

STATE OF MICHIGAN
COURT OF APPEALS

ACO DEVELOPMENT, INC.,

Plaintiff-Appellant,

v

SUPERIOR CHARTER TOWNSHIP and
SUPERIOR TOWNSHIP PLANNING
COMMISSION,

Defendants-Appellees.

UNPUBLISHED

August 26, 2008

No. 276540

Washtenaw Circuit Court

LC No. 04-000547-CZ

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

Plaintiff sought a conditional use permit to build a mini-storage facility on property zoned as commercial, but the township planning commission denied the permit. Plaintiff filed a claim of appeal from the commission decision and filed an original complaint raising various constitutional challenges. Ultimately, the trial court granted defendants' renewed motion for summary disposition by holding that a denial of due process and equal protection had not been established.¹

¹ Plaintiff purchased the property in the fall of 2001 for \$410,000. After the conditional use permit was denied, plaintiff filed a complaint alleging contempt of court, violation of covenant running with the land, exclusionary zoning, violation of substantive and procedural due process, and temporary taking. A claim of appeal from the planning commission decision was also filed. After the complaint and claim of appeal were filed, plaintiff sold the property to third parties for \$900,000 in 2004, but plaintiff asserted that the sale amount was a depressed price. The trial court granted summary disposition in favor of defendants regarding the contempt of court claim that requested modification of the growth management plan. The decision was not appealed. The trial court granted defendants' second motion for summary disposition when it concluded that plaintiff did not have standing in light of the sale of the property. However, the trial court allowed plaintiff to file an amended complaint. Defendants filed a third motion for summary

(continued...)

Plaintiff alleges that the trial court erred in granting summary disposition in favor of defendants where the planning commission's discretion was legally invalid as an unlawful delegation of legislative discretion. We disagree. A trial court's grant of summary disposition is reviewed de novo. *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Constitutional issues present questions of law subject to de novo review. *Michigan Dep't of Transportation v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). Challenges to the constitutionality of a zoning ordinance are reviewed de novo on appeal. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995).

Contrary to the assertion of plaintiff, this issue is not preserved for appellate review. An issue is not properly preserved for appellate review when it has not been raised, addressed, and decided by the trial court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). The trial court's opinion and order granting defendants' motion for summary disposition did not address and decide the question of an unlawful delegation of legislative authority.²

(...continued)

disposition based on MCR 2.116(C)(10), but the motion was denied when the trial court held that there were "issues of fact." Defendants filed a renewed motion for summary disposition based on MCR 2.116(C)(8), the trial court granted the motion, and it is the subject of this appeal. Although not raised in the statement of questions presented, on appeal plaintiff contends that the trial court should be bound by its earlier holding that factual issues exist and could not examine documentary evidence when the motion was brought under MCR 2.116(C)(8). However, the trial court is only bound by the published decisions of the Court of Appeals and the Michigan Supreme Court. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). Additionally, a trial court is not constrained by the subrule identified by the party when moving for summary disposition. *Computer Network, Inc v AM General Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). If a party brings a motion for summary disposition under the wrong subrule, the trial court can proceed under a different subrule provided neither party is misled. *Id.* In light of the fact that this was the fourth motion for summary disposition, prior motions were brought under MCR 2.116(C)(10), and plaintiff referenced evidence not contained within the complaint (for example the zoning ordinances), this challenge is without merit.

² Indeed, in the lower court record, defendants renewed their motion for summary disposition and did not address the question of the propriety of the delegation of legislative authority. In the brief in opposition, plaintiff directed the trial court's attention to an earlier motion that briefly mentioned but did not address with citation to legal authority the question of an improper delegation. At the trial court's request, the parties filed supplemental briefs addressing "whether Plaintiff [had] stated a legally sufficient claim under 42 USC § 1983." In the supplemental brief, plaintiff did not address the issue now raised on appeal. Following the trial court's decision, plaintiff did not file a motion for reconsideration to assert the improper delegation claim. The issue preservation requirements are designed to prevent a party from harboring error as an appellate parachute by "sandbagging" the circuit court after an unfavorable ruling is rendered. See *Polkton Twp, supra* at 95-96. Moreover, plaintiff's contention that the planning commission was required to approve the mini storage facility upon satisfaction of the criteria contained in Section 5.14 of the zoning ordinance is without merit. Plaintiff fails to mention that the planning commission was also required to examine the criteria contained in section 6.06 of the zoning ordinances. Thus, the planning commission did not sua sponte create legislation to preclude plaintiff from obtaining a conditional use permit.

Next, plaintiff contends that the trial court erred in dismissing the equal protection claim “without any reasoning or analysis.” We disagree. There is no requirement that a trial court address the existence of factual issues or conclusions of law when ruling on a motion. MCR 2.517(A)(4). (“Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule.”).³

Equal protection challenges to zoning decisions are difficult to maintain because the plaintiff raising the challenge must demonstrate that the ordinance discriminates against a particular class. “When no suspect or somewhat suspect classification can be shown, the plaintiff has the burden of establishing that the statute is arbitrary and not rationally related to a legitimate governmental interest.” *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). The substance of an equal protection claim is discrimination based on characteristics that do not justify different treatment. *Id.* at 176. “[A] plaintiff need not demonstrate total exclusion to prevail on a due process or equal protection claim. If a use is totally excluded, the burden shifts to the defendant to justify the ordinance. If it is not totally excluded, a plaintiff may still prevail if he can meet the difficult burden of demonstrating no reasonable relationship to a legitimate government interest.” *Id.* at 176-177. (Citations omitted.)

Although a particular use of land may be otherwise proscribed by a zoning ordinance, a party may seek a variance or special use exception. See *Szluha v Avon Twp*, 128 Mich App 402, 405; 340 NW2d 105 (1983). Deference is given to the zoning authority’s interpretation of its own ordinance, *Macenas v Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989), with considerable weight given to the findings by the trier of fact, who occupies a better position to test the credibility of the witnesses. *Id.* at 392. The reason for this deference is obvious – the zoning authority members “are local residents who reside in the township and who possess a much more thorough knowledge of local conditions, current land uses, and the manner of future development desirable for those who reside in the township.” *Szluha, supra* at 410. Plaintiff failed to meet the burden of establishing a denial of equal protection where the planning commission complied with the local zoning ordinances and deference is to be accorded its decision.

Affirmed.

/s/ Henry William Saad

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello

³ See also *Lud v Howard*, 161 Mich App 603, 614; 411 NW2d 792 (1987), which held that findings of fact and conclusions of law are not required when deciding motions.