

STATE OF MICHIGAN
COURT OF APPEALS

HOLWERDA BUILDERS, LLC,

Plaintiff-Appellant,

v

TOWNSHIP OF GRATTAN and GREGORY L.
CONVERSE,

Defendants-Appellees.

UNPUBLISHED

July 14, 2005

No. 260711

Kent Circuit Court

LC No. 04-006316-CZ

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff Holwerda Builders, LLC, appeals as of right a trial order granting summary disposition to defendants Township of Grattan and Gregory L. Converse, defendant township's zoning administrator. Because the township zoning act (TZA) grants townships the authority to enact zoning ordinances which include Planned Unit Development (PUD) requirements, the township PUD provisions require notice and public hearings before the approval of any PUD application, and the township PUD provisions are constitutional, we affirm.

The parties do not dispute the material facts in this case. Rox, LLC split an eighty acre parcel of land originally zoned for agricultural use into ten sites approximately three to four acres each and one parcel in excess of forty acres. Defendant township approved the split. Rox, LLC sold four of the smaller sites to plaintiff. Plaintiff purchased the lots with the intention of building four single-family homes on each lot. Rox, LLC subsequently submitted a plan to develop the remaining forty-plus acres as a condominium site consisting of twelve individual sites. Plaintiff then requested building permits from defendant township for its parcels. Defendant township refused to grant plaintiff building permits stating that plaintiff's lots must comply with the PUD provisions in the township's zoning ordinance designed to regulate higher density developments due to Rox, LLC's plans to develop its remaining adjacent property with a twelve-unit condominium.

Plaintiff filed a complaint against defendants after defendants refused to issue the requested building permits. Plaintiff claimed that its building plans met the requirements of the township's zoning ordinance and argued that the township's PUD regulations were illegal and unconstitutional for six separate reasons: the township cannot require PUD approval in any circumstance; the township's PUD provisions violate the notice requirements of the township zoning act (TZA), MCL 127.271, *et seq.*, which authorizes townships to adopt ordinances

regulating the use of land; the PUD regulations do not require a hearing before the township board; the PUD regulations applied to noncontiguous lands; the threshold for the PUD is arbitrary and capricious; and finally, the requirement for a public sanitary sewer in a residential PUD is an arbitrary and capricious imposition. Plaintiff's complaint requested that the trial court declare invalid those provisions of defendant township's zoning ordinance that are unconstitutional and exceed the authority granted by the TZA. Plaintiff also requested a writ of mandamus ordering defendant township to approve plaintiff's building permit applications.

Defendant township denied that its ordinance provisions exceed the township's zoning authority or were otherwise unconstitutional. Defendants argued that the trial court lacked subject matter jurisdiction over plaintiff's complaint because plaintiff had not obtained a final decision that is ripe for judicial review. Defendants further argued that defendant township's PUD provisions were authorized by the TZA and were a rational means of advancing defendant township's legitimate interests, i.e., were constitutional.

Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendants responded to plaintiff's motion by arguing that defendant township's PUD provisions were valid and enforceable and that defendants were, in fact, entitled to summary disposition pursuant to MCR 2.116(I)(2). After entertaining oral arguments on the matter, the trial court denied plaintiff's motion for summary disposition and granted summary disposition to defendants. The trial court found that plaintiff lacked standing to contest the ordinance, that the PUD was constitutional, that the township was authorized to require PUD approval when the property owner makes the voluntary decision to develop its property at a higher density, that the township's PUD provisions do not violate the notice requirements of the TZA, that the township board was not required to hold a public hearing on the PUD applications, and finally that the eleven lot threshold for a PUD was valid. It is from this order that plaintiff appeals.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Furthermore, statutory interpretation is a question of law, which is reviewed de novo on appeal. *Preserve the Dunes, Inc v Michigan Dep't of Envtl Quality*, 471 Mich 508, 513; 684 NW2d 847 (2004).

Plaintiff filed its motion for summary disposition pursuant to MCR 2.116(C)(8) as well as (C)(10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). Because plaintiff is the party who filed the motion for summary disposition and is also the party asserting a claim in this case, it seems apparent that plaintiff intended to bring its motion pursuant to MCR 2.116(C)(9), failure to state a valid defense to a claim, rather than (C)(8).¹ "A motion under

¹ It is well settled that, where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled. *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996); *Ruggeri Electrical Contracting Co, Inc v Algonac*, 196 Mich App 12, 18; 492 NW2d 469 (1992). In this case, defendants were neither misled nor prejudiced by the trial court's consideration of plaintiff's motion under MCR 2.116(C)(8).

MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings." *Allstate Insurance Co v JJM*, 254 Mich App 418, 421 n 2; 657 NW2d 181 (2002). "Summary disposition under MCR 2.116(C)(9) is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery." *Id.*

Plaintiff also filed its motion for summary disposition pursuant to MCR 2.116(C)(10), which states that summary disposition of all or part of a claim or defense may be granted when [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

And if it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Auto-Owners Ins v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

Plaintiff first argues that the TZA does not grant townships the authority to enact a zoning ordinance that requires a property owner to comply with PUD requirements. "Local governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the state constitution or state statutes or which are necessarily implied therefrom. A power is 'necessarily implied' if it is essential to the exercise of authority that is expressly granted." *Conlin v Scio Township*, 262 Mich App 379, 385; 686 NW2d 16 (2004). However, our Supreme Court has stated that, pursuant to our Michigan Constitution, statutes concerning Michigan townships are to be liberally construed in the townships' favor. *Hess v West Bloomfield Township*, 439 Mich 550, 560-561; 486 NW2d 628 (1992); See Const 1963, art 7, § 34. Therefore, the township zoning act (TZA), is to be liberally construed in defendant township's favor.

We now turn to the specific provisions of the TZA concerning the authority granted to townships to impose PUD requirements on property owners. If the terms of a statute are unambiguous, judicial construction is inappropriate. *Health Care Ass'n Workers Comp Fund v Dir of Bureau of Worker's Comp*, 265 Mich App 236, 243-244; 694 NW2d 761 (2005). MCL 125.271(1), regarding the authority of townships to enact zoning ordinances, 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 . . .*; to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that use of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements; and to promote public health, safety, and welfare. . . . [Emphasis added.]

And MCL 125.286c, regarding planned unit developments, provides in relevant part:

(1) As used in this section, "*planned unit development*" includes such terms as cluster zoning, planning development, community unit plan, planned

residential development, and other *terminology denoting zoning requirements* designed to accomplish the objectives of the zoning ordinance through a land development project review process based on the application of site planning criteria to achieve integration of the proposed land development project with the characteristics of the project area.

(2) *A township may establish planned unit development requirements in a zoning ordinance* which permit flexibility in the regulation of land development; encourage innovation in land use and variety in design, layout, and type of structures constructed; achieve economy and efficiency in the use of land, natural resources, energy, and the provision of public services and utilities; encourage useful open space; and provide better housing, employment, and shopping opportunities particularly suited to the needs of the residents of this state. The review and approval of planned unit developments shall be by either the zoning board, an official charged with administration of the ordinance, or the township board, as specified in the ordinance. . . . [Emphasis added.]

According to the plain language of MCL 125.271(1), the Legislature has granted townships the authority to enact zoning ordinances to regulate land use for a variety of purposes including to prevent overcrowding and insure the appropriate use of natural and public resources. Furthermore, according to the plain language of MCL 125.286c(2), the Legislature has granted townships the authority to “establish planned unit development requirements in a zoning ordinance” that assist the township in this regulation of land use. Plaintiff’s argument that the TZA does not grant townships the authority to require that a property owner develop his property as a PUD is not supported by the statutory language.² Plaintiff’s argument ignores the TZA’s clear language providing that townships can “establish planned unit development requirements in a zoning ordinance.” MCL 125.286c(2).

Plaintiff next argues that the trial court erred in granting defendants summary disposition because defendant township’s zoning ordinance violates the TZA by effectively rezoning plaintiff’s property without notice and public hearing as required by the act. The TZA provides that notice be given to property owners before a proposed zoning ordinance is adopted, after a zoning ordinance is adopted, and before decisions regarding the rezoning of property. MCL 125.279; MCL 125.281; MCL 125.281a; MCL 125.284. The TZA further requires that notice be given to property owners located within 300 feet of the boundary of a property being considered for a planned unit development. MCL 125.286b(2); MCL 125.286c(5).

Articles 14 and 14A of defendant township’s ordinance offer two methods of obtaining PUD approval: Article 14.02 allows a property owner to seek PUD approval by requesting that

² Plaintiff also provides case law in support of its argument that a township can never force PUD requirements on a property owner and relies on a Florida case, *Porpoise Point Partnership v St Johns County*, 532 So2d 727 (Fla App, 1988). Although law from other jurisdictions is not binding, it may constitute persuasive authority. *Mable Cleary Trust, supra*, 262 Mich App at 494 n 5. However, *Porpoise* is not persuasive because it is readily distinguishable on its facts.

property be rezoned as a PUD zoning district while article 14A.02 allows for administrative approval of a PUD proposal. Both articles specifically require that notice be given to property owners in accordance with the statutory requirements before approval of a PUD. Therefore, plaintiff's argument that defendant township's PUD provisions violate the TZA's notice requirements fail.

Plaintiff argues that defendant township's ordinance does not require public hearings before the approving authority of a PUD. According to MCL 125.286c(5), "[f]ollowing receipt of a request to approve a planned unit development, the body or official charged in the ordinance with review and approval of planned unit developments shall hold at least 1 public hearing on the request." According to articles 14.05G and 14A.05G of defendant township's ordinance, the township board makes the final decision regarding the approval of a PUD through either rezoning or through the administrative process. However, while the ordinance requires that public hearings be held whether the request is for rezoning or administrative approval of a PUD, the hearings are held before the planning commission and not the township board. Articles 14.05(B) and 14A.05(B).

Defendants argue that because article 14 of the ordinance requires rezoning of property into a PUD district, then public hearings before the planning commission are expressly provided for in the TZA at MCL 125.286c(5). It states, "If the ordinance requires that the township board amends the ordinance to act on the planned unit development request, the zoning board shall hold the hearing . . . and the report and the documents related to the planned unit development request shall be transmitted to the township board for consideration in making a final decision." MCL 125.286c(5). However, defendants do not address whether defendant township's PUD provision providing for *administrative* approval violates the TZA public hearing requirement. According to the plain language of MCL 125.286c(5), the public hearing is to be held before "the body or official charged in the ordinance with review and approval" of a PUD. Therefore, in light of article 14A.05(G) of defendant township's ordinance, which charges the *township board* with final decisions regarding PUD applications seeking administrative approval, article 14A.05(B), requiring that a public hearing be held before the planning commission on PUD applications violates the TZA. However, because plaintiff has never applied for PUD approval through either the rezoning or administrative process, there has not yet been a reason for defendant township to hold a public hearing in this case. Also, article 21.01 of the township's zoning ordinance states that any provision or section of the ordinance found to be invalid shall not effect the remaining valid provisions. Therefore, the appropriate relief for plaintiff would be to require that a public hearing on any application of plaintiff for PUD approval be held before the township board.

Plaintiff also argues that defendant township is refusing to comply with its own ordinance in denying plaintiff's building permit applications because single-family homes are allowed by right in the agricultural zoning district within which the lots are located. This argument ignores the fact that defendant township's PUD provisions are part of the township's zoning ordinance. According to article 14.14(E) of the township's ordinance, because Rox LLC proposed the twelve condominium units on its remaining property within seven years of the division of its parcel into ten lots, four of which were sold to plaintiff, all of the lots in Rox LLC's original parcel are considered subdivisions and, because Rox LLC's proposal is for more than eleven units, each lot in the original parcel is subject to PUD approval. While plaintiff's proposed

single-family homes are allowed in the agricultural zoning district, once the zoning ordinance's PUD provisions are considered, defendant township's ordinance requires that plaintiff apply for PUD approval to proceed with construction of the homes. Accordingly, defendant township denied plaintiff's building permit applications pursuant to article 14.14(A) of the ordinance. Therefore, plaintiff's continued argument that the ordinance allows the development for which it is seeking building permits ignores the fact that plaintiff must comply with the ordinance's PUD provisions because of the proposed development on the entirety of the parent parcel from which plaintiff's lots were divided.

Finally, plaintiff argues the township's zoning ordinance is unconstitutional on its face. Plaintiff argues that the ordinance is unconstitutional as applied, an argument it did not specifically make before the trial court. "An issue is not properly preserved if it is not raised before, addressed, or decided" by the trial court and that this Court "need not address issues first raised on appeal." *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). However, the root of plaintiff's argument is that it is being forced to apply for PUD approval because of the actions of a third party – Rox, LLC's proposal to develop its remaining parcel with twelve condominiums – rather than plaintiff's proposal to build four single-family homes on four separate lots. As such, plaintiff has presented its "as applied" constitutional challenge to the trial court and is well known by defendants.

This Court reviews de novo a trial court's decision on constitutional challenges to zoning ordinance provisions. *Yankee Springs Township v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004). Furthermore, whether a party has standing is a question of law reviewed de novo. *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

Plaintiff asserts that defendant township's zoning ordinance is unconstitutional on its face for three reasons: (1) the ordinance is vague and overbroad because it treats property owners of non-contiguous lands the same as those owning contiguous lands, (2) the ordinance is arbitrary and capricious because it identifies, without reason, the number eleven as the trigger for its PUD requirements, and (3) the ordinance arbitrarily precludes development for property owners who must comply with residential PUD requirements if no public sewer is available, which is required in a residential PUD. We agree with the trial court that plaintiff lacks standing to make arguments (1) and (3).

To have standing:

First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a *causal connection between the injury and the conduct complained of*--the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [Emphasis added.] [*Lee, supra*, 464 Mich at 739, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992)]

Plaintiff has not been injured by the ordinance's treatment of non-contiguous property owners because it is an undisputed fact that its four lots are contiguous to each other. Furthermore, defendant explains that plaintiff has not been injured by the ordinance's requirement that public sewer be provided in a residential PUD because, pursuant to article 14.08(A)(2)(c) of defendant township's ordinance, plaintiff is not required to develop its land as a residential PUD to proceed with its desired construction of four single-family homes on lots sized over three acres each. Instead, it can develop without a public sewer as a rural preservation PUD. Plaintiff lacks standing to make these two arguments because plaintiff complains of conduct unrelated to its specific injury.

With respect to the second argument, plaintiff argues that the ordinance violates its right to substantive due process and equal protection. Specifically, plaintiff argues that the ordinance is arbitrary and capricious because it requires PUD approval for developments of eleven or more units, rather than some other number. In *Conlin, supra*, 262 Mich App at 391 n 2, this Court observed that where there are no suspect classifications or fundamental rights involved and an ordinance does not completely exclude a particular use, the tests for substantive due process and equal protection are essentially the same. No such suspect classifications or fundamental rights are involved in this case and, while the ordinance requires plaintiff to comply with the PUD requirements of the ordinance, plaintiff has not demonstrated that this completely excludes its intended use of the property. Therefore, we address the constitutional challenges together.

Substantive due process and, in this case, plaintiff's right to equal protection, require that defendant township's ordinance, including its PUD provisions, be rationally related to a legitimate governmental interest. *Conlin, supra* at 389. Specifically, this Court noted three rules of judicial review that applied to such constitutional challenges to an ordinance:

(1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Conlin, supra* at 390.]

Furthermore, quoting *Muskegon Area Rental Ass'n v City of Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001), this Court noted that in order to show that an ordinance is not rationally related to a legitimate government interest, a challenger must "negative every conceivable basis" which might support the ordinance or show that the ordinance is based "solely on reasons totally unrelated to the pursuit of the State's goals." *Conlin, supra* at 391, quoting *Muskegon Area Rental Ass'n, supra*, at 464.

Plaintiff argues that the ordinance is arbitrary and capricious because of the number of units, eleven, comprise a development which requires PUD approval and then simply states: "Why is eleven the correct number? The ordinance is arbitrary and capricious." Plaintiff has not attempted to explain why such a number is unrelated to the township's goals of density regulation for the health, safety, and welfare of its citizens or negate support for using this number.

As stated in defendant township's ordinance, the township enacted PUD provisions for the following purposes:

1. To provide a more desirable living environment by preserving the agricultural and rural character of the Township and by protecting open fields, stands of trees, lakes, streams, hills and similar natural assets.
2. To encourage the preservation of open space and passive recreation areas.
3. To encourage developers to use a more creative and imaginative approach in the development of land.
4. To promote more efficient and aesthetic use of open areas. [Article 14.01(B).]

Furthermore, the establishment of PUD requirements furthers the purposes identified in the TZA as those purposes for which the Legislature granted zoning authority to townships in the first place, e.g., to insure the proper use of natural and public resources, to limit overcrowding, and to promote public health, safety, and welfare. MCL 125.271(1); MCL 125.286c(2). This Court has found that “avoiding overcrowding and preserving open space are ‘legitimate governmental interests.’” *Conlin, supra*, 262 Mich App at 394. Because defendant township’s PUD provisions advance both of these interests by regulating denser development while preserving open space in approved PUDs, the ordinance provisions are rationally related to these legitimate governmental interests, and the ordinance is constitutional on its face.

Plaintiff also argues that defendant township’s ordinance is unconstitutional as applied because it requires plaintiff to comply with the ordinance’s PUD provisions because of the actions and proposed development of adjacent land rather than plaintiff’s proposed construction of four single-family homes. An “as applied” challenge to the validity of a zoning ordinance is subject to the rule of finality which this Court has found to mean that “where the possibility exists that a municipality may have granted a variance – or some other form of relief – from the challenged provisions of the ordinance, the extent of the alleged injury is unascertainable unless these alternative forms of potential relief are pursued to a final conclusion.” *Conlin, supra*, 262 Mich App at 382-383, citing *Paragon Properties Co v City of Novi*, 452 Mich 568, 580-581; 550 NW2d 772 (1997). Plaintiff never submitted a proposal for PUD approval through either the ordinance’s rezoning or administrative avenues of approval. Therefore, it is unknown whether plaintiff could proceed with its desired construction of four single-family homes on its property and plaintiff’s “as applied” constitutional challenge is unripe for this Court’s review.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Pat M. Donofrio