STATE OF MICHIGAN

COURT OF APPEALS

ROBERT C. KESTNER and DAWN A. KESTNER,

Plaintiffs-Appellees,

v

KENOCKEE TOWNSHIP,

Defendant-Appellant.

UNPUBLISHED
May 29, 1998

No. 199623
St. Clair Circuit Court
LC No. 94-001192 CZ

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant Kenockee Township appeals as of right from an amended order enjoining it from interfering with plaintiffs' proposed mobile home park development. The amended order also requires plaintiffs to comply with all federal, state, and local regulations and statutes, and limits the number of mobile home units per acre to 3.7. We affirm.

Plaintiffs proposed to build a mobile home park on 115 acres of property that they owned in defendant township. To that end, they petitioned for rezoning of the property from agricultural (AG), a classification under which mobile home developments were not allowed, to residence district R-4, which specifically provides for mobile home development. Defendant's board of trustees acted in conformance with recommendations made by defendant's and St. Clair County's planning commissions by voting three to one to deny plaintiffs' petition. The parties stipulated that defendant had not applied the R-4 zoning classification to any land in the township.

Defendant first contends that even though it has not zoned any property within the township R-4, the zoning ordinance does not unconstitutionally exclude mobile home parks because thirty-five acres of land zoned for commercial use, C-1, was available and mobile home parks were permitted as a special use under the C-1 classification. We review zoning issues de novo but give considerable weight to the findings made by the trial court, *Kirk v Tyrone Twp*, 398 Mich 429, 444; 247 NW2d 848 (1976), and will not disturb those findings unless we would have reached a different result if we had occupied the position of the trial court. *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 525-

526; 569 NW2d 841 (1997). Zoning ordinances are presumed valid and the attacking party has the burden of showing that the ordinance is an

arbitrary and unreasonable restriction on the owner's proposed use of his property. *Kirk, supra* at 439. An ordinance "which totally excludes from a municipality a use recognized by the Constitution or other laws of this State also carries with it a strong taint of unlawful discrimination and a denial of the equal protection of the law as to the excluded use." *Kropf v Sterling Heights*, 391 Mich 139, 156; 215 NW2d 179 (1974). A zoning ordinance can be exclusionary on its face where the ordinance creates a classification but does not apply the classification to any land or where mobile home parks are prohibited except by special permission. *Smookler v Wheatfield Twp*, 394 Mich 574, 582-583; 232 NW2d 616 (1975) (Williams, J., separate opinion). Moreover, an ordinance that fails to provide for a certain classification cannot be cured by the "fact that plaintiff could apply for a variance or a special permit." *Countrywalk Condominiums, Inc v City of Orchard Lake Village*, 221 Mich App 19, 23; 561 NW2d 405 (1997).

Defendant admitted that unless special use permits were obtained for the property zoned C-1, no property could be zoned for mobile home parks in defendant township. By providing the R-4 classification but not applying it to any actual land, defendant has essentially failed to provide for a legitimate land use. *Smookler, supra*, 394 Mich 582 (Williams, J., separate opinion). Further, that a special use permit might be obtained for the thirty-five acres zoned C-1 does not alleviate the exclusionary effect caused by defendant's failure to apply its R-4 classification. Outright prohibition of trailer parks by the selective administration of a local ordinance constitutes exclusionary zoning. *Dequindre Development Co v Charter Twp of Warren*, 359 Mich 634, 640; 103 NW2d 600 (1960). Thus, the trial court properly found defendant's zoning ordinance to be unconstitutional in that it effectively excluded mobile home parks.

Defendant next argues that additional proceedings were required at the trial court level to determine the reasonableness of plaintiffs' proposed mobile home development. After finding an existing zoning classification to be unconstitutional, a trial court should determine the reasonableness of the proposed use. *Rogers v Allen Park*, 186 Mich App 33, 40; 463 NW2d 431 (1990). Reasonableness can be determined by examining the existing uses and zoning of nearby properties but the standard of reasonableness should "be appropriately high, so that a plaintiff who has successfully challenged an unconstitutional ordinance will not automatically be free to proceed with its proposed use." *Schwartz v Flint*, 426 Mich 295, 328; 395 NW2d 678 (1986). The trial court's findings of reasonableness are not "unlike the findings that must be read initially in order to find a particular zoning ordinance unconstitutional as applied." *Id.* at 325. If the developer can show the reasonableness of the proposed use by a preponderance of the evidence, the trial court may issue an injunction preventing a township from interfering with the proposed use. *Id.*

Here, the trial court did not make a specific inquiry into the reasonableness of the proposed use. However, it did examine stipulated exhibits that addressed various aspects of the proposed development. These exhibits led the trial court to conclude that plaintiffs' proposed sanitary system would be able to handle sewage from the development, that the existing roads would be able to handle the increased traffic, that the fire department and the schools could manage the increased burdens, and that plaintiffs would arrange for city water to be provided to the development. The trial court also found that the development would be "systematically integrated" into the community over a period of time.

Further, the proposed sanitary sewage and water systems, as well as the other aspects of the development, would have to comply with applicable legal requirements. We conclude that based on this evidence, plaintiffs demonstrated by a preponderance of the evidence that their proposed development was reasonable.

Defendant also contends that plaintiffs' challenges to the zoning ordinance were not ripe for judicial review, maintaining that plaintiffs did not exhaust their administrative remedies by filing for a variance before instituting this legal action. However, by asserting a facial challenge in their complaint to the existence and enactment of defendant's zoning ordinance, plaintiffs were not required to first exhaust their administrative remedies. *Jott, supra* at 525. Facial challenges to zoning ordinances are not subject to the rule of finality that requires a final decision from the governing legislature or administrative body. *Countrywalk Condominiums, supra* at 22-23. Therefore, plaintiffs' constitutional challenge was ripe for review by the trial court.

Defendant next challenges the trial court's decision to amend its original order when it granted plaintiffs' motion for reconsideration. Defendant argues that plaintiffs failed to demonstrate palpable error and that the Mobile Home Commission Act (MHCA), MCL 125.2301 *et seq*.; MSA 19.855(101) *et seq*., did not preclude the trial court from incorporating reasonable conditions and requirements in the original order. A decision granting or denying a motion for reconsideration is reviewed for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). MCR 2.119(F)(3) permits motions for reconsideration to be granted when the moving party can demonstrate "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). However, palpable error only provides guidance to the trial court in deciding reconsideration motions and does not operate to restrict the trial court's discretion in determining whether a grant of reconsideration is appropriate in a particular case. *Michigan Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 645-646; 419 NW2d 439 (1988).

In the first order granting a permanent injunction, dated September 3, 1996, the trial court found defendant's zoning ordinance to be exclusionary, prohibited defendant from interfering with plaintiffs' development, ordered the construction of the mobile home park "in accordance with a site plan to be approved by the township," limited the density of units to 3.7 per acre, ordered plaintiffs to construct and maintain a sanitary disposal system that complied with all laws and regulations at their own expense, ordered plaintiffs to construct and maintain a water line to supply water from the Detroit Water Board Water System, and ordered plaintiffs to provide for the systematic integration of the development into the community. Plaintiffs filed a motion for reconsideration claiming that the original order constituted judicial zoning because it infringed on the exclusive authority granted to the Mobile Home Commission by the MHCA to regulate mobile home developments. The trial court amended its original order and eliminated every provision except those that restricted the density of the units and prohibited defendant from interfering with the development. Also, it ordered compliance with all applicable laws and regulations.

"The most a court may do after declaring an existing zoning ordinance void as applied to certain property is to find that the specific use contemplated by the owner is reasonable and may be permitted."

Schwartz, supra at 328, quoting *Fiore v Highland Park*, 76 Ill App 2d 62, 76; 221 NE2d 323, 330 (1966), cert den 353 US 1084; 89 S Ct 867; 21 L Ed 2d 776 (1969). The Court in *Schwartz* held that "[a]fter a zoning ordinance has been declared unconstitutional, in addition to that declaration, a judge may provide relief in the form of a declaration that the plaintiff's proposed use is reasonable . . . and an injunction preventing the defendant from interfering with that use." *Id*. at 329. To the extent that the terms of the original order regulated the development, the order constituted impermissible judicial zoning. *Id*. at 309. Therefore, palpable error existed justifying the trial court's decision to vacate its original order. Further, although we recognize that the MHCA vests the Mobile Home Commission with authority to establish guidelines coordinating density, MCL 125.2305(1)(a); MSA 19.855(105)(1)(a), the parties to this case stipulated that the density of the proposed development will not exceed 3.7 units per acre. Therefore, to the extent that this agreement accords with the density guidelines promulgated by the Mobile Home Commission, the stipulation should be enforced.

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy