately below, we need not determine whether, solely on the basis of the record before it, the trial court abused its discretion in finding otherwise.

Subsequent to the filing of the present appeals, plaintiff and defendant entered into a stipulation to dismiss appeal No. 193390. Plaintiff further filed a motion, in which defendant concurred, to dismiss the Committee's appeal (No. 193772) as moot because of such stipulation.[6] Generally, appellate courts do not consider actions occurring after the filing of the appeal in reviewing a trial court's actions. Here, however, these subsequent actions are particularly relevant to the inquiry whether defendant is adequately representing the Committee's interest. Defendant initially approved plaintiff's requesting rezoning. The people clearly indicated their disapproval of the expansion of plaintiff's mobile home park by passing the referendum. By stipulating to the dismissal of No 193390, defendant is now conceding to the very rezoning that the referendum invalidated. While there may well be legitimate reasons for defendant now to stipulate to dismissal of the case, the Committee should be entitled to intervene under these circumstances. Defendant's willingness to forego appellate review of the trial court order declaring plaintiff's property to be zoned RMH, clearly bolsters the Committee's argument that defendant may not be adequately representing the Committee's interest in upholding the referendum. Accordingly, we conclude that the Committee meets the three criteria for intervention and reverse the trial court orders denying the Committee's motions to intervene.

In response to the motion to dismiss No. 193772 as moot, the Committee provided a copy of the agreement between plaintiff and defendant. Paragraph 7 states:

> The parties further agree that this Agreement shall be deemed null and void, and shall not in any way prejudice the rights and liabilities of the parties, in the event that the

> Court of Appeals, in connection with the Committee For Sumpter Township's appeal in . . . No. 193772, remands this case for further proceedings in the lower court, or grants any substantive relief other than a dismissal of the [Committee's] appeal.

Because we are reversing the trial court's orders denying intervention and remanding this matter for further proceedings, we assume that the stipulation for dismissal of No. 193390 is null and void. Accordingly, although we grant the motions for immediate consideration, we deny plaintiff's motion for leave to file a motion to dismiss and its motion to dismiss No. 193772 as moot.

We now turn to defendant's claim of error in No. 193390. Defendant argues that the trial court erred in declaring plaintiff's property to be zoned RMH because, although the Board approved amendments to the zoning ordinance on January 25, 1994, which in turn referenced the zoning map, the change to the zoning map relating to plaintiff's property was unauthorized, failed to comply with the zoning procedures of the Township and was thereby insufficient to rezone plaintiff's property. We agree. The trial court's order was in the nature of a declaratory judgment which we review de novo on appeal. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996); *Atty Gen v Cheboygan Rd Comm'rs*, 217 Mich App 83, 86; 550 NW2d 821 (1996). The trial court's factual findings are reviewed for clear error. *Auto-Owners*, *supra* at 469.

Plaintiff correctly notes that the zoning map is incorporated into the zoning ordinance by reference and is thus the decisive description of the boundaries of the zoning districts. However, the zoning map can only display the boundaries of zoning districts that have been created or altered by either the original zoning ordinance or subsequent amendment. Black's Law Dictionary (6th ed) defines "zoning map" as a "map *created by a zoning ordinance* which displays the various zoning districts." *Id*. at 1619 (Emphasis added.) A plain reading of the Township Rural Zoning Act (TRZA), MCL 125.271 *et seq*.; MSA 5.2963(1) *et seq*., which is replete with references to the zoning ordinance, further supports this conclusion. The TRZA provides, in relevant part:

> The township board of an organized township in this state may provide *by zoning ordinance* for the regulation of land development . . . . [MCL 125.271; MSA 5.2963(1); emphasis added.]

MCL 125.272; MSA 5.2963(2) states that the township board may proceed "with the adoption [of] a zoning ordinance containing land development regulations." MCL 125.280; MSA 5.296(10) provides for submission of a proposed "zoning ordinance *including any zoning maps*" to the county zoning commission, county planning commission, or, if there is no county zoning commission or county planning commission, to the coordinating zoning committee. *Id*. (Emphasis added.) Finally, with respect to changes in zoning classifications, MCL 125.284; MSA 5.2963(14) provides for rezoning only by way of "amendments or supplements" to the *zoning ordinance*, not by altering the zoning map. In other words, zoning classifications can only be established by ordinance not by unsanctioned changes in municipality zoning maps. See *Northville Corp v Walled Lake*, 43 Mich App 424, 435; 204 NW2d 274 (1973) (a zoning map is "issued in accordance with" a zoning ordinance.)

Here, the January 25, 1994, amendments to the zoning ordinance were unrelated to plaintiff's requested rezoning. The proposed amendments submitted to the Wayne County Planning Commission for review made no mention of any changes to the zoning map. Only unrelated changes to the text of the ordinance were undertaken. Moreover, while the public notice and notice of hearing on the proposed amendments both summarized their regulatory effect, in part, as "[adding] uses not specifically permitted, voting places and the official zoning map," neither referred to plaintiff's requested rezoning. In fact, the sole reference to plaintiff's property being rezoned RMH prior to the township board's March 22, 1994, resolution was on the zoning map. A change in the zoning map was not, as a matter of law, sufficient to rezone plaintiff's property to RMH. The Board correctly found it necessary to approve of the rezoning of plaintiff's property to RMH on March 24, 1994, notwithstanding the earlier (erroneous) changes to the zoning map. Therefore, the trial court erred in ruling that plaintiff's property was maintained as RMH following the August 1994 referendum which restored the *status quo ante* March 22, 1994.

For these reasons, we reverse the trial court's orders denying the Committee's motions to intervene in No. 193772 and reverse its orders declaring plaintiff's property zoned RMH and dismissing the case with prejudice in No. 193390 and remand the case for further proceedings. Specifically, our reversal of the order declaring plaintiff's property zoned RMH makes it necessary to address the merits of the allegations in plaintiff's complaint. We do not retain jurisdiction. As stated above, while we grant the motions for immediate consideration, we deny plaintiff's motions for leave to file a motion to dismiss and its motion to dismiss No. 193772 as moot. Also, by its terms, the parties' stipulation to dismiss No. 193390 is null and void because we are remanding No. 193772 for further proceedings.

/s/ Stephen J. Markman
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell

[1] Specifically, the map was altered in January of 1994 at some time prior to January 25. The township zoning administrator testified regarding this alteration that it was "just a little bit premature" since "the process to rezone [the land] was in the hopper." On January 25, the Board enacted several zoning changes, unrelated to the instant controversy, and also reincorporated by reference in its zoning ordinance the zoning map as it existed as of that date. The township zoning administrator added that it was not until March 24, 1994 that the rezoning was "officially adopted or ratified by the township board."

[2] Accordingly, it was unnecessary to resolve plaintiff's claims of due process violations, arbitrary denial of its rezoning request, temporary taking, and exclusionary zoning.

[3] We do not find it relevant in opposition to this element that there may have been personal financial interests that motivated the Committee's motion to intervene. Whatever the nature of these interests, they presumably are the same interests that prompted the Committee's referendum leadership and that

produced a campaign effort sufficient to persuade a majority of the Township to support the referendum.

[4] "In the last analysis, the people are the fountainhead of the law in a democracy and, therefore, it is natural that the legislative article [Art. 2, §9] should contain a reservation by the people of the right to make laws directly through the use of the statutory initiative and referendum." *Kuhn v Department of Treasury*, 384 Mich 378, 385 n 10; 183 NW2d 796 (1971), quoting Lederle, "The Legislative Article" in Pealy (ed), *The Voter and the Michigan Constitution in 1958* (1958) at 47. See also, *Michigan Farm Bureau v. Secy of State*, 379 Mich 387, 393; 151 NW2d 797 (1967).

[5] We emphasize that there is no finding here that defendant's counsel acted in bad faith in seeking to represent the post-referendum interests of the Township.

[6] Because these appeals had already been placed on the session calendar, MCR 7.211(C)(2) technically did not allow the filing of a motion to dismiss as moot. Therefore, plaintiff also filed a motion for leave to file its motion to dismiss.