

STATE OF MICHIGAN
COURT OF APPEALS

OLD EPI BUILDING, T.A. FORSBERG, INC.,
LLC, and KURT J. BOEGNER,

UNPUBLISHED
April 17, 2008

Plaintiffs-Appellants,

v

MERIDIAN CHARTER TOWNSHIP,

No. 276713
Ingham Circuit Court
LC No. 06-001264-AW

Defendant-Appellee.

Before: Wilder, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant Meridian Charter Township (township). Plaintiffs own property on Jolly Oak Rd., a mostly unimproved and unpaved, L-shaped roadway that ends at Jolly Rd. to the south and Okemos Rd. to the east. This case arises out of plaintiffs' attempt to force the township, by way of a mandamus action, to enforce a condition contained in a site plan approval and special use permit relative to the obligations of an owner-developer of property also located on Jolly Oak Rd., pursuant to which condition the owner-developer was responsible for improving and paving Jolly Oak Rd. However, as a collateral matter in zoning litigation between the township and the owner-developer, in which plaintiffs did not participate, there was an agreement reached in a consent judgment to eliminate the condition, permitting the owner-developer to develop the property without being required to improve and pave the roadway. Plaintiffs seek to have the condition enforced because otherwise Jolly Oak Rd. will be improved and paved by the government, resulting in a special assessment district under which the owners of property abutting the road will have to share in the road construction costs, including plaintiffs. The trial court summarily dismissed the action under MCR 2.116(C)(8) and (10), ruling that plaintiffs' action was precluded by the prior consent judgment, that plaintiffs, although not a party to the suit, had the alternative remedy of appealing the consent judgment, that plaintiffs failed to show a clear legal right to have the township perform a clear legal duty, that plaintiffs failed to establish that enforcement of the site plan condition was ministerial, and that plaintiffs failed to show that the township lacked discretion to enforce or eliminate the condition. We affirm.

I. Basic Facts and Procedural History

A. The Complaint and Documentary Evidence

On October 4, 2006, plaintiffs filed a complaint against the township, which included allegations that they each owned property on Jolly Oak Rd. and that their properties and the roadway were located within the township's boundaries. The location of Jolly Oak Rd. was described in reference to Okemos Rd. and Jolly Rd., between which Jolly Oak traverses in an L-shaped pattern. Plaintiffs alleged and it is undisputed that Jolly Oak is unpaved except for the eastern section of the road abutting Okemos. In the northwest corner of the Jolly and Okemos intersection, and within a rectangular area bounded by Jolly, Okemos, and Jolly Oak, is property that was once owned by LandEquities Corporation. That property is now owned by Meridian Crossing Associates, LLC (Meridian), and is known as the Meridian Crossing property. We shall simply refer to it as the "property" or the "development property." According to the complaint, LandEquities desired to develop the property for commercial purposes and obtained approval of a site plan from the township in 1998 for the first phase of the development. Plaintiffs alleged and it is undisputed that paragraph or condition number 17 of the site plan approval required LandEquities to make road improvements in the area as outlined in a letter from the county road commissioner, and the improvements were to be completed within two years of the date that the first building permit was issued relative to the development property.¹ The referenced road commissioner letter spoke of road construction improvements to be made to Jolly Oak, including reconstruction of Jolly Oak to "a three lane all-season standard with concrete curb and gutter." Plaintiffs contended that LandEquities developed part of the property fronting on Okemos and Jolly without making any improvements to Jolly Oak, contrary to the site plan approval. Plaintiffs claimed that, pursuant to a letter dated June 18, 2001, the township granted LandEquities an extension until August 3, 2003, to make the Jolly Oak improvements. The letter was attached to the complaint and confirmed this claim, and the letter also indicated that no building permit would be issued for the last building in the development "until all road improvements required in the site plan approval [are] completed."

Plaintiffs alleged that after the first phase of the development was completed, LandEquities conveyed ownership of the property to Meridian, making Meridian, in plaintiffs' view, subject to the road improvement condition in the site plan approval. Plaintiffs claimed that on September 20, 2005, the township granted a special use permit for the construction of four one-story buildings and a three-story hotel on the property.² Plaintiffs alleged that the

¹ The site plan approval was attached to plaintiffs' complaint.

² Pursuant to documentary evidence later submitted in support of summary disposition, an August 10, 2005, letter from the township indicated that the planning commission approved a special use permit to build a Staybridge Suites Hotel on the property. The document also stated that approval was granted in accordance with plans showing four one-story buildings on the property and the hotel. According to the approval letter, the letter itself acted as the special use permit. A subsequent letter dated September 22, 2005, provided that the township had approved, on September 20, 2005, an amendment to the earlier special use permit, which amendment allowed the expansion of a shopping center on the property. The letter also referenced the four one-story buildings and hotel to be built on the property. This letter clearly formed the basis of the allegation in plaintiffs' complaint. We note that the August 10 letter stated that all previous conditions placed on two other special use permits remained in effect; however, no evidence regarding previous special use permits was ever submitted by the parties. The township did
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township's actions in granting the special use permit did not expressly include a requirement that Meridian comply with the site plan approval and improve Jolly Oak.³ Plaintiffs complained that, despite a duty to do so, the township elected not to enforce the road improvement condition relative to Meridian. The decision not to enforce the road improvement condition was encompassed within a consent judgment arising out of litigation between Meridian and the township, which we shall discuss further below.

The complaint contained an allegation that in July 2006, the township board entertained a petition by Meridian that sought the creation of a special assessment district for purposes of grading, graveling, paving, and improving Jolly Oak, and to cover the costs of constructing drainage facilities, curbs, and gutters. If a special assessment district is created, persons or entities owning property on Jolly Oak will have to share in the costs of improving Jolly Oak according to the amount of each owner's frontage on the roadway, instead of Meridian absorbing the full cost per the road improvement condition. Plaintiffs alleged that the township's failure to enforce the road improvement condition as part of the site plan approval was unlawful and caused them to suffer damages and irreparable harm. Plaintiffs requested that the trial court issue a writ of mandamus, directing the township to enforce the site plan approval relative to the road improvement condition prior to any further development of the property.

B. The Township's Motion for Summary Disposition

Prior to filing an answer, the township filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). The township argued that Meridian had sued the township in 2006 regarding an amendment of the zoning classification affecting the development property, and in September 2006 the parties settled the suit, resulting in a consent judgment. One aspect of the consent judgment was the elimination of any past conditions requiring the improvement and paving of Jolly Oak as contained in the site plan approval and special use permit. The township argued that plaintiffs' request for a writ of mandamus could not be granted because the road improvement condition was eliminated by way of the consent judgment. In the alternative, the township contended that MCL 125.286e(3), repealed by 2006 PA 110,⁴ or its replacement

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allege that in 1999 a special use permit had been granted on an application by LandEquities.

³ While the September 22, 2005, letter, which constituted a special use permit, did not refer to any conditions, the August 10, 2005, letter stated that "Jolly Oak Road shall be paved from Meridian Crossing Drive west to the hotel entrance prior to issuance of [a] certificate of occupancy."

⁴ 2006 PA 110 repealed the Township Zoning Act (TZA), effective July 1, 2006. See MCL 125.3702(1)(c). The Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, replaced the TZA. 2006 PA 110. MCL 125.3702(2) provides that "[t]his section [repealing the TZA] shall not be construed to alter, limit, void, affect, or abate any pending litigation, administrative proceeding, or appeal that existed on the effective date of this act or any ordinance, order, permit, or decision that was based on the acts repealed by this section." Plaintiffs' complaint was filed in October 2006, and the consent judgment that eliminated the road improvement condition was entered in September 2006. Therefore, we shall apply the MZEA. While the site plan approval and special use permit were issued prior to July 1, 2006, there is no indication that the subsequent, post-July 1, 2006, elimination of the road improvement condition was subject to

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statute, MCL 125.3501(2), gave the township the discretion to amend a site plan if the property owner agreed; therefore, plaintiffs did not have a clear legal right to have the site plan condition enforced and thus no right to a writ of mandamus. Additionally, the township asserted that plaintiffs had no legal right to have Meridian improve Jolly Oak *at its own expense*, where the site plan approval, while requiring Meridian to improve the road, did not specify that Meridian had to also pay for the work, as opposed to the government or surrounding property owners. Moreover, the township claimed that it had the discretion to change or eliminate the requirement for improving and paving the roadway under MCL 125.286b and 125.586d(3), both repealed by 2006 PA 110, or their replacements, MCL 125.3502 and MCL 125.3504(5).⁵ Because the township had the discretion not to force Meridian to improve and pave Jolly Oak, the mandamus action, which only applies to ministerial and not discretionary actions, could not be sustained.

In response, plaintiffs argued that there was a question of fact regarding whether the township entered into the consent judgment in the earlier litigation in a manner consistent with township ordinances and state law. Plaintiffs questioned whether the township could alter the site plan approval and special use permit through the consent judgment, where various ordinances suggested that certain procedures, including a public hearing, were required before changes were made. Plaintiffs stated that while there may be an element of discretion in amending the site plan in the enabling statutes, there were factual questions concerning whether the planning director was granted that discretion by the township board and, if so, how that discretion was to be utilized. Plaintiffs contended that the site plan approval and special use permit were intertwined and that if the site plan approval was amended, it also resulted in amendment of the special use permit, which required certain procedures to be followed under the zoning ordinances. With respect to the township's argument that the road improvement condition contained in the site plan approval did not express that LandEquities or Meridian had to pay for the improvement, plaintiffs argued that this was technically true, but such a position would be unreasonable and lack common sense.

In reply, the township argued that amendment of a site plan approval and special use permit were akin to administrative actions, not legislative; therefore, the consent judgment could permissibly amend the site plan approval and special use permit. Further, the amendments were minor in nature and needed only to be addressed and approved by the planning director and not the planning commission.

At the hearing on the township's motion for summary disposition, the trial court ruled from the bench in fairly cursory fashion. The court ruled that plaintiffs' action was precluded by the prior consent judgment, that plaintiffs, although not a party to the suit, had the alternative

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TZA provisions that would call for a different result than one reached under analysis pursuant to the MZEA.

⁵ We note that MCL 125.586d(3) was found in the City and Village Zoning Act, MCL 125.581 *et seq.*, repealed by 2006 PA 110, effective July 1, 2006, and that the so-called replacement statute, MCL 125.3504(5), found in the MZEA, addresses all forms of local government. Because a township is involved here, MCL 125.586d(3) would never have been applicable, but we can apply MCL 125.3504(5).

remedy of appealing the consent judgment, that plaintiffs failed to show a clear legal right to have the township perform a clear legal duty, that plaintiffs failed to establish that enforcement of the site plan condition was ministerial, and that plaintiffs failed to show that the township lacked discretion to enforce or eliminate the condition. An order dismissing plaintiffs' action was subsequently entered for the reasons stated by the trial court on the record.

C. Prior Litigation Between Meridian and the Township

The lower court record contains only a copy of the complaint and the consent judgment from the litigation between the township and Meridian. The complaint arose out of the township's 2001 ordinance amendment and zoning map change that downsized Meridian's property from commercial service (CS) to the newly created zoning classification of C-2, which contained some commercial use restrictions not found in the prior CS classification, and which caused some buildings on the property to become nonconforming uses. Meridian's claims included denial of procedural due process, denial of substantive due process, an unconstitutional taking of property, violation of equal protection, and a taking under 42 USC 1983. Subsequently, J.P.M.S., Inc., joined as a party plaintiff in the action. J.P.M.S., Inc., had acquired a portion of the development property on which the hotel was to be built. Our plaintiffs were never involved in the litigation.

The consent judgment provided that the development property would be governed by and subject to the C-2 zoning classification as contained in the township's zoning ordinance. Further, the judgment addressed a site plan for the construction of the hotel on the property, which is not relevant for purposes of our analysis. Additionally, the 2005 special use permit was amended to add language that provided that all site plan approvals and the original special use permit "shall not require the paving of Jolly Oak Rd." Other provisions in the consent judgment are not pertinent to our discussion.

II. Analysis

A. Appellate Arguments

Plaintiffs argue that the trial court erred in concluding that their complaint was barred because of plaintiffs' failure to appeal the earlier lawsuit in which they did not participate. Plaintiffs contend that there was no reason for them to participate in that suit, where the issue being litigated concerned the zoning classification of the development property. According to plaintiffs, they would not be aggrieved by a zoning change, nor would they have had standing to intervene in that suit, and there was no basis to include them in the suit under the joinder rules. However, the consent judgment that was eventually entered, and specifically the provision eliminating the road improvement condition, went beyond the scope of the litigation and did aggrieve plaintiffs and caused them injury in light of the special assessment district. Just as a matter of simple procedure, plaintiffs could not "appeal" the prior suit.

Plaintiffs further argue that the statutory provisions cited by the township below do indeed grant the township authority to modify previously-approved site plans and special use permits, but they do not give the township authority to circumvent their own ordinances. Plaintiffs maintain that, pursuant to Meridian Township Ordinance (MTO) § 86-129, a party that seeks amendment of a special use permit must do so in writing, and a determination must be

made whether the proposed change is “major” or “minor.” If the change is deemed “major,” the planning commission or township board must review it, and it may be subject to a public hearing. If the change is deemed “minor,” a public hearing still may be necessary. With respect to modification of site plans, plaintiffs argue that MTO § 86-157 requires a written application, the payment of fees, and an analysis by the director of community planning and development to assure that any changes conform to a multitude of criteria. Plaintiffs contend that none of the steps involved in amending a site plan and special use permit were followed, although both were effectively amended here by way of the consent judgment, thereby depriving plaintiffs of due process.

The township argues that plaintiffs are not entitled to undo the consent judgment as they failed to intervene in the action or appeal the judgment. According to the township, to the extent that plaintiffs had standing to pursue the instant litigation, they had standing to intervene in the prior litigation between Meridian and the township. The consent judgment was final and binding, and if plaintiffs were aggrieved by the judgment they could have appealed the judgment. Further, for purposes of a mandamus action, the township asserts that plaintiffs did not establish that the township owed them a clear legal duty, that plaintiffs did not establish that the action sought was ministerial, as opposed to discretionary, and that plaintiffs did not establish that they had no other legal or equitable remedy. The township argues that a mandamus action cannot be used to overturn a consent judgment. Under either MCL 125.286e(3), repealed by 2006 PA 110, of the old TZA, or MCL 125.3501(2) of the recently enacted MZEA, the township had the discretion to amend the site plan as long as the property owner was in agreement. The township also maintains that the site plan approval did not dictate that LandEquities or Meridian had to construct the roadway at its own expense. With regard to special use permits, the township retained the discretionary authority to change the paving requirement under MCL 125.286b and MCL 125.586d(3), both repealed by 2006 PA 110, or their replacement counterparts, MCL 125.3502 and MCL 125.3504(5). See footnote 5 ante. The township argues that because the consent judgment represented mutual consent by the township and Meridian to eliminate the improvement and paving condition, plaintiffs’ claims fail.⁶

B. Standard of Review and Summary Disposition Tests

This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

MCR 2.116(C)(8) provides for summary disposition where “[t]he opposing party has failed to state a claim on which relief can be granted.” A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). “The

⁶ The township also points out that plaintiffs failed to challenge the special assessment district under MCL 41.721 *et seq.*

motion should be granted if no factual development could possibly justify recovery.” *Beaudrie, supra* at 130.

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

C. Discussion

We shall begin by analyzing the applicable statutory provisions and local ordinances. MCL 125.3102(r) defines a site plan as “the documents and drawings required by the zoning ordinance to insure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes.” A special use permit is “[a] zoning board’s authorization to use property in a way that is identified as a special exception in a zoning ordinance.” Black’s Law Dictionary (7th ed). “Unlike a variance, which is an authorized violation of a zoning ordinance, a special-use permit is a permitted exception.” *Id.*

With respect to site plans, MCL 125.3501 provides in pertinent part:

(1) The local unit of government may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body or official responsible for reviewing site plans and granting approval.

(2) If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan, unless a change conforming to the zoning ordinance receives the mutual agreement of the landowner and the body or official that initially approved the site plan.

Here, a site plan was submitted and approved, and the change to the site plan, or rather its approval conditions, through the consent judgment reflected a mutual agreement between the township and Meridian. We shall discuss below whether the change conformed to the zoning ordinance.

With respect to special use permits, MCL 125.3504(5) provides that “[t]he conditions imposed with respect to the approval of a land use or activity shall be recorded in the record of the approval action and remain unchanged except upon the mutual consent of the approving authority and the landowner. . . .”⁷ Meridian and the township mutually consented to change a

⁷ MCL 125.3502 describes the general procedures relative to special use permits:

(1) The legislative body may provide in a zoning ordinance for special land uses in a zoning district. A special land use shall be subject to the review and approval of the zoning commission, the planning commission, an official charged with administering the zoning ordinance, or the legislative body as required by the zoning ordinance. The zoning ordinance shall specify all of the following:

(a) The special land uses and activities eligible for approval and the body or official responsible for reviewing and granting approval.

(b) The requirements and standards for approving a request for a special land use.

(c) The procedures and supporting materials required for the application, review, and approval of a special land use.

(2) Upon receipt of an application for a special land use which requires a discretionary decision, the local unit of government shall provide notice of the request as required under section 103. The notice shall indicate that a public hearing on the special land use request may be requested by any property owner or the occupant of any structure located within 300 feet of the property being considered for a special land use regardless of whether the property or occupant is located in the zoning jurisdiction.

(3) At the initiative of the body or official responsible for approving the special land use or upon the request of the applicant, a real property owner whose real property is assessed within 300 feet of the property, or the occupant of a structure located within 300 feet of the property, a public hearing shall be held before a discretionary decision is made on the special land use request.

(4) The body or official designated to review and approve special land uses may deny, approve, or approve with conditions a request for special land use approval. The decision on a special land use shall be incorporated in a statement

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condition of the special use permit by eliminating the road improvement condition as evidenced by the consent judgment. Finding no statutory problem with the township's actions, we now turn to the local ordinances.

MTO § 86-129 addresses the amendment of special use permits. An applicant may apply for an amendment in writing to the director of community planning and development. MTO § 86-129(a). The director must make a determination whether the requested amendment is minor or major. *Id.* If the amendment is deemed major, approval of the amendment must be made either by the planning commission or the township board if the board originally approved the special use permit subsequent to an appeal of a planning commission determination on the application. MTO § 86-129(d).⁸ With respect to requested amendments addressed by the township board, an application for an amended special use permit must be submitted to the director of community planning and development, a filing fee must be paid, and public hearings and all other procedures required for the initial application must occur. MTO § 86-129(d)(2). In regard to situations in which the planning commission is addressing a requested major amendment, the ordinance simply provides that it may be granted “in accordance with the procedures and criteria set forth in this division[.]” MTO § 86-129(d)(1). It appears that the procedures entail essentially the same as those related to the township board's action on a requested amendment. If an amendment is deemed minor, an application for an amended special use permit must be submitted to the director of community planning and development, a filing fee must be paid, and procedures required for the initial application as set forth in MTO § 86-121 *et seq.*, which does include a public hearing, MTO § 86-125, must be followed. MTO § 86-129(e).⁹

Under MTO § 86-129, it appears that an amendment of a special use permit is an issue distinct from a change in a condition of its approval.¹⁰ For example, MTO § 86-129(b) provides that “[a] major amendment shall be evidenced by having a significant impact on the permit and the conditions of its approval[.]” Thus, an amendment of a special use permit under the ordinance encompasses changes in the property owner's desired construction and building plans, which could impact conditions, not merely a decision by the township to eliminate a condition of an existing special use permit. The examples of major amendments include significant building additions relative to square footage, an expansion or increase in the intensity of use, significant additions of square footage to the site area, expansions that will cause the need for more parking

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of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed.

⁸ The ordinance indicates that “[m]ajor amendments to approved special use permits may only be granted by the body issuing the original special use permit[.]” MTO § 86-129(d).

⁹ There does not appear to be much of a difference between the treatment of major and minor amendments, except that proceedings regarding minor amendments are conducted before the director of community planning and development instead of the planning commission. MTO § 86-129(e)(3).

¹⁰ This would be consistent with MCL 125.3504(5), quoted above, which addresses the changing of conditions.

spaces, and the addition of a drive-through window. MTO § 86-129(b). We cannot read MTO § 86-129 as demanding some type of application, the payment of a filing fee, and the holding of public hearings when the township simply wishes to eliminate a condition of an existing special use permit.

MTO § 86-156 sets forth review criteria for examining site plan submissions, which includes consideration of traffic, drives, and vehicle circulation. MTO § 86-157, which addresses modifications to approved site plans, provides:

Upon application and payment of the fee in the amount established in the schedule of fees adopted by the township board, modifications to an approved site plan may be granted by the director of community planning and development, provided that such changes conform to the provisions of this chapter and all other township, county, state, and federal laws and regulations.

To the extent that Meridian may not have submitted an application and paid a fee to change the site plan as a prerequisite to the entry of a consent judgment that eliminates a site plan condition, this was something of little significance that the township could certainly waive without impinging the rights of the public or plaintiffs, as opposed to foregoing a required public hearing, and does not give a basis to order enforcement of a no-longer existing condition, nor to partially set aside the consent judgment, assuming said judgment was subject to collateral attack. Moreover, comparable to our discussion concerning MTO § 86-129, we do not view MTO § 86-157 as demanding an application and the payment of a fee where the township wishes to eliminate a site plan condition; rather, it is applicable where the property owner seeks to make construction or development changes that deviate from the original site plan submitted to the township.

We find nothing in the statutes or ordinances that would bar the township from eliminating the road improvement condition in the site plan approval and special use permit as it did vis-à-vis entry of the consent judgment. To obtain a writ of mandamus, a plaintiff must show that: (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy. *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999). Here, plaintiffs had no clear legal right to have the township enforce the properly eliminated road improvement condition, the township had no clear legal duty to enforce the properly eliminated road improvement condition, and a discretionary action, as opposed to a ministerial action, was involved. Furthermore, because the township had the authority to eliminate the road improvement condition through the consent judgment and its actions were not contrary to the statutes or ordinances, plaintiffs were not denied due process of law. Assuming that plaintiffs could collaterally attack the consent judgment, there is no basis for finding the judgment void or unenforceable.

Although unnecessary for resolution of this appeal given our ruling above, we shall briefly examine whether plaintiffs could attack the validity of the consent judgment as argued. We do agree with plaintiffs that the nature of the litigation between Meridian and the township would not have given plaintiffs notice or a reason to become involved in that litigation. The case dealt with zoning classifications and not conditions attached to the site plan approval and special use permit. The agreement to eliminate the road improvement condition was clearly a peripheral

matter that Meridian and the township decided to address in settling the case. The court rule on necessary joinder of parties, MCR 2.205, was not triggered by the allegations in Meridian's complaint, and the allegations did not give rise to permissive joinder under MCR 2.206, nor serve as a ground for plaintiffs to intervene in the action under MCR 2.209. We acknowledge the argument that plaintiffs should have been joined in the previous lawsuit at the point when there was talk of an agreement between Meridian and the township to eliminate the road improvement condition. However, plaintiffs' interest in the subject matter of the litigation was not sufficient such that their presence in the action was essential to permit complete relief. MCR 2.205(A) (necessary joinder). The road improvement condition was a matter between Meridian and the township, not involving plaintiffs. Plaintiffs had no legal right or basis to force the township to include the road improvement condition in the first place; they were merely the incidental beneficiaries of the township's initial decision to have LandEquities, and later Meridian, pave Jolly Oak. Accordingly, plaintiffs had no legal right or basis to stop the township from later eliminating the condition simply because they and others, including Meridian, will have to share in the costs of improving the road through a special assessment district. Plaintiffs point to no law that mandates the township to force Meridian to improve Jolly Oak as a condition of development. Thus, and also given our ruling regarding the statutes and ordinances, plaintiffs' participation in the earlier lawsuit was unnecessary, and even had they participated, it would have been of no consequence.

Furthermore, assuming a valid argument existed to challenge the consent judgment, plaintiffs' particular course of action in challenging the judgment was not supported by authority. Perhaps the proper method would have been for plaintiffs to seek relief from judgment in the previous action under one or more of the various theories found in MCR 2.612 after, if allowed, first becoming a "party" to the action postjudgment. We note that MCR 2.209 provides that an application for intervention must be timely, but there is no language suggesting that the application cannot be made postjudgment, which, under certain circumstances, might indeed be timely. Plaintiffs could have attempted to interject themselves postjudgment in the previous litigation to challenge the consent judgment but declined to do so.

The method chosen by plaintiffs to challenge the consent judgment can best be described as a collateral attack on the judgment through the filing of the instant action. However, while the lack of subject matter jurisdiction can generally be collaterally attacked, "the exercise of that jurisdiction can be challenged only on direct appeal." *In re Hatcher*, 443 Mich 426, 439; 505 NW2d 834 (1993). The court presiding over the litigation between Meridian and the township unquestionably had subject matter jurisdiction concerning the zoning dispute and over issues about the site plan and special use permit arising between Meridian and the township. Plaintiffs, by arguing that the consent judgment was invalid because certain ordinance-required procedures were not followed, were challenging the exercise of the court's jurisdiction, and that is not subject to collateral attack.

III. Conclusion

We find nothing in the statutes or ordinances that barred the township from eliminating the road improvement condition in the site plan and special use permit vis-à-vis entry of the consent judgment. Further, plaintiffs had no clear legal right to have the township enforce the properly eliminated road improvement condition, the township had no clear legal duty to enforce the properly eliminated road improvement condition, and a discretionary action, as opposed to a

ministerial action, was involved. Accordingly, the writ of mandamus was properly denied. Additionally, because the township had the authority to eliminate the road improvement condition through the consent judgment and its actions were not contrary to the statutes or ordinances, plaintiffs were not denied due process of law. Moreover, plaintiffs' interest in the subject matter of the previous litigation was not sufficient such that their presence in the action was essential to permit complete relief, MCR 2.205(A), where they had no legal say in the township's decision to eliminate the road improvement condition. Finally, assuming a valid argument existed to challenge the consent judgment, plaintiffs' particular course of action in challenging the judgment constituted a collateral attack unsupported by authority.

Affirmed.

/s/ Kurtis T. Wilder

/s/ William B. Murphy

/s/ Patrick M. Meter