STATE OF MICHIGAN

COURT OF APPEALS

GILD GENERAL ASSOCIATES,

Plaintiff-Appellee,

v

TOWNSHIP OF GROSSE ILE,

Defendant-Appellant,

and

GERALD HOOVER, JAMES JACKSON, CATHERINE FELL, JEROME SZPONDOWSKI, MARIE FOLEY, MILDRED GALLOWAY, NICK GUZENSKI, EVERETT BIELBY, GLEN BAGNALL, VERA KUNZI, ADELINE ROZYCKI, DAVID HILL, GREGORY P. JABRO, FREDERIC BUSH, LILY MOLISEE, NANCY YOUNG, KEVIN POIRIER, LINDA SMALL, LAUREN WHITE, JAMES LINARDOS, WILLIAM BARTOLOTTA, CLAIRE BEAUDET, JOHN BELL, Property Owner BOMMARITO, JAMES NEAL, VFW GEN. WILLIAM S. KNUDSEN POST 7310, WILLIAM STANTO, ROSETTA BRADEN, MICHIGAN CONSOLIDATED GAS CO., DETROIT EDISON, CAROL LAFAYETTE, BRYCE HOROWIN, RAY DONN, MYRTLE LEWIS, JANINE GORNOWICH, MARY CHAPMAN, KEITH REUTER, NEWELL FIGI, VIRGINIA ZELAZNY, MAXINE COLLINS, GROSSE ILE TOWNSHIP SCHOOLS, ROBERT KOPKE, AMERITECH, INC., DOUGLAS G. ROBERTS, RUSSELL GRONVELT, GAIL JONES, DAN JASPER, PARKLANE CONDOMINIUM ASSOCIATION, TERESA RIDDLE, GRAYS

UNPUBLISHED
January 28, 2000

No. 207500
Wayne Circuit Court
LC No. 96-622648 CZ

DRIVE CONDOMINIUM ASSOCIATION, STEWART MCNABB, RUSSELL WISCHER, CAROL FIGI, WILLIAM H. MCNAMARA, SYLVIA BRESNAHAN, WILLIAM JONES, GOLF CLUB MANOR, ANDREW SHIMKO, JILLIAN SHIMKO, JUNG HYUN SONG, JAMES DEKEYSER, DAVID ROLLINS, DOUGLAS LEMANSKI, Property Owner BARTHA, RITA THORNTON, ROSE ZULEWSKI, DAVE WATSON, AAM INVESTMENT CO., COLLEEN WARSOW, RICHARD BOBNIK, ROSE DEJACK, STANDON INVESTMENTS, STEVE MILLER, and DAVID GRAHAM,

Defendants.

Before: Gribbs, P.J., and O'Connell and R. B. Burns*, JJ.

PER CURIAM.

This is an action to vacate or modify a sidewalk required in a recorded plat. Defendant Township of Grosse Ile[1] appeals from an order denying its motion for summary disposition and granting plaintiff's cross-motion for summary disposition of the complaint and the counterclaim under MCR 2.116(C)(10). We vacate and remand.

On appeal, defendant contends that the trial court erred in granting summary disposition to plaintiff. We agree. This Court reviews summary disposition decisions de novo to determine whether there are any questions of material fact and whether the prevailing party was entitled to judgment as a matter of law. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 4; 574 NW2d 691 (1997).

The former Subdivision Control Act of 1967,[2] provides procedural and substantive requirements for the approval and recording of subdivision plats. At relevant times in this case, the act provided that "[n]o approving authority or agency having the power to approve or reject plats shall condition approval upon compliance with, or base a rejection on, any requirement other than those included in section 105." MCL 560.106; MSA 26.430(106). Section 105 provides that "[a]pproval of preliminary and final plats shall be conditioned upon compliance with . . . [a]ny ordinance or published rules of a municipality or county adopted to carry out the provisions of this act." MCL 560.105(b); MSA 26.430(105)(b). Further, "[t]he standards for approval of plats prescribed in this act are minimum standards and any municipality, by ordinance, may impose stricter requirements and

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

may reject any plat which does not conform to such requirements." MCL 560.259; MSA 26.430(259). These grants of power to the township are to be "liberally construed in their favor." Const 1963, art 7, § 34.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

As to the approval procedure, the subdivision act allows a proprietor[3] to voluntarily submit a "*pre*preliminary plat" to the appropriate governing body for information and review. MCL 560.107; MSA 26.430(107) (emphasis added). However, the formal process of plat approval begins with the submission of a "preliminary plat" to the municipality's governing body in accordance with section 111. See MCL 560.111; MSA 26.430(111). Approval of a preliminary plat is governed by sections 112 through 120. MCL 560.107(2); MSA 26.430(107)(2). "Tentative approval [of a preliminary plat] under this section shall confer upon the proprietor for a period of 1 year from date, approval of *lot sizes, lot orientation and street layout*." MCL 560.112; MSA 26.430(112) (emphasis added). Further, the applicable township ordinance provided that "[t]he Township Board Of Trustees shall not give tentative approval [of a preliminary plat] until it has been reviewed by the Planning Commission after a public hearing and its recommendations [are] received." See Grosse Ile Ordinance 39-5(1).

Depending on the specific characteristics of the proposed subdivision, approval of the preliminary plat by various agencies may be required under sections 113 through 119. MCL 560.120(1); MSA 26.430(120). The proprietor may then submit the preliminary plat to the governing body for final approval. MCL 560.120(2); MSA 26.430(120)(2). "Final approval of the preliminary plat approval (sic) under this section shall confer upon the proprietor for a period of 2 years from date of approval, the conditional right that the *general terms and conditions* under which preliminary approval was granted will not be changed." MCL 560.120(1); MSA 26.430(120)(1) (emphasis added). A final plat is then prepared, surveyed, approved, and recorded in accordance with sections 125 through 198 -- and sections 201 through 213, concerning assessor's plats, where applicable. See MCL 560.125 through 560.213; MSA 26.430(125) through 26.430(213).

Here, the minutes from the township's board of trustees show that plaintiff's principal, William D. Krauss, Jr. -- who, with Tony Krauss, also appears to be the builder -- obtained *pre*preliminary plat approval on January 20, 1992, for the Island Crossings South (a/k/a Island Crossings II) subdivision, without sidewalks.[4] On October 26, 1992, the township enacted a sidewalk ordinance, Section 39-5(D), which requires that sidewalks be constructed in subdivisions as a condition of final approval of a preliminary plat. On May 17, 1993, plaintiff received tentative approval of its preliminary plat from the township board of trustees, conditioned -- among other things -- upon construction of a sidewalk on the south side of Grays Drive, on land owned in most part by the township. Grays Drive was itself constructed (or re-constructed) by Krauss Builders as part of the subdivision project, immediately south of the same. Plaintiff admits that it originally assented to the sidewalk condition. However, on November 1, 1993, Krauss Builders objected to the sidewalk. The process nevertheless continued and, on August 8, 1994, plaintiff received final approval of its preliminary plat, still on the condition that it construct the sidewalk.

On November 10, 1994, plaintiff obtained an irrevocable letter of credit to pay the township for the sidewalk in the event plaintiff failed to build it. On December 12, 1994, the township trustees "grant[ed] final plat approval" for the subdivision. On August 29, 1995, plaintiff obtained an extension of the letter of credit until November 10, 1996. On November 7, 1995, Krauss Builders again objected to the sidewalk condition. Plaintiff relayed its objections to the bank on February 1, 1996, and sued on April 10, 1996, alleging that the sidewalk condition was a violation of equal protection,

substantive due process, and the subdivision control act; and that it constituted an unlawful assessment. Defendant filed a counterclaim arguing that plaintiff's action was really an administrative appeal, and seeking to amend the plat in the event the trial court found that the sidewalk condition was unlawful. The trial court granted summary disposition to plaintiff, finding that the ordinance could not be properly applied to it. The sidewalk was apparently never constructed.

Defendant first argues that, instead of an original action, plaintiff should have filed a claim of appeal from the final decision of the township's board of trustees. On the record before us, we agree.

Once a final plat is approved and recorded, the act allows "the *owner* of a lot in the subdivision, *a person of record claiming under the owner*[,] or the *governing body* of the municipality" where the land is located, to file an action to "vacate, correct, or revise a recorded plat o[r] any part of it." MCL 560.222; MSA 26.430(222) (emphasis added); see also MCL 560.266; MSA 26.430(226). Here, neither the complaint nor the amended complaint alleged that plaintiff -- the developer -- owned land in the subdivision, nor do they allege that the final plat was recorded. Therefore, under the literal language of the act and the allegations of the complaint, plaintiff had no standing to bring this suit as an original action. By contrast, assuming that the final plat was recorded, defendant township clearly had standing to file its counterclaim.

We note that, like the township rural zoning act,[5] the subdivision control act "is silent regarding what recourse a party has when, as in this case, a township board denies" a party's request under the act "and the ordinance does not provide for an appeal to the zoning board of appeals." *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 200; 550 NW2d 867 (1996); see also Grosse Isle Code of Ordinances, Chapter 39. In *Carleton*, this Court "resolve[d] this issue of first impression by holding that where a township zoning ordinance does not provide for review . . . by a zoning board of appeals, the township board's decision is final and subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28." *Carleton*, *supra*, 217 Mich App at 200. Therefore, unless plaintiff can amend its complaint on remand to state an original action, it will be limited to the standard of review provided by our constitution, i.e., whether the board of trustees' decision was "authorized by law; and, in cases [such as this one,] in which a hearing is required, whether the same [is] supported by competent, material and substantial evidence on the whole record." See *Carleton*, *supra*, 217 Mich App at 200-204 (quoting Const 1963, art 6, § 28).

We note that, if the action proceeds on remand as an administrative appeal, plaintiff may not raise issues which were not presented to the township's board of trustees, except in limited circumstances. See *Town & Country Dodge, Inc v Dept of Treas*, 420 Mich 226, 228 n 1; 362 NW2d 618 (1984); see also *West Ottawa Ed Ass'n v West Ottawa Pub Schs Bd of Ed*, 126 Mich App 306, 317-318; 337 NW2d 533 (1983). Further, if this action proceeds as an administrative appeal, it may not to be decided by a motion for summary disposition under MCR 2.116(C)(10). *Carleton*, *supra*, 217 Mich App at 203-204.

Nevertheless, we review the remaining issues assuming, *arguendo*, that plaintiff/developer may be able to amend the complaint to allege both an ownership interest and that the plat was recorded, and thereby properly bring an original action under the subdivision act.[6] We clarify that, if an ownership

interest and plat recording are properly alleged, the trial court is to reconsider its decision of the parties' cross-motions for summary disposition in light of our opinion.[7] Otherwise, the action must proceed as an administrative appeal, as discussed above. See *Carleton*, *supra*, 217 Mich App at 200-204.

The township next argues that plaintiff is estopped from challenging the sidewalk condition because it assented to the condition below; plaintiff counters that the township had no authority to require it to build the sidewalk. We conditionally agree with the township.

Assuming for a moment the constitutionality of the sidewalk ordinance, we now address the issue of whether it was properly applied to plaintiff. We note that, when the sidewalk ordinance was passed in October 26, 1992, plaintiff had only obtained *pre*preliminary plat approval. The subdivision act does not require that step and does not provide any reassurance that conditions will not be changed after its completion. See MCL 560.107; MSA 26.430(107). By contrast, obtaining tentative approval of a preliminary plat confers one year of approval as to lot sizes, orientation and street layout.[8] MCL 560.112; MSA 26.430(112). Similarly, final approval of preliminary plat protects the general terms and conditions of approval for two years. MCL 560.120(1); MSA 26.430(120)(1). Here, however, plaintiff did not obtain tentative approval of its preliminary plat until May 17, 1993, well after the ordinance had gone into effect. Therefore, contrary to the circuit court's decision, the sidewalk ordinance was properly applied to plaintiff.

Returning to the constitutional issues, we note that the powers granted to a township are not unlimited, and that the township's power to require any specific improvement as a condition of plat approval must be either explicitly granted by statute or "fairly implied from the statutory powers." See *Eyde Const Co v Meridian Twp*, 149 Mich App 802, 807-816; 386 NW2d 687 (1986). We also recognize that our Supreme Court has held that a municipality may not condition approval of a proposed plat on the developer making improvements located entirely outside of the platted subdivision. *Arrowhead Development Co v Livingston Co Road Comm*, 413 Mich 505, 510, 513-520; 322 NW2d 702 (1982). Specifically, the Court held that a county road commission could not require a proprietor to improve a road outside the subdivision which, because of its elevation, constituted a hazard to subdivision traffic entering the road. *Arrowhead*, *supra*, 413 Mich at 519-520. Similarly, our courts have invalidated conditions which a municipality had no power to require -- even where the plaintiffs had agreed to them. See *Ridgemont Dev Co v East Detroit*, 358 Mich 387, 389-396; 100 NW2d 301 (1960) (where no ordinance covered the issue, city could not require developer to deed it land for playgrounds, even if plaintiff consented under duress); see also *Eyde*, *supra*, 149 Mich App at 804-816 (even where an ordinance required it, township lacked the power to require the dedication of land for public recreation as condition of plat approval).

Here, it is clear that, although the township could properly require plaintiff to build a sidewalk in accordance with the new ordinance, it could not require that the sidewalk be located outside of the subdivision. However, it was plaintiff who not only agreed to the sidewalk condition, but who proposed locating the sidewalk on the south side of Grays Drive, just outside of the subdivision. In fact, when the township board of trustees asked Mr. William D. Krauss, Jr., whether he was "amenable to the sidewalks on one side," he responded:

> Well, the sidewalks belong -- I first got wind of the fact that there's a going to be a change in the -- sidewalks. If they belong anywhere, they belong in your commercial zoning district *across the street*, that's where your commercial is. That doesn't look like at this point in time it's ever going to be resolved. That's where your condos are, that's where your senior citizens proposed [housing] is supposed to be.
>
> I mean, when you look at -- at single family [developments] -- and, you know, the wetlands is the code word nowadays. There are a hell of a lot more wetlands going on, on the north side than there are on the south side [of Grays Drive], and if you're serious about woodlands and you're serious about wetlands, *the sidewalks belong on the south side of the street*. The seniors are going to use them. The seniors aren't going to walk across the street and see there's a sidewalk, they're going to use a sidewalk in front of their own housing, or whatever kind of housing they end up with. [Emphasis added.]

Thus, we find that *Arrowhead* may be distinguishable because it appears that plaintiff, not the township, proposed locating the sidewalk outside of the subdivision. Therefore, on remand, the court is to determine whether the elements of promissory estoppel have been met in this case. See *Novak v Nationwide Mut Ins Group*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999) (elements of estoppel).

Lastly, defendant argues that, even if the sidewalk condition is found unlawful for any reason, the trial court has no power to vacate, amend or revise it without the approval of the township's board of trustees. Therefore, defendant argues, the trial court erred in dismissing the counterclaim that prayed for reformation of the plat. We agree.

At relevant times in this case, section 226 of the act provided that, "upon trial and hearing of the action," the court may order that a plat be corrected vacated or revised "*with the following exceptions*:"

> (a) [state highways and federal aid roads;]
>
> (b) [county roads; and]
>
> (c) A part of a street or alley under the jurisdiction of a city, village, or township and a part of any *public walkway*, park, or public square or any other land dedicated to the public for purposes other than pedestrian or vehicular travel *shall not be vacated, corrected, or revised* under this section *except by both a resolution* or other legislative enactment *duly adopted by the governing body of the municipality and by court order*. [MCL 560.226(1); MSA 26.430(226)(1) (emphasis added).]

We recognize that the punctuation of subsection (c) makes it rather ambiguous. However, contrary to plaintiff's argument, we read the statute as providing that there are three categories of publicly dedicated land, which we have separated by semicolons for clarity, that may not be changed by a court without

municipal approval:[9] land dedicated to vehicular travel (highways, roads, streets and alleys); land dedicated to pedestrian travel (walkways); and land dedicated to the public for purposes other than vehicular or pedestrian travel (parks, and public squares). See MCL 560.226(1); MSA 26.430(226)(1).

It is true that the phrase "for purposes other than pedestrian or vehicular travel" was added in 1978 by P.A. 1978, No. 556. See MCL 560.226; MSA 26.430(226) (historical notes). Plaintiff therefore argues that we should interpret the section as containing an exception within an exception -- i.e., to require joint municipal/court action only to change "land dedicated to the public for purposes other than pedestrian or vehicular travel." We find that, if we adopted plaintiff's proposed construction, the exception would swallow the rule and courts would be able to unilaterally change not only sidewalks, but also dedicated streets. That is clearly not the case. See *Kraus v Dept of Comm*, 451 Mich 420, 424; 547 NW2d 870 (1996) (if dedication offer was properly accepted, "then the circuit court had no authority to vacate the roads absent the [municipality's] consent"); see also *Marx v Dept of Comm*, 220 Mich App 66, 74; 558 NW2d 460 (1996). We therefore hold that the sidewalk condition may not be modified without the township's approval. Thus, the trial court erred in dismissing the township's counterclaim for reformation of the plat.

Vacated and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Robert B. Burns

[1] The remaining defendants are required to be named as parties. MCL 560.224a; MSA 26.430(224a).

[2] The act is now known as the Land Division Control Act, MCL 560.101 *et seq.*; MSA 26.430(101) *et seq*.

[3] At relevant times, a "[p]roprietor" was defined as "a natural person, firm, association, partnership, corporation or combination of any of them which may hold any ownership interest in land whether recorded or not." MCL 560.102(o); MSA 26.430(102)(o).

[4] We note that Mr. William D. Krauss, Jr., usually proceeded through the plat approval process in his own name or that of the builder. Plaintiff Gild General's name is largely absent from the plat approval paperwork filed with the court below.

[5] MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq*.

[6] We suspect that, because plaintiff proceeded through the approval process as a "proprietor," it may very well have the property interest required to bring an original action under the subdivision act. See MCL 560.107; MSA 26.430(107); see also MCL 560.102(o); MSA 26.430 (102)(o) (definitions).

[7] The trial court has, of course, discretion to permit or require additional briefing, etc.

[8] Because plaintiff had not yet obtained tentative approval when the ordinance was changed, we do not decide whether a sidewalk is one of the conditions that the statute protects for a year following tentative approval. See MCL 560.112; MSA 26.430(112).

[9] As to state highways and federal aid roads, such approval must come from the state transportation department; for county roads, it must come from the county road commission. MCL 560.266(1); MSA 26.430(226)(1).