

STATE OF MICHIGAN
COURT OF APPEALS

MELCHING, INC., and KENNETH B. CALLOW,
Plaintiffs-Appellees,

UNPUBLISHED
July 1, 2014

v

No. 315177
Muskegon Circuit Court
LC No. 12-048736-AW

CITY OF MUSKEGON,
Defendant,

and

LOREN PAGE and EVE DOUGLAS,
Intervening Defendants-Appellants.

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

In this action to determine the validity of a voter-enacted initiative to rezone certain real property, intervening defendants Loren Page and Eve Douglas (intervenor) appeal as of right the trial court's order granting summary disposition in favor of plaintiffs Melching, Inc., and Kenneth B. Callow. We affirm.

The property at issue is owned by Melching and is located within the boundaries of defendant City of Muskegon (the city), which is a home rule city pursuant to the Home Rule City Act (HRCA), MCL 117.1 *et seq.* Historically, the property was zoned I-2, General Industrial Zoning, and it was home to an industrial facility known as the Sappi Paper Mill. In August 2012, intervenor Page submitted a petition to the city clerk calling for a ballot initiative to rezone the property from I-2 to WM, Waterfront Marine. The petition contained the requisite number of signatures necessary to place the initiative on the ballot for the fall 2012 election. On November 6, 2012, the city's residents approved Proposal 4, which was the initiative to rezone the property.

On November 29, 2012, plaintiffs filed a complaint against the city, alleging that Proposal 4 constituted an invalid means of amending the city zoning map and ordinance, given that the proposal effectively rezoned property absent compliance with the procedural hurdles set forth in the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.* Plaintiffs sought declaratory relief, as well as an injunction, to prevent the city from enforcing the rezoning

accomplished by Proposal 4. Additionally, plaintiff Callow moved for, and obtained, special leave to file a *quo warranto* action against the city to challenge the validity of the election on Proposal 4.¹

After granting the intervenors' motion to intervene, the trial court granted summary disposition in favor of plaintiffs, ruling that Proposal 4 did not constitute a valid rezoning of the property. The trial court found that our Supreme Court's decision in *Korash v Livonia*, 388 Mich 737; 202 NW2d 803 (1972), dictated that the citizens of a home rule city could not, absent compliance with the MZEA, employ a voter initiative to rezone property. The trial court also entered a writ of *quo warranto* pursuant to MCL 600.4545, declaring that the election on Proposal 4 was void on the basis of a material error. Intervenors appeal as of right.

This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of law generally. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). We also review de novo issues of statutory construction. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

Under the HRCA, cities are empowered to engage in the zoning of property when provided for in their respective charters. MCL 117.4i(c) ("Each city may provide in its charter for . . . [t]he establishment of districts or zones within which the use of land and structures . . . may be regulated by ordinance."); *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 683; 625 NW2d 377 (2001). Here, the city's charter authorizes the designation of zoning districts by ordinance and the zoning of property generally. The HRCA also authorizes a city to include a charter provision allowing for "[t]he initiative and referendum on all matters within the scope of the powers of that city" MCL 117.4i(g). In this case, the city's charter authorizes "initiatory petitions" in regard to proposed ordinances.

The MZEA also authorizes the zoning of property by municipalities, stating that "[a] local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens[.]" MCL 125.3201(1). Pursuant to the MZEA, "[a]mendments or supplements to [a] zoning ordinance shall be adopted in the same manner as provided under th[e] act for the adoption of the original ordinance." MCL 125.3202(1). The MZEA provides for a number of procedural steps with respect to adopting an ordinance, which, under MCL 125.3202(1), would also apply to the amendment of an ordinance. More specifically, plaintiffs cited MCL 125.3305(b), 125.3306, 125.3308(1), and 125.3401 in their pleadings in regard to procedures that were not complied with prior to the rezoning of the property under Proposal 4. MCL 125.3305(b) requires a zoning

¹ An action for *quo warranto* "may be brought in the circuit court of any county of this state whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof." MCL 600.4545(1).

commission to adopt and file recommendations with the governing legislative body with respect to “[t]he establishment of zoning districts, including the boundaries of those districts.” MCL 125.3306(1) provides that “[b]efore submitting its recommendations for a proposed zoning ordinance to the legislative body, the zoning commission shall hold at least 1 public hearing.” The statute further prescribes rules regarding the required notice that must be given relative to the public hearing. MCL 125.3306(1)-(3). MCL 125.3308(1) provides that “[f]ollowing the required public hearing . . . , the zoning commission shall transmit a summary of comments received at the hearing and its proposed zoning ordinance, including any zoning maps and recommendations, to the legislative body of the local unit of government.” Finally, MCL 125.3401 addresses proceedings by the legislative body after receiving a zoning ordinance or an amendment of an ordinance from the zoning commission, entailing a litany of rules concerning public hearings, notices, referrals, the adoption of an ordinance or amendment, and required post-adoption steps and notices. There is no dispute that there was a lack of compliance with the MZEA before Proposal 4 was approved by the city’s voters.

The crux of the dispute is whether, despite the HRCA’s grant of authority allowing the inclusion of charter provisions giving the citizens of a home rule city the power of initiative in regard to matters generally held within the scope of a city’s authority, including the power to zone, an ordinance can be amended through the power of initiative when such a mechanism fails to comply with the procedural steps and safeguards outlined in the MZEA. In *Korash*, 388 Mich at 738, our Supreme Court addressed this precise question, framing the issue as whether “the Legislature intend[ed] to authorize home-rule cities to enact zoning ordinances both by legislative action and initiative, or just by legislation?” The Court noted the language in the HRCA, and specifically MCL 117.36, which provided and still provides that “[n]o provision of any city charter shall conflict with or contravene the provisions of any general law of the state.” *Korash*, 388 Mich at 743. The *Korash* Court ultimately held:

As a consequence the home-rule act provision for zoning must be read in conjunction with the Zoning Enabling Act. When so read, the question is whether the exercise of the charter-authorized right to initiative is compatible with the city authority to zone. The answer is it is not, particularly where the city has set up a zoning authority.

The initiative makes no provision that (1) a tentative report on the proposed ordinance be made by the Livonia Planning Commission; (2) a public hearing be held by the Livonia Planning Commission; (3) a final report be made by the Livonia Planning Commission; (4) publication of notice of hearing be made; (5) a public hearing be held by the Livonia City Council; and (6) affected property owners have the opportunity to file a written objection to the proposed zoning change and to force a 3/4 vote of the Livonia City Council.

As was stated by the California Supreme Court in *Hurst v City of Burlingame*, 207 Cal 134, 141; 277 P 308, 311 (1929):

“The initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance.”

...

[T]his Court has consistently held that the procedures outlined in the Zoning Enabling Act must be strictly adhered to. *Krajenke Buick Sales v Hamtramck City Engineer*, 322 Mich 250 (1948); *Stevens v Madison Heights*, 358 Mich 90 (1959). As we stated in *Stevens*:

“The statute spells out a certain procedure that must be followed to enact a zoning ordinance; this procedure admittedly was not followed by the city in this case; and therefore the ordinance in question is invalid.”

Therefore, the amendment to the ordinance, having been enacted by a procedure different from and contrary to the procedure required by the Zoning Enabling Act, is invalid. [*Korash*, 388 Mich at 744-746 (citations omitted).]

Korash is controlling and demands that we affirm the ruling of the trial court. See *Charles A Murray Trust v Futrell*, 303 Mich App 28, 48; 840 NW2d 775 (2013) (“[I]t is well established that this Court is bound by stare decisis to follow the decisions of the Supreme Court.”). Intervenors, however, maintain that *Korash* was implicitly and necessarily overruled by *West v City of Portage*, 392 Mich 458; 221 NW2d 303 (1974), and *Beach v City of Saline*, 412 Mich 729; 316 NW2d 724 (1982). It is unnecessary to review the Court’s opinion in *West* in any great detail, as it was a plurality opinion and the subsequent opinion in *Beach*, which partially adopted the lead opinion in *West*, provides the relevant principles. *Beach*, 412 Mich at 730-731 n 1 (In speaking of the two divergent opinions in *West*, the Court stated that “[s]ince neither opinion obtained four signatures, neither is binding under the doctrine of stare decisis.”) (citation omitted). In *Beach*, which was a two-page opinion, the Court stated:

On October 11, 1976, the Saline City Council adopted a resolution authorizing the city attorney to file a request with the State Boundary Commission for annexation to the city of 160 acres of property. On November 23, 1977, the city obtained an option to purchase the property, and on January 23, 1978, the city council adopted a resolution exercising the option. On February 22, 1978, the plaintiff filed three petitions for referendum with the city clerk. One of the petitions which plaintiff sought to be submitted to the electorate concerned whether the city should purchase the property authorized by the city council resolution. When the city refused to submit the propositions to the electorate, plaintiff filed suit in Washtenaw Circuit Court seeking to enjoin the city from closing the purchase of the property and to compel the referendums. The circuit court entered a judgment in favor of the city and the Court of Appeals affirmed.

In *West* . . ., the lead opinion by Justice LEVIN concludes that a right of referendum authorized by the home-rule act extends only to legislative acts:

“We hold that the words ‘initiative’ and ‘referendum’ are themselves an implicit limitation on the matters that may properly be the subject of an initiative or referendum, and that the Legislature did not in 1909 intend to confer on the

electors of home-rule cities the power to vote on questions not truly legislative in character.”

[I]n *Rollingwood Homeowners Corp, Inc v City of Flint*, 386 Mich 258, 268; 191 NW2d 325 (1971), the Court stated that “[t]here is nothing inherently legislative about a decision to acquire real estate.” We are of the view that the opinion of Justice Levin in *West, supra*, correctly and adequately treats the governing legal principle and adopt the reasoning and conclusion of Justice Levin in part I of *West*.

Accordingly, in lieu of granting leave to appeal, . . . we affirm that part of the Court of Appeals judgment holding that the action of the City of Saline in purchasing real property constitutes an administrative act not subject to a referendum. [*Beach*, 412 Mich at 730-731.]

The *Beach* Court did not take a position regarding part II of Justice LEVIN’s lead opinion in *West*, wherein he stated that a city commission’s *rezoning of property* was “an administrative, not a legislative, act and, therefore, not subject to referendum[.]” *West*, 392 Mich at 472. This language was not binding, and it is now “settled law in Michigan that the zoning and rezoning of property are legislative functions.” *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000), citing *Schwartz v City of Flint*, 426 Mich 295, 307-308; 395 NW2d 678 (1986). Intervenors attempt to piece together an argument that *West* and *Beach*, when read together, suggest that an initiative under the HRCA could be pursued to rezone property if rezoning were a legislative and not an administrative function.² And, according to intervenors, given the subsequent development in the caselaw recognizing rezoning as indeed a legislative function, *Schwartz* and *Sun Communities*, it can now be concluded that the rezoning of property through amendment of an ordinance via the process of initiative is permissible, effectively eviscerating *Korash*.

We conclude that while there may be a tinge of logic to intervenors’ argument, it is much too tenuous to support a holding that *Korash* is no longer good law. First, while the *Beach* Court accepted Justice LEVIN’s lead opinion in *West* in regard to differentiating between legislative and administrative functions for purposes of a right to initiative and referendum, *Beach* was not a zoning case and dealt with the purely administrative function of purchasing property. Thus, any implicit conclusion that *West* contravened *Korash* does not find additional support in the binding ruling in *Beach*. More importantly, whether due to the nature of the parties’ arguments or a choice made by the Supreme Court, the *West* case simply did not address the issue raised in *Korash* regarding the interplay between the HRCA and the zoning statutes relative to initiative and referendum. And given that fact, we are in no position to find that *Korash* has been overruled. Moreover, this Court has recognized the continuing vitality of *Korash*. *Livonia*

² The argument is that, if rezoning through the process of initiative is not permissible given the necessity to comply with the MZEA or its predecessor, why did the Court in *West* bother to explore the dichotomy between administrative and legislative functions with respect to initiative and referendum.

Hotel, LLC v City of Livonia, 259 Mich App 116, 137; 673 NW2d 763 (2003) (“Contrary to defendants’ claim, reliance upon *Korash* is not misplaced.”).³ In sum, *Korash* is directly on point, it remains controlling, and there is no basis or authority for us to limit the applicability of *Korash* or to find that it has been superceded.

We also decline intervenors’ invitation to uphold the election with the caveat that the results, while not construed as accomplishing a rezoning of the property, should be used to force consideration of the rezoning issue by the city’s planning or zoning commission, at which time full compliance with the MZEA can be met. Doing so would improperly entail us effectively rewriting the city’s charter, twisting the law regarding the true impact of an initiative, and subverting the election process. Therefore, we reject this alternative argument.

As a final thought, we welcome our Supreme Court to take a second look at the issue if given the opportunity and inclination and to possibly reconsider its decision in *Korash*. It appears to us that the primary purpose of the myriad procedural requirements found in the MZEA alluded to above is to protect the citizens of a community from acts of a zoning commission and local legislative body absent notice, hearings, the opportunity of community members and affected property owners to be involved in the process, and absent input by the community in general. An actual election in which, through the ballot box, citizens can voice their approval or disapproval of a zoning measure after a public campaign would seem to afford the same protections to the community as otherwise accomplished through the MZEA when commissions make zoning decisions and not the people at large. If two statutory provisions lend themselves to a construction that is harmonious and avoids conflict, such a construction should control. *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009); *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). Perhaps there is a way to read the HRCA and the MZEA in harmony on the issue posed to us today; however, it is for our Supreme Court to engage in that analysis and to reconsider *Korash*, not this Court.

Affirmed. Having fully prevailed on appeal, plaintiffs are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan

³ We also note that *West* concerned a referendum while *Korash* addressed an initiative, with the *Korash* Court specifically noting that its holding was “limited to the use of the *initiative* as a means to amend or enact zoning laws[,]” and that “[t]he issue of whether a referendatory procedure [was] proper [was] not before” the Court. *Korash*, 388 Mich at 744 n 4.