STATE OF MICHIGAN

COURT OF APPEALS

DAVID G. BILICKI, INC., EVELYN BILICKI, and DAVID G. BILICKI,

Plaintiffs-Appellants,

v

VILLAGE OF OTISVILLE,

Defendant-Appellee.

UNPUBLISHED
October 19, 2001

No. 221422
Genesee Circuit Court
LC No. 96-049776-CZ

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's orders granting summary disposition in favor of defendant with regard to claims advanced in both plaintiffs' first and second amended complaints. We affirm.

In 1993, defendant, through its council, conditionally approved a preliminary site plan for a mobile home park on property owned by plaintiffs.[1] Later in 1993, plaintiffs obtained a state permit under the Mobile Home Commission Act (MHCA), MCL 125.1101 *et seq.*, for the construction of 112 units in Phases I and II of their proposed development. In July 1996, a portion of plaintiffs' property running along the northwest side of Phases I and II was rezoned from a mobile home to a single-family residential classification. Plaintiffs had planned to build Phases III and IV of the mobile home park in the rezoned area, but had not yet acquired a state permit for construction.

In August 1996, plaintiffs commenced the instant action, filing a four-count complaint challenging defendant's rezoning decision, alleging an unlawful taking grounded in vested rights (Count I) and reasonableness (Count III), exclusionary zoning (Count II), and a violation of 42 USC 1983 (Count IV). In June 1998, plaintiffs amended their complaint to add a fifth count concerning a parcel of property described as an abandoned railroad right-of-way, which ran

[1] For purposes of this opinion, we will collectively refer to plaintiffs Evelyn Bilicki, David G. Bilicki, and David G. Bilicki, Inc., as the plaintiffs. We note, however, that the corporate plaintiff is the alleged developer of the mobile home park, not the owner of the property.

through the planned mobile home park development on the northwest side of Phases I and II. Plaintiffs also added a sixth count challenging the reasonableness of inspection fees charged by defendant for mobile homes.

In April 1999, the trial court granted defendant summary disposition of plaintiffs' unlawful taking, exclusionary zoning, and 42 USC 1983 counts in the first amended complaint. No decision was made on the added two counts. Plaintiffs were given an opportunity to amend the fifth count or add additional counts.

In their second amended complaint, plaintiffs restated their counts alleging an unlawful taking and a violation of 42 USC 1983. Plaintiffs also restated their count concerning defendant's inspection fees and added a count alleging that the MHCA had preempted defendant's authority to rezone their property, but omitted the previously alleged count five in the first amended complaint. In July 1999, the trial court granted defendant summary disposition of plaintiffs' claim concerning the inspection fees, dismissing it, without prejudice, based on plaintiffs' failure to exhaust their administrative remedies. The trial court also granted defendant summary disposition of the preemption claim. Finally, the trial court determined that the unlawful taking and 42 USC 1983 counts were barred by its prior summary disposition ruling.

I

On appeal, plaintiffs first argue that they had a vested right to construct the mobile home park. However, we conclude that review of this claim is not appropriate because plaintiffs have not briefed the particular trial court ruling underlying their argument. *Joerger v Gordon Food, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). Further, plaintiffs do not cite any record support for their argument. A party may not leave it to this Court to search for a factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Regardless, assuming that plaintiffs' argument is directed at the trial court's decision to grant summary disposition of the unlawful taking claim alleged in Count I of the first amended complaint, we note that no error is apparent. Because the trial court looked beyond the pleadings when granting summary disposition, we have treated the trial court's ruling as having been made under MCR 2.116(C)(10). *Atkinson v Detroit*, 222 Mich App 7, 9; 564 NW2d 473 (1997). Admissible evidence is required to create a genuine issue of material fact under this rule. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Upon de novo review, *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998), we find no error in the trial court's ruling with regard to Count I of plaintiffs' first amended complaint. The critical date for determining plaintiffs' vested rights was the enactment date of the rezoning ordinance in July 1996. *Heath Twp v Sall*, 442 Mich 434, 441; 502 NW2d 627 (1993). Where, as in this case, the claimed vested right is based on a prior nonconforming use, the general rule is that, to establish the prior nonconforming use, a property owner must engage in "work of a 'substantial character' done by way of preparation for an actual use of the premises." *Id.* at 439, quoting *Bloomfield Twp v Beardslee*, 349 Mich 296, 307; 84 NW2d 537 (1957).

In the case at bar, given plaintiffs' failure to show either a state permit to build Phases III and IV of the planned mobile home park or work of a substantial character on the critical date, we conclude that the trial court correctly determined that plaintiffs' claim lacked the requisite factual support to establish a vested right to build Phases III and IV. *Heath Twp, supra* at 440. Vested rights could not be based on plaintiffs' expectation that a permit would be issued in the future. See generally *In re Certified Question*, 447 Mich 765, 788; 527 NW2d 468 (1994).

Although plaintiffs suggest that their phased development plan should have been treated as an indivisible whole for purposes of determining if they had a vested right to build Phases III and IV, plaintiffs have not supported their position with citation to supporting authority. A mere statement of position is insufficient to bring an issue before a reviewing court. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). We note, however, that a preliminary matter in assessing a "taking" claim is the determination of the relevant parcel. *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 578; 575 NW2d 531 (1998). Keeping in mind though that we are confronted here with a determination of what rights were vested when the July 1996 rezoning became effective, rather than the effect of rezoning on the parcel, we conclude that plaintiffs have failed to demonstrate the type of circumstance to warrant treating their phased development plan as an indivisible whole. Cf. *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 575-576; 398 NW2d 393 (1986).

II

Plaintiffs next claim that an unlawful taking occurred because defendant had no reasonable governmental interest in rezoning the property. As with the prior issue, we find that review of this issue is inappropriate because plaintiffs have failed to brief the particular trial court ruling underlying their argument. *Joerger, supra*. Moreover, assuming that plaintiffs' argument is directed at the trial court's decision to grant summary disposition of the unlawful taking claim advanced in Count III of the first amended complaint, we find no basis for relief.

In this regard, we note that a regulatory taking claim may be framed as either a Fifth Amendment taking or as a Fourteenth Amendment due process type of taking. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 68; 445 NW2d 61 (1989). The latter type of taking is based on a denial of substantive due process. *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991). It requires proof that "(1) there is no reasonable government interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of legitimate land use from the area in question. *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). By comparison, the Fifth Amendment prohibits the taking of private property for public use without just compensation. *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 163 (2001). "The purpose of just compensation is to put a property owner in as good a position as it would be if the taking had not occurred." *Silver Creek Drain Dist v Extrusions Division, Inc*, 245 Mich App 556, 562; 630 NW2d 347 (2001). Although a case-specific inquiry is required, land use regulations effect takings in the following two general situations: "(1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economic viable use of his land." *K & K Construction, Inc, supra* at 576.

In the case at bar, the trial court focused on the economic viability standard and the question of damages in determining that summary disposition was appropriate with respect to Count III of plaintiffs' first amended complaint. We conclude that plaintiffs' failure to address this ruling precludes appellate relief. *Joerger, supra*. However, even if we were to consider plaintiffs' argument concerning the reasonableness of the 1996 rezoning decision within the context of a Fifth Amendment taking predicated on a zoning ordinance's alleged failure to substantially advance a legitimate state interest, or standards for a substantive due process type of taking, we would not reverse the trial court's ruling. We are unpersuaded that plaintiffs met their burden of presenting admissible evidence showing at least a genuine issue of a material fact with regard to their claim. *Maiden, supra* at 121.

III

Plaintiffs argue that the doctrine of estoppel should be applied to preclude defendant from stopping construction of their mobile home park. Once again, we find that appellate review of this issue is not appropriate because plaintiffs do not brief the particular trial court ruling underlying their argument. *Joerger, supra.*

We note, however, that, to the extent plaintiffs rely on the equitable theory of estoppel, such a theory does not afford plaintiffs a cause of action in and of itself. *Hoye v Westfield Ins Co*, 194 Mich App 696, 707; 487 NW2d 838 (1992). Although equitable estoppel may assist a plaintiff, absent extraordinary circumstances, a municipality is generally not precluded by estoppel from enforcing its zoning code. *Id.*; *Holland v Manish Enterprises,* 174 Mich App 509, 514; 436 NW2d 398 (1988). We are unpersuaded that plaintiffs have shown the requisite exceptional circumstances for applying equitable estoppel. Moreover, their failure to show how equitable estoppel would aid any of their pleaded causes of action precludes appellate relief. *Joerger, supra*; see also *Roberts & Son Contracting, Inc v North Oakland Development Corp,* 163 Mich App 109, 113; 413 NW2d 744 (1987) (failure to address a necessary issue precludes appellate relief).

Although plaintiffs also argue that the MHCA preempts defendant from rezoning their property, the question of statutory preemption is distinct from a claim of equitable estoppel. A municipal ordinance is preempted if "1) the statute completely occupies the field that ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute." *Rental Property Owners Ass'n v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). Statutory construction is a question of law. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Unlike zoning laws, the MHCA does not regulate the development and proper use of land. *Silver Creek Twp v Corso*, 246 Mich App 94, 98; 631 NW2d 346 (2001). By enacting MCL 125.1145(2), the Legislature intended to save validly enacted zoning ordinances. See *Gackler, supra* at 581. As such, and assuming that plaintiffs' argument is directed at the trial court's decision to grant summary disposition of the preemption claim in the second amended complaint, we find that plaintiffs have not demonstrated any error.

IV

Plaintiffs next claim that defendant's actions throughout the proposed development of the mobile home park and attempt to rezone the property in 1996 were arbitrary and capricious. We decline to address this issue because it is given only cursory consideration in plaintiffs' brief, with no discussion of the relevant count in the first or second amended complaint, no discussion of the pertinent ruling of the trial court, and no citation to relevant supporting authority concerning arbitrary and capricious conduct. *Joerger, supra*; *Community Nat'l Bank of Pontiac v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987). Plaintiffs' reliance on *Heath Twp, supra*, and *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89; 223 NW2d 689 (1974), to argue arbitrary and capricious conduct is misplaced because the question before our Supreme Court in both of those cases involved vested rights. The reasonableness of an ordinance is not relevant to a claim based on vested rights. "Though the ordinance be reasonable, it cannot operate to oust the property owner of his vested right." *Dusdal v Warren*, 387 Mich 354, 359-360; 196 NW2d 778 (1972).

V

Plaintiffs next argue that the current zoning classification is unconstitutional even if it does not create a total prohibition of land use for mobile homes. Again, we could decline to address plaintiffs' claim given their failure to address the pertinent ruling of the trial court. *Joerger, supra* at 175. In passing, and assuming for purposes of our review that plaintiffs' argument is directed at the trial court's decision granting summary disposition of Count II of the first amended complaint, we find no basis for relief.

In this regard, we note that the trial court resolved this issue on the basis of a statutory, rather than constitutional, ground. The trial court looked to MCL 125.592 of the City and Village Zoning Act in holding that plaintiffs could not establish the requisite total exclusion because plaintiffs were building Phases I and II of their mobile home park. Although we agree with plaintiffs' assertion that the challenged zoning ordinance need only have the effect of totally prohibiting the establishment of a land use, given the evidence that Phases I and II were, in fact, being built, we are unpersuaded that the trial court incorrectly decided this statutory issue. *Adams Outdoor Advertising, Inc v Holland*, 463 Mich 675, 684; 625 NW2d 377 (2001). Although a claim that zoning is exclusionary may also have a constitutional basis, such a claim is founded on substantive due process. *Guy v Brandon Twp*, 181 Mich App 775, 786; 450 NW2d 279 (1989). As we have already concluded for purposes of plaintiffs' second issue, we are unpersuaded that they have shown a genuine issue of material fact on this question.

VI

The remaining three issues raised by plaintiffs warrant little discussion. We decline to consider plaintiffs' claim of entitlement to monetary compensation or claim for relief under 42 USC 1983, given plaintiffs' failure to cite appropriate factual and legal authority for their claims. *Goolsby, supra* at 655; *Joerger, supra* at 175; *Norman, supra* at 260.

Further, we decline to consider plaintiffs' challenge to the amount of inspection fees charged by defendant. The trial court resolved this claim on the basis of its conclusion that plaintiffs failed to exhaust their administrative remedies. Summary disposition under MCR

2.116(C)(4) is proper when a plaintiff does not exhaust administrative remedies. *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). Plaintiffs' failure to address this basis for the trial court's ruling precludes appellate relief. *Roberts & Son Contracting, Inc*, *supra* at 113.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens