STATE OF MICHIGAN

COURT OF APPEALS

SOLEIMAN SEGHATOLESLAMI and IDA BARRONS,

Plaintiffs-Appellees/Cross-Appellants,

v

TOWNSHIP OF FREMONT,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
July 1, 1997

No. 194416
Tuscola Circuit Court
LC No. 95-014304 CE

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right and plaintiffs cross appeal from the declaratory judgment finding that the Fremont Township Zoning Ordinance unlawfully excluded mobile home parks from the township, in violation of the Township Rural Zoning Act, MCL 125.297a; MSA 5.2963(27a), and ordering defendant to rezone plaintiffs' property. We affirm, but vacate the order and remand for entry of an order enjoining defendant from interfering with plaintiffs' use of their property.

Section 27a of the Township Rural Zoning Act prohibits townships from enacting zoning ordinances that exclude a particular land use from the township or the surrounding area. The Fremont Township Zoning Ordinance has five zoning classifications: AR-1, agricultural and residential; RC-1, residential cluster; FC-1, forestry and conservation; C-1, commercial; and I-1, light industrial. Section 313 of the Fremont Township ordinance prohibits mobile home parks from residential areas and allows mobile home parks in other areas only by special permission of the Fremont Township Zoning Board of Appeals.

After plaintiffs' request for either a special use permit or rezoning that would have allowed them to develop a mobile home park on their property was denied by the planning commission, plaintiffs brought suit claiming that the ordinance unlawfully excluded mobile home parks and seeking an injunction prohibiting defendants from interfering with plaintiffs' use of their property. Plaintiffs also sought attorney fees and costs. Defendant argued that the ordinance did not exclude mobile home parks because they were not prohibited from being located in commercial or light industrial zones.

Following a three-day hearing, the trial court found that plaintiffs proved that the ordinance excluded mobile home parks, that there was a demonstrated need for such facilities in the township, and that plaintiffs' proposed use of their property was reasonable. The court then ordered defendant to rezone plaintiffs' property to "medium density residential" and denied plaintiffs' request for attorney fees.

Defendant first contends on appeal that the trial court erred when it concluded that the ordinance excluded mobile home parks from the township. We disagree. A similar ordinance was addressed by our Supreme Court in *Smith v Plymouth Twp Building Inspector*, 346 Mich 57, 63; 77 NW2d 332 (1956). In that case, the ordinance prohibited mobile home parks unless, through a special procedure, the township board of appeals made an exception. *Id*. The Court concluded that "[t]here is no authorization in the [Township Rural Zoning] act for a delegation of power to vary a zoning ordinance in specific instances to the township board." *Id*. The Court held that the powers of the zoning board of appeals, as set forth at MCL 125.290; MSA 5.2963(20), do not include the authority to grant or deny permits. *Id*.

In this case, none of the ordinance's zoning classifications permit construction of a mobile home park by right. Under § 313, such a facility can only be constructed if the board of appeals issues a special permit. However, pursuant to *Smith*, the board of appeals does not have such power. Therefore, mobile home parks are effectively excluded. We find no substantive difference between the ordinance at issue and the one struck down in *Smith, supra*.

Although defendant argues that location of the mobile home park should be determined in accordance with the master plan, this Court has held that the validity of a zoning regulation must be tested by existing conditions. *Troy Campus v City of Troy*, 132 Mich App 441, 457; 349 NW2d 177 (1984). While the master plan serves as "a general guide for future development," it is but one factor in determining the reasonableness of a proposed land use. *Id*. At the present time, the land designated for medium density residential use under the master plan is zoned AR-1, just as is plaintiffs' property. Even if there had been a proposal for creation of a mobile home park in the area designated by the master plan for medium density residential use, the use would be barred because § 313 completely prohibits mobile home parks in residential areas. Therefore, the trial court did not err when it concluded that the ordinance effectively prohibited mobile home parks.

Moreover, the fact that mobile home parks were the only residential use singled out for consignment to commercial and industrial areas is a strong indication that the classification is arbitrary and unrelated to the public health, safety or general welfare. *Village of Euclid, Ohio v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926); *Macenas v Village of Michiana*, 433 Mich 380, 390; 446 NW2d 102 (1989). This conclusion is supported by the fact that all the areas zoned commercial or industrial are far too small to support a mobile home park. Although there are areas zoned for forestry and conservation that are large enough to accommodate a mobile home park, such a use is effectively banned from these areas because (1) the district requires minimum one acre lots; and (2) single family residential use is permitted by right and § 313 bans mobile home parks from residential areas. Therefore, we find that the trial court correctly concluded that the ordinance effectively excludes mobile home parks from the township.

Defendant next contends that the trial court clearly erred when it determined that plaintiffs had met their burden of proving by a preponderance of the evidence that there was a demonstrated need for a mobile home park within the township and that the proposed use of the property as a mobile home park was a reasonable one. A zoning ordinance may not totally exclude a lawful land use where there is a demonstrated need for the use in the township or the surrounding area and the use is an appropriate one for the location of the property. *English v Augusta Twp*, 204 Mich App 33, 37-38; 514 NW2d 172 (1994).

With regard to whether a demonstrated need was shown to exist, plaintiffs' expert's research revealed that existing parks were virtually at capacity. The township master plan recognized the need for diversification of the housing supply to meet the needs of people of all economic levels. The township supervisor admitted that the township needed a mobile home park. Consequently, we find that the trial court's conclusion that there was a demonstrated need for a mobile home park in the township was firmly supported by the evidence.

Furthermore, the trial court did not clearly err when it determined that a mobile home park is an appropriate use for plaintiffs' property. In *English*, *supra* at 39, this Court looked at factors such as water and sewage capacity and zoning of the surrounding area in determining the appropriateness of a proposed use. In the instant case, plaintiffs' expert testified that his preliminary study showed that plaintiffs' parcel had sufficient water, sewer and drainage capacity to handle a mobile home park. With regard to traffic, he stated that M-24 has a capacity of an average of 5,000 cars per day, well above the present daily average of 2,900. The soil is suitable for the construction of roads and foundations.

Defendant argues that plaintiffs' proposed use is unreasonable because (1) it is not in the area designated as medium density residential in the master plan and (2) the resulting higher population density would be incompatible with the surrounding area. The uncontradicted testimony at trial showed that there was no substantive difference between plaintiffs' land and the area designated medium density residential on the master plan. Therefore, we find defendant's argument to be without merit.

Plaintiffs argue on cross-appeal that the trial court abused its discretion when it denied their request for attorney fees. The recovery of attorney fees in Michigan is governed by the "American rule." *Popma v ACIA*, 446 Mich 460, 474; 521 NW2d 831 (1994); *Goolsby v Detroit*, 211 Mich App 214, 224; 535 NW2d 568 (1995). Under this rule, attorney fees are not recoverable unless authorized by statute, court rule, or a recognized common-law exception. *Popma*, *supra* at 474. In *Gundersen v Village of Bingham Farms*, 1 Mich App 647, 649; 137 NW2d 763 (1965), this Court reversed an award of attorney fees in a suit to enjoin enforcement of an ordinance because no statutory or other authority provided for such an award. While acknowledging that no statutory or other basis exists for an award of attorney fees, plaintiffs cite *Gundersen*, *supra*, for the proposition that an exception exists at common law where failure to award attorney fees would produce an inequitable result. However, it should be noted that in *Gundersen* no inequitable result was shown. Our research has uncovered no zoning case in which an award of attorney fees was upheld on this basis in the absence of statutory or other authority. Therefore, the trial court did not abuse its discretion when it denied plaintiffs' request for attorney fees.

Finally, both parties argue that the trial court improperly usurped a legislative function and violated the doctrine of separation of powers when it ordered defendant to rezone plaintiffs' property. We agree. The proper remedy in such cases, as determined in *English*, *supra* at 39-41, is an injunction prohibiting defendant from interfering with plaintiffs' reasonable use of their property as a mobile home park.

In *Schwartz v Flint*, 426 Mich 295, 329; 395 NW2d 678 (1986), our Supreme Court stated that when a zoning ordinance is declared unconstitutional, "a judge may provide relief in the form of a declaration that the plaintiffs's proposed use is reasonable, assuming the plaintiff's burden has been met, and an injunction preventing the defendant from interfering with that use." However, the Court confined its analysis to situations in which an ordinance is found to be unconstitutionally applied. *Id*. at 325-326 n 24. "Exclusionary zoning is an entirely different type of determination, necessitating potentially broader relief." *Id*.

In *English*, *supra* at 40, this Court noted the parameters of the holding in *Schwartz*, *supra* at 325-326 n 24, and the fact that "the Supreme Court did not explain what that 'potentially broader relief' [available in exclusionary zoning cases] might be." Relying on *Schwartz*, this Court nonetheless determined that the proper remedy in an exclusionary zoning case is an injunction prohibiting the township from interfering with the plaintiff's proposed reasonable use of his property. *Id*. at 41. Because the court's remedy in the instant case amounted to a usurpation of the legislative function and judicial zoning, as denounced in *Schwartz*, *supra* at 308-310, the order is vacated, and we remand for entry of an order consistent with *English*, *supra*. As this Court noted in *English*, plaintiffs will remain subject to regulation by various federal and state agencies. *Id*.

The decision of the trial court that defendant engaged in exclusionary zoning is affirmed. The trial court's order of rezoning is vacated, and the case is remanded for entry of an injunction prohibiting defendant from interfering with plaintiffs' reasonable use of their property as a mobile home park. We do not retain jurisdiction. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Maureen Pulte Reilly
/s/ Harold Hood
/s/ William B. Murphy