

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA F. TAYLOR, WESTLAND SERVICE
TOWING, INC., and WESTLAND RV
STORAGE,

UNPUBLISHED
September 20, 2007

Plaintiffs-Appellants,

v

No. 269454
Wayne Circuit Court
LC No. 05-514565-CZ

CITY OF WESTLAND, WESTLAND FIRE
DEPARTMENT, WESTLAND CITY
PLANNING COMMISSION, WESTLAND
ZONING & ORDINANCE COMMITTEE, and
WESTLAND ANIMAL CONTROL,

Defendants-Appellees.

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendants' motion for an injunction in this zoning and land use dispute. We affirm.

I. Basic Facts and Proceedings

Plaintiff Barbara Taylor operated two businesses at 37744 Avondale in the city of Westland, Westland Service Towing, Inc., and Westland RV Services, Inc. Westland Service Towing, Inc., is a towing service for stranded vehicles, and Westland RV Services, Inc., is a vehicle storage and refurbishing service. She acquired the premises by land contract from the Prayer Baptist Church in June 2004.

On May 10, 2005, several employees of defendant city inspected the premises and noted several violations. They informed Taylor that she could not operate her businesses or occupy the premises until the city approved such actions. Thereafter, she met with the city's planning director who informed her that she needed special land use approval before she could apply for a certificate of occupancy. Thompson provided Taylor the necessary forms and directed her to complete a site plan. The following day, May 11, 2005, city employees returned to the premises and again informed Taylor that she could not operate her businesses until she received approval from the city. The city employees also "red-tagged" the building.

On May 16, 2005, plaintiffs filed a complaint for a declaratory judgment and injunctive relief. Plaintiffs alleged that the intended uses of the building were lawful and consistent with the manner in which the building had been used since it was built. Plaintiffs also alleged that the violations required to be remedied needed to be clarified and that only those necessary and lawful should be required to be made. Plaintiffs further alleged harassment by city officials and that the red tags on the building resulted in lost revenue for the businesses. The city's actions, plaintiffs maintained, amounted to a taking of property without due process of law in violation of the federal and state constitutions. Plaintiffs requested that defendants be enjoined from interfering with plaintiffs' use of the premises, and that plaintiffs be required to make only those modifications that are reasonable and in accordance with the law.

Defendants filed a brief in response to plaintiffs' complaint contending that injunctive relief should be denied because plaintiffs' property was zoned as "I-1 Light Industrial" and that plaintiffs' uses of the property, including tire sales, car repair, glass repair, storage of junked vehicles, and using the premises as a personal residence, conflicted with zoning restrictions for that zoning district. Defendants argued that plaintiffs were not entitled to injunctive relief because their uses of the premises violated Westland Zoning Ordinance 248, and they had to obtain special land use approval before a certificate of occupancy could be issued. Defendants argued that plaintiffs failed to satisfy the four criteria for injunctive relief, namely the likelihood of success on the merits, irreparable injury, the risk of harm if no injunction is issued, and the risk of harm to the public interest if an injunction is issued. Defendants further argued that plaintiffs failed to exhaust their administrative remedies by appealing to the city's Zoning Board of Appeals.

On October 19, 2005, defendants filed a motion for injunctive relief, requesting an order enjoining plaintiffs from occupying the premises until all zoning violations have been remedied. Defendants argued that Taylor agreed not to operate her businesses on the premises until she obtained city approval, but that she nevertheless continued to operate her businesses in violation of the city's ordinance. Defendants relied on letters from neighbors regarding plaintiffs' ongoing business activity and opposing the issuance of a special land use permit in plaintiffs' favor. Defendants argued that, although no showing of irreparable harm is required to enjoin activity violating a zoning ordinance, the citizens of Westland will nonetheless suffer irreparable harm if an injunction is not issued.

Following a hearing, the trial court denied plaintiffs' request for an injunction and granted defendants' request for injunctive relief, ruling that plaintiffs would have to comply with the ordinance and obtain approval to use the premises as it was being used. Before a written order was entered reflecting the trial court's ruling, plaintiffs, represented by new counsel, filed an emergency motion for reconsideration. Plaintiffs argued that on October 4, 2005, the Westland Planning Commission issued a recommendation to the Westland City Council advocating the approval of Taylor's application for a special land use permit. Plaintiffs contended, however, that later that day, the commission changed its position and recommended that the permit be denied based on letters received from four Westland residents opposing the special land use permit. Plaintiffs contended that, based on the commission's change in position, the city council denied the special land use permit. Plaintiffs argued that the trial court should reconsider its ruling and stay proceedings pending an evidentiary hearing to satisfy due process safeguards because they were not given an opportunity to present evidence to the court.

Plaintiffs further argued that because defendants failed to address how Taylor's towing business violates the ordinance, they had not demonstrated that they would prevail on the merits. The trial court denied plaintiffs' motion after a November 11, 2005, hearing and ruled that Taylor had to comply with the city's ordinances.

On December 13, 2005, plaintiffs filed a motion to maintain the status quo, arguing that they were in compliance with the zoning ordinance and had removed all nonconforming items from the premises. Plaintiffs relied on an affidavit from Taylor indicating that she removed Westland RV Storage, Inc., from the premises and wished to continue operating only the towing business on the property. Plaintiffs argued that the towing service is essentially a phone dispatch service, which did not violate any ordinance. They further argued that they would be irreparably injured if they were forced to cease conducting business and that maintaining the status quo would not harm any individual or entity. On January 19, 2006, the trial court entered a stipulated order. Pursuant to the order, plaintiffs were not required to remove vehicles, trailers, and boats currently on the premises, but were prohibited from moving new items onto the premises. The order also prohibited plaintiffs from operating a dispatch service on the premises, authorized plaintiffs to present their case before the Zoning Board of Appeals, and directed the parties to return to the court for a final ruling on the injunction issue.

At a February 27, 2006, hearing, counsel for defendants indicated that the Zoning Board of Appeals denied Taylor's request for a use variance, that she was also denied special land use approval, and that she continued to conduct business on the premises. Notably, the record does not indicate that plaintiffs sought review of the ZBA decision. Rather, counsel for plaintiffs relied on the ZBA's finding that the property was zoned "I-1 Light Industrial," which includes uses such as "cabinet and furniture making, carpet manufacturing, cloth products manufacturing, [and] contractors' shops and yards," to argue that these uses incidentally operate with an office. Defense counsel responded that office use is proper in a commercial zoned area. The trial court granted defendants' request for an injunction because "the zoning ordinances don't permit operating a truck dispatch service or storage" On March 10, 2006, the trial court entered a written order reflecting its oral ruling and allowing plaintiffs 30 days to remove the dispatch service from the premises.

On appeal, plaintiffs raise three constitutional arguments that were not raised or addressed in the circuit court and, accordingly, are unpreserved. *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 554; 672 NW2d 513 (2003). Therefore, our review is limited to plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004). Although plaintiffs' complaint alleged that defendant's actions amounted to a taking without due process, trial counsel did not raise, brief or argue this point beyond the complaint, and the trial court thus did not address it.

In *Kropf v City of Sterling Hts*, 391 Mich 139; 215 NW2d 179 (1974), our Supreme Court discussed challenges to the constitutionality of ordinances. There, the Court stated:

Plaintiffs must bear the burden of proof in attacking the constitutionality of the ordinance in question. It is up to them to present sufficient proofs to the court showing that the defendant city by its action violated one of their aforesaid constitutional rights and thus acted "unreasonably". They must show that the city, via its ordinance denied them substantive or procedural due process, equal

protection of the laws, or deprived them of their property without just compensation. To each of these claims the court will apply their proofs presented and determine if they have met their burden in showing the ordinance in question to be “unreasonable”, for, as we have said, reasonableness is the test of its validity. [*Kropf, supra* at 156-157.]

Plaintiffs first contend that the city’s denial of special land use approval violated their substantive due process rights because the ordinance, as applied, is arbitrary and capricious. The power of a city to enact an ordinance is not absolute, and the enactment of a zoning ordinance that has no reasonable basis for its very existence may deny a citizen substantive due process. *Kropf, supra* at 157. “That ‘reasonable basis’ must be grounded in the police power, which our courts have defined as including ‘protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public, or any substantial part of the public.’” *Hecht v Niles Twp*, 173 Mich App 453, 460; 434 NW2d 156 (1988), citing *Cady v Detroit*, 289 Mich 499, 504-505; 286 NW 805 (1939). In *Kropf, supra* at 158, the Court stated:

In looking at this “reasonableness” requirement for a zoning ordinance, this Court will bear in mind that a challenge on due process grounds contains a two-fold argument; first, that there is no reasonable governmental interest being advanced by the present zoning classification itself, . . . or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question.

Rather than addressing the zoning ordinance itself, plaintiffs’ arguments pertain to the city council’s denial of their special land use application and assert that the denial, rather than the ordinance, was arbitrary and capricious. Plaintiffs rely on several documents not included in the lower court record, including the city’s master plan, a positive report from the city’s building department, and positive letters of support from neighbors or other persons. Included in the lower court record, however, are three letters from neighbors opposing the grant of a special land use permit. Despite that the city’s planning commission initially recommended approval of the permit, plaintiffs concede that the city’s denial was based on these letters. Because it does not appear that the denial was arbitrary and capricious, or without any reasonable basis as plaintiffs contend, they cannot establish plain error.

Plaintiffs also argue that the city’s ordinance effects a constitutional taking of the property because it denies them an economically viable use of the property. “To show an unconstitutional taking, a plaintiff ‘must show that if the ordinance is enforced the consequent restrictions on [the] property [would] preclude its use for any purpose to which it is reasonably adapted.’” *Bell River Assoc v China Charter Twp*, 223 Mich App 124, 133; 565 NW2d 695 (1997) (brackets in original), citing *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 571; 398 NW2d 393 (1986). A mere diminution in value does not constitute a taking, but rather, a plaintiff alleging the denial of all economically viable use of land must show that the land is either unmarketable or unsuitable for use as zoned. *Bell River Assoc, supra* at 133.

Rather than focusing on the effect of the ordinance on the property, plaintiffs argue that the city’s actions were deplorable and that the city has been attempting to shut down Taylor’s towing and repair business since she moved onto the premises. Plaintiffs fail to demonstrate that

the property is unmarketable or unsuitable for use as zoned. Westland Ordinance, § 10:3.2, provides a list of several uses permitted in the “I-1 Light Industrial” district, including contractors’ shops and yards, various manufacturing plants, and warehousing and storage facilities. The pictures of the premises included in the lower court record show that the property is suitable for many of these uses. Further, any diminution in value of the property would not constitute a taking. *Bell River Assoc, supra* at 133. Because plaintiffs have failed to show that enforcement of the ordinance would preclude the use of the property for any purpose to which it is reasonably adapted, they have failed to establish plain error.

Plaintiffs next contend that, by denying special land use approval, the city engaged in exclusionary zoning in violation of the United States and Michigan Constitutions. Plaintiffs also rely on former MCL 125.297a,¹ which provided:

A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

Interpreting this provision, this Court has stated that “a zoning ordinance may not exclude completely a lawful use of the land where: (1) a demonstrated need exists for the land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful.” *Bell River Assoc, supra* at 135.

Plaintiffs argue that no district within the city allows their proposed uses without a special land use permit. Defendants, on the other hand, contend that some of plaintiffs’ proposed uses are allowed by special land use permit and others are permitted as a matter of right, depending on the zoning district. The only ordinance provisions included in the lower court record pertain to uses permitted as a matter of right or by special use permit in the “I-1 Light Industrial” district. Therefore, we are unable to determine whether any of plaintiffs’ proposed uses are permitted as a matter of right in other districts within the city. Even if plaintiffs are correct that the city allows for their proposed uses only by special land use permit, this Court has held that a zoning ordinance permitting a use only by a special use permit does not violate MCL 125.297a. See *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 172-173; 667 NW2d 93 (2003). Moreover, the record indicates that the city did not totally exclude plaintiffs’ proposed uses, but specifically allowed the uses on a different parcel of property that Taylor owns within the city that is not at issue in this appeal. According to the record, Taylor merely needed to remedy some code concerns regarding the other parcel. Accordingly, plaintiffs cannot establish that the city’s zoning decisions had the effect of totally prohibiting their proposed land uses under MCL 125.297a.

¹ The statute was repealed by 2006 PA 110, but it is applicable to this case, which was pending at the time that the statute was repealed. See MCL 125.3702(2).

We next address plaintiffs' constitutional arguments regarding exclusionary zoning and denial of equal protection. Because plaintiffs' exclusionary zoning arguments are based on federal and state due process rights, the analysis of plaintiffs' exclusionary zoning and equal protection arguments is essentially the same. *Landon Holdings, Inc, supra* at 175, 177. This Court has recognized that total exclusion of a use is not required to establish a constitutional violation. *Id.* at 176. If a use is totally excluded, however, the burden shifts to the city to justify its ordinance. *Id.* On the other hand, if a use is not totally excluded, "a plaintiff may still prevail if he can meet the difficult burden of demonstrating no reasonable relationship to a legitimate governmental interest." *Id.* at 176-177.

As previously indicated, it appears that plaintiffs' proposed uses are not totally excluded because they may be conducted on a different parcel of property that Taylor owns within the city. Thus, in order to prevail, plaintiffs must demonstrate that no reasonable relationship to a legitimate governmental interest exists. *Landon Holdings, Inc, supra* at 176-177.

It appears that the exclusion bears a reasonable relationship to a legitimate governmental interest. The premises is located directly across the street from a single family residential district and other neighboring property is occupied by a church and a DTE training facility. Letters from residential neighbors opposing the grant of a special land use permit expressed concern regarding traffic, parking in front of their homes, safety, and the maintenance of plaintiffs' premises, among other matters. Considering that the premises abuts a single-family residential district, the city has a legitimate interest in regulating the property and exercising some control over the industrial uses that occur on the property. Plaintiffs have not shown that the exclusion bears no reasonable relationship to a legitimate governmental interest. *Landon Holdings, Inc, supra* at 176-177.

Further, in support of their equal protection argument, plaintiffs maintain that the building was used for the same type of business for many years before they occupied it and that the previous owners were never instructed that they were violating any zoning regulations. Plaintiffs, however, failed to present any evidence supporting this argument in the trial court and the record contains none. Therefore, they have failed to establish that they were treated differently from previous owners of the property. For the foregoing reasons, plaintiffs have not established a plain error with respect to their exclusionary zoning and equal protection arguments.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood