

STATE OF MICHIGAN
COURT OF APPEALS

JEANNETTE CARR and PETER D. WARD,

Plaintiffs-Appellants,

v

CITY OF ANN ARBOR, ABIGAIL ELIAS,
KRISTEN D. LARCOM, JAMES DEWOLF, and
LARRY PICKEL,

Defendants-Appellees,

and

SPRINT SPECTRUM, L.P., and ANN ARBOR
PUBLIC SCHOOLS,

Intervening Defendants-Appellees.

Before: White, P.J., and Talbot and E.R. Post*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting the motion for summary disposition filed by defendants-appellees. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Intervening defendant Sprint Spectrum, L.P. filed an application with the City of Ann Arbor for permission to build a 130-foot cellular communications tower on land owned by intervening defendant Ann Arbor Public Schools. James DeWolf, a city employee, approved the application, and the city issued a building permit for construction of the tower.

Plaintiffs filed a petition for administrative review with the Ann Arbor Zoning Board of Appeals (ZBA), arguing that the city erred by issuing the permit. Plaintiffs learned that Kristen D. Larcom, an assistant city attorney, furnished the ZBA with written, ex-parte communications regarding the petition for review. The ZBA held a hearing and denied plaintiffs' petition.

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

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No. 225456
Washtenaw Circuit Court
LC No. 98-009468-CZ

Plaintiffs filed a request with the city pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, seeking disclosure of the communications from the city attorney to the ZBA. The city denied the request on the ground that the communications were subject to the attorney-client privilege and thus were exempt from disclosure. MCL 15.243(1)(h).

Plaintiffs filed suit in circuit court. Plaintiffs appealed the ZBA's decision, alleging a violation of the FOIA by the city, and sought other relief. The circuit court affirmed the ZBA's decision and granted summary disposition in favor of defendants on plaintiffs' remaining counts. The circuit court held that an attorney-client relationship existed between the ZBA and the city attorney, and concluded that communications from the city attorney to the ZBA were protected from disclosure under two exemptions contained in the FOIA, specifically the attorney-client privilege, MCL 15.243(1)(h), and the work product privilege. MCL 15.243(1)(i); MCR 2.302(B)(3).

We review a trial court's decision on a motion for summary disposition *de novo*. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

A circuit court must determine *de novo* whether disclosure of records should be compelled under the FOIA. *Schroeder v Detroit*, 221 Mich App 364, 365-366; 561 NW2d 497 (1997). The public body has the burden of establishing that its denial of disclosure should be sustained. *Id.* Whether requested information falls within an exemption to the FOIA is a mixed question of law and fact. *Id.* We review a circuit court's factual determinations for clear error, and review questions of law *de novo*. *Id.* at 366.

Plaintiffs argue that the circuit court erred by granting defendants' motion for summary disposition of their FOIA claim. Plaintiffs assert that as a quasi-judicial body, a ZBA must remain impartial. Furthermore, plaintiffs contend that because the city was a party to the dispute before the ZBA, the ZBA could not properly receive advice from the city attorney.

We disagree and affirm. A municipal government is authorized to create a ZBA which can take any action that could be taken by the municipality. MCL 125.585(1). The existence of authority to enact an ordinance implies the existence of authority to quasi judicially enforce the ordinance. *Rental Property Owners Ass'n of Kent County v Grand Rapids*, 455 Mich 246, 270; 566 NW2d 514 (1997). A ZBA does not function in the same manner as a court of law. A ZBA is a municipal administrative body charged with interpreting ordinances, hearing appeals, and performing other functions related to the application of the municipal zoning ordinances. Its decisions are administrative in nature, and constitute the municipality's final decision as to the effect of its zoning ordinances. The decision of a ZBA is final. A party affected by the decision of a ZBA can take an appeal to circuit court. MCL 125.585(11).

Contrary to plaintiffs' assertion, the city was not a party to the matter before the ZBA. The dispute regarding the interpretation and application of the relevant ordinance was among Sprint, the school district, and plaintiffs. The ZBA's procedural rules provide that the city attorney shall advise the ZBA and submit memoranda as requested. Plaintiffs' reliance on cases such as *Abrahamson v Wendell*, 72 Mich App 80; 249 NW2d 302 (1976), and *Barkey v Nick*, 11 Mich App 381; 161 NW2d 445 (1968), is misplaced. In those cases, a city official appeared before the ZBA and sought to influence its decision. No such appearance occurred in this case, and the city had nothing to gain from the ZBA's decision.

The city attorney acts as counsel for the city, and advises the heads of administrative units. The city attorney is authorized to represent the ZBA. See *Flint v Bd of Hospital Managers*, 377 Mich 681, 684; 142 NW2d 5 (1966). The circuit court correctly held that because the city attorney is the attorney for the ZBA, the memoranda given to the ZBA were protected from disclosure under both the attorney-client privilege exemption, MCL 15.243(1)(h), and the work product privilege exemption. MCL 15.243(1)(i); MCR 2.302(B)(3). The circuit court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Edward R. Post