

STATE OF MICHIGAN
COURT OF APPEALS

WOLTERS REALTY, LTD.,

Plaintiff-Appellee,

v

SAUGATUCK TOWNSHIP, SAUGATUCK
PLANNING COMMISSION, and SAUGATUCK
ZONING BOARD OF APPEALS,

Defendants-Appellants.

UNPUBLISHED

August 3, 2004

No. 247228

Allegan Circuit Court

LC No. 00-028157-CZ

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

In this zoning case, defendants Saugatuck Township, Saugatuck Planning Commission, and Saugatuck Zoning Board of Appeals appeal by right from the trial court's ruling that the township's ordinance, as applied to plaintiff's parcel, was unreasonable and the court's order that enjoining defendants from interfering with the development of a travel plaza¹ that plaintiff Wolters Realty planned to build on property it owned within the township. Because plaintiff has failed to establish that a final decision was made regarding the rezoning of the particular parcel, and as such, the issue is not ripe for adjudication, we reverse.

The twenty-acre parcel of land at issue is located in Saugatuck Township, just east of exit 34 near the northbound entrance ramp of I-196. At the time plaintiff filed its complaint, the majority of the parcel was zoned "A-2," or agricultural. However, there were also two irregularly shaped portions of plaintiff's parcel zoned "C-1," or commercial. Plaintiff sought to have a portion of its A-2-zoned parcel rezoned to C-1 to enable it to construct a travel plaza because plaintiff believed the C-1 portion of its parcel was too small to accommodate the plaza.

Plaintiff initially filed an application for special use approval with the planning commission to construct a "convenience/gas facility"² on the southern seven acres of the parcel.

¹ The travel plaza apparently would include a gas station, truck stop, fast food center, and convenient store.

² Plaintiff's reference to its proposed use in the application for special use did not mention
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However, the defendant planning commission denied plaintiff's application for special use approval, and the township zoning board of appeals (ZBA) denied plaintiff's appeal of that decision. Plaintiff did not seek a variance from the township ZBA.

Plaintiff then filed a three-count complaint, appealing the ZBA's denial of its appeal and alleging that the 208' by 174' C-1 portion of the parcel was too small and too irregular for any reasonable commercial use, so as a result, the zoning scheme was unreasonable as applied to plaintiff's parcel. After the trial court denied plaintiff's appeal of the ZBA's decision, it conducted a bench trial on plaintiff's remaining due process challenges to the allegedly unreasonable ordinance. Ruling in plaintiff's favor on its "as applied" challenge to defendant's zoning ordinance, the trial court first observed that "[t]he uses in the immediate vicinity of the Parcel are predominately commercial and/or commercial/industrial uses." The trial court also stated that the key issue was whether the ordinance and the zoning were reasonable as applied to plaintiff's parcel. In determining whether the zoning was reasonable, the trial court acknowledged that it would have to consider "the [area's] character, its suitability for particular uses, the conservation of property values and the general trend and character of buildings and population development." The trial court stated:

This Court is satisfied based on the testimony of all the witnesses that the present application of the ordinance as to this parcel is unreasonable. The current commercial frontage on M-89 is too narrow and limited in size to sell or use, the size and character of the land doesn't make it useful for agricultural purposes, the commercial industry character of adjacent properties, location directly next to the expressway with attended [sic] traffic noise all are factors directly affecting the Court's conclusion.

* * *

Having determined the ordinance unreasonable as to this parcel the Court further determines that use of the property as a truck stop – fast food restaurant is a reasonable use for the parcel and Saugatuck Township shall be enjoined from interfering with such use and development.

On appeal, defendants first argue that the trial court did not have subject matter jurisdiction to hear plaintiff's "as applied" challenge to the township's zoning ordinance. Defendants argue that, in addition to appealing the denial of the special use application, plaintiff

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"truck stop" or "commercial refueling station." But defendant repeatedly refers to plaintiff's proposed use of its parcel as a "truck stop" in its appellate brief. The trial court referred to the proposed use of the parcel as a truck stop/fast food restaurant, but we observe that the trial court also referred to the proposed use as a gas station. Plaintiff's vice president of operations for Woltco Inc., the company that would have actually operated the gas station, testified that the company's plan for the parcel was to develop a 5,000 square-foot store that would contain some type of brand-name fast food chain. Moreover, the vice president specifically denied that the development would contain accommodations for semi-trucks to park overnight.

was also required to seek a variance from the township ZBA to satisfy the requirements of finality. We agree.

There is no preservation requirement for subject matter jurisdiction challenges, and the issue may be raised for the first time on appeal. *McFerren v B & B Investment Group*, 233 Mich App 505, 511-512; 592 NW2d 782 (1999). Whether the trial court had subject matter jurisdiction over a claim is a question of law that we review de novo. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

It is undisputed that plaintiff mounted an “as applied” challenge to the ordinance. In *Paragon Properties v Novi*, 452 Mich 568, 576; 550 NW2d 900 (1996), our Supreme Court clearly defined and explained the finality rule and its application to “as applied” challenges:

A claim for compensation may allege that an ordinance is confiscatory “as applied” or “on its face.” A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. [*Village of Euclid, Ohio v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).] An “as applied” challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution. *Id.*

A challenge to the validity of a zoning ordinance “as applied,” whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality. *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65, 70; 498 NW2d 1 (1993), citing *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108; 87 L Ed 2d 126 (1985). [*Paragon Properties, supra* at 576-577 (footnote omitted).]

Our Supreme Court explained that “[t]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury” *Id.* at 577, quoting *Williamson, supra* at 193.

The plaintiff in *Paragon* sought rezoning through the City of Novi. When the city denied the request, the plaintiff brought suit alleging a violation of the takings and due process clauses of the Michigan and federal constitutions. The City of Novi argued that the case should be dismissed because the plaintiff did not seek a use variance, and as such, no final decision was rendered to make the issue justiciable. Our Supreme Court agreed, holding that until the plaintiff sought a variance, the “as-applied” claim against the city was not ripe for the trial court’s review. *Id.* at 580. The *Paragon* Court reasoned:

The City of Novi’s denial of Paragon’s rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance. . . . [H]ad Paragon petitioned for a land

use variance, Paragon might have been eligible for alternative relief from the provisions of the ordinance. [*Id.* (footnote omitted).]

Recently, this Court, in *Braun v Ann Arbor Charter Township*, ____ Mich App ____; ____ NW2d ____ (Docket No. 247109, issued May 20, 2004), held that even when there is no uncertainty regarding the result, a plaintiff must exhaust all administrative remedies before seeking judicial redress of a zoning decision. In *Braun*, the plaintiffs petitioned the defendant to rezone approximately 363 acres of land. *Id.* at slip op 1. Plaintiffs submitted a petition for rezoning and supporting documentation. *Id.* The township's planning commission recommended denying the rezoning request, so the plaintiffs submitted the application to the Washtenaw County Metropolitan Planning Commission. *Id.* The Commission also recommended denying plaintiffs' petition. *Id.* Following the recommendations, the defendant township's board adopted a resolution denying the plaintiffs' petition. *Id.* The plaintiffs did not file a petition for review of the resolution or seek a variance before the ZBA. *Id.* at slip op 1-2. In concluding that the plaintiffs failed to exhaust all administrative remedies, this Court quoted *Palazzolo v Rhode Island*, 533 US 606, 620-621; 121 S Ct 2248; 150 L Ed 2d 592 (2001), stating:

“Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property *depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.* As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. [*Id.* at slip op 3, quoting *Palazzolo, supra* (emphasis added). See also *MacDonald, Sommer & Frates v Yolo County*, 477 US 340; 106 S Ct 2561; 91 L Ed 2d 285 (1986).]

Similarly, this Court in *Conlin v Scio Twp*, ____ Mich App ____; ____ NW2d ____ (Docket No. 243886, issued April 22, 2004), held that summary disposition was appropriate where the trial court found that the plaintiffs failed to exhaust their administrative remedies. In *Conlin*, this Court held that the plaintiffs' failure to apply for conditional land use approval or rezoning of their property clearly demonstrated that plaintiffs failed to exhaust their administrative remedies. *Id.* at slip op 2.

In the present case, it is undisputed that plaintiff never sought a variance from defendants. Further, plaintiff's appeal of the planning commission's decision to the ZBA relates only to the planning commission's decision to deny the special use application regarding the gas station/convenience store proposed use. Plaintiff argues it would be futile to seek redress through the township because the township clearly indicated that it would not allow rezoning of the area in question or a variance. However, this Court specifically held in *Braun, supra*, that a plaintiff must seek all administrative remedies before commencing legal action. Because plaintiff failed to do so, the trial court did not have jurisdiction to hear plaintiff's legal challenge.

Because we find that plaintiff failed to exhaust all available administrative remedies, this matter was not ripe for adjudication. Accordingly, we need not address any of the other issues presented for our consideration.

Reversed. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello