STATE OF MICHIGAN

COURT OF APPEALS

ACC INDUSTRIES, INC.,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF MUNDY,

Defendant-Appellee.

UNPUBLISHED
February 24, 2004

No. 242392
Genesee Circuit Court
LC No. 95-037227-NZ

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

In this zoning case, plaintiff ACC Industries, Inc., appeals by right from the trial court's order denying plaintiff's motion to supplement the record and reaffirming a judgment of no cause of action in favor of defendant Charter Township of Mundy. We affirm.

I

The instant case involves a zoning dispute arising out of plaintiff ACC Industries' efforts to challenge defendant Charter Township of Mundy's (the township) denial of its rezoning request on two separate occasions. The property at issue is located in Mundy Township and is currently zoned RA, a residential low density zone. Plaintiff requested that the township change the zoning to M3, a classification that would permit the construction of a manufactured housing community. Defendant denied plaintiff's first rezoning application in November 1994. Plaintiff subsequently filed a second application, but the Mundy Township planning commission and township board again denied plaintiff's proposal. Plaintiff thereafter filed the instant suit in May 1995, alleging that defendant improperly denied its request for rezoning.

In a five-count amended complaint, plaintiff claimed that its procedural due process rights were violated during a planning commission meeting and proceedings by the township board regarding plaintiff's first rezoning application. Plaintiff further sought equitable relief to protect it from alleged over-regulation that was purportedly confiscatory in nature. Additionally, plaintiff sought to recover for alleged substantive due process violations based on the arbitrary and capricious conduct of defendant, as applied. Plaintiff also raised a substantive due process violation predicated on a facial challenge to the ordinance as arbitrary and capricious in nature. Finally, plaintiff in count V of its amended complaint set forth an exclusionary zoning challenge.

Defendant township denied all liability and raised numerous affirmative defenses. Following extensive discovery and numerous pretrial motions, a bench trial was held. During the trial, the trial court reconsidered defendant's contention that the matter was not ripe for decision until it had been considered by the zoning board of appeals. The trial court ordered that the case should first be reviewed by the zoning board of appeals before it rendered a final decision in the matter. Thus, the trial court adjourned the trial for an expedited hearing by the zoning board of appeals, which ultimately denied plaintiff's request for rezoning. After the adjournment, the court heard additional testimony at trial and rendered a judgment of no cause of action in favor of defendant township that dismissed all of plaintiff's claims.

Plaintiff appealed, and while the appeal was pending, defendant submitted a motion to this Court "to provide [it] with accurate information regarding unpublished local regulations or to remand to permit correction of the record." Defendant's motion pertained to five hundred feet of frontage of the subject property that purportedly was zoned differently than originally represented to the trial court. This Court denied defendant's motion to provide more accurate information regarding unpublished local regulations and remanded the case "so that the trial court may determine in what manner to correct the record and whether a new trial may be necessary." *ACC Industries, Inc v Charter Twp of Mundy*, Docket No. 218335, order dated October 25, 2001. The Court of Appeals did not retain jurisdiction. On remand, the trial court declined to further supplement the record and reaffirmed its prior decision dismissing plaintiff's claims in their entirety. Plaintiff now appeals.

II

Plaintiff first argues that the trial court erred in summarily dismissing its procedural due process claim prior to trial. Plaintiff complains that defendant township voted in November 1994 to deny plaintiff's first application for rezoning, without ever having provided plaintiff with a copy of the dispositive township master plan. Plaintiff contends that its representatives requested a copy of the master plan before there was any vote on the first rezoning application, and further requested that no decision be made regarding rezoning until a copy of the master plan was provided for its review. Plaintiff maintains that despite this request to adjourn, defendant township board members proceeded to vote on the rezoning proposal without providing the master plan to plaintiff. Plaintiff states that it was not provided with a copy of the master plan until sometime after the November 1994 meeting and thus was required to reapply and pay a second fee in order to present a second application, which was presented and denied in May 1995. Plaintiff now argues that a genuine issue of material fact exists regarding whether there was an effective denial of plaintiff's opportunity to be heard when it presented its first rezoning petition, and the trial court therefore erred in granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant as to this claim.

The grant or denial of a motion for summary disposition is reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* The moving party is entitled to judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; MCR 2.116(C)(10), (G)(4).

In presenting a (C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363.

The federal and Michigan constitutions guarantee that persons may not be deprived of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art 1, § 17. Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process. *Hanlon v Civil Service Comm*, 253 Mich App 710, 722-723; 660 NW2d 74 (2002). Whether the due process guarantee is applicable depends initially on the presence of a protected "property" or "liberty" interest. *Id.* at 723. If the plaintiff possesses such an interest, the court must determine what process is due. In general, due process requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. *Id.* The opportunity to be heard does not require a full trial-like proceeding, but does require a hearing to the extent that a party has to know and respond to the evidence. *Id*.

Here, plaintiff has failed to identify any constitutionally cognizable property interest in a rezoning decision. See *Seguin v City of Sterling Heights*, 968 F 2d 584, 590-591 (CA 6, 1992). Plaintiff had no justifiable expectation that its plan would be approved because Mundy Township had discretion to deny the rezoning request. Moreover, even if plaintiff possessed a sufficient property interest to support a procedural due process claim, plaintiff cannot demonstrate that it was denied the process due. Plaintiff does not complain that it was not given notice or an opportunity to be heard. Rather, plaintiff complains that defendant failed to adjourn a hearing that was established at plaintiff's request and that it was not provided with information it deemed necessary in order to present its case during the hearing. We know of no authority, and plaintiff cites none, recognizing a procedural due process claim based on the failure to adjourn a rezoning hearing that was initially requested by the applicant at the time of his or her choosing and where the applicant's attorney wrote in advance of the meeting to withdraw the application.

In any event, even assuming the process regarding the first application was flawed, the trial court correctly held that any alleged deficiency was cured by the fact that plaintiff subsequently obtained the master plan and thereafter was provided and accepted the opportunity to make a presentation regarding its proposal to both the planning commission and the township board. Accordingly, any procedural transgression in the first round of hearings was rectified when plaintiff presented its proposal to the commission as part of the second application for rezoning. Plaintiff does not allege that it was denied procedural due process when defendant township acted on its second application. Thus, the trial court did not err in granting summary disposition in favor of defendant on plaintiff's procedural due process claim.

III

In the midst of trial, the trial court made a sua sponte decision to remand the case to the township zoning board of appeals pursuant to *Paragon Properties Co v Novi*, 452 Mich 568; 550

NW2d 772 (1996), which requires an appeal to the zoning board of appeals before a judicial claim ripens.[1] The zoning board of appeals then reviewed and denied plaintiff's rezoning request. Thereafter, the trial resumed. Plaintiff now argues the trial court erred in remanding the case to the zoning board of appeals.

This Court need not reach the merits of plaintiff's claim that the trial court improperly remanded the case to the zoning board of appeals for its consideration, and that the board's decision should now be disregarded. As defendant argues, typically if a litigant has failed to comply with *Paragon*, *supra*, the remedy is to dismiss the lawsuit without prejudice to its refiling when the plaintiff has obtained a final decision. Here, the trial court remanded the case rather than dismissing it. As a result, even assuming this Court does not agree with the trial court's decision, there has been no harm to plaintiff. If anything, the trial court gave plaintiff an additional opportunity to make its case before a township body, the zoning board of appeals.

Plaintiff nevertheless complains this was error and, in an unusual argument, urges this Court to "disregard" the zoning board of appeals proceedings. However, plaintiff has not elaborated on any differences in the records of the township board, the appeals board, or the trial court that make a difference to the outcome of the case. It is not enough for an appellant to simply announce a position or assert error and then leave it to this Court to discover and rationalize the basis for the claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Plaintiff fails to show how it was harmed by the remand in a outcome determinative way. The failure to point to outcome determinative differences between the zoning board of appeals' record and the trial record makes it unnecessary for this Court to decide the issue, which has not been adequately briefed by plaintiff. *Id.*

IV

Plaintiff next argues that substantive due process standards were not met by defendant township's actions. Plaintiff contends that based on the proofs presented at trial, the trial court failed to recognize the defect in the challenged zoning denial and the defect in the existing zoning ordinance classification itself, which served to preserve large lot sizes and density in excess of the proposed reasonable and "master planned for" development in the area in question. Plaintiff complains that there was non-existent or slight deliberation on the part of the township, no factual support for positions taken in opposition to plaintiff's rezoning application, an assertion of irrelevant issues on the part of defendant, and a track record of repeated manufactured housing rezoning request denials. Plaintiff maintains there is a conspicuous absence of any tangible proof or legitimate basis on which a denial plaintiff's rezoning petition reasonably could have been based.

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[1] In *Paragon*, *supra* at 576, the Supreme Court held that a judicial challenge to the constitutionality of a zoning ordinance, as applied to a particular parcel of land, is not ripe for judicial review until the plaintiff has obtained a final, nonjudicial determination regarding the permitted use of the land (i.e., denial of a special-use permit or variance). The purpose of this requirement is to ensure that the plaintiff has suffered an "actual, concrete injury." *Id.* at 577.

This Court reviews de novo a trial court's ruling on a constitutional challenge to a zoning ordinance. *Jott, Inc v Charter Twp of Clinton*, 224 Mich App 513, 525-526; 569 NW2d 841 (1997). The trial court's factual findings, however, are accorded considerable deference, and those findings will not be disturbed unless this Court would have reached a different result had it occupied the trial court's position. *Id*. at 526. See also *Bell River Assoc v Charter Twp of China*, 223 Mich App 124, 129-130; 565 NW2d 695 (1997).

A substantive due process claim requires proof that: (1) there is no reasonable governmental interest being advanced by the present zoning classification or (2) an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question. *Kropf v Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974); *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Three basic rules of judicial review are applicable:

> (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical *ipse dixit*; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Frericks, supra* at 594, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

See also *Brae Burn, Inc, v Bloomfield Hills*, 350 Mich 425, 431-432; 86 NW2d 166 (1957).

In the instant case, plaintiff alleges both "facial" and "as applied" challenges to the township zoning ordinance. A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. *Paragon, supra* at 56. An "as applied" challenge alleges a present infringement or denial of a specific right or of a particular injury in the process of actual execution of government action. *Id.*; *Frericks, supra* at 595.

Pertinent considerations in determining the reasonableness of a particular exclusion include the use of surrounding areas, traffic patterns, and available water supply and sewage disposal systems. *Johnson v Lyon Twp*, 45 Mich App 491, 494; 206 NW2d 761 (1973). Further, "[t]he fact that other sites are better suited, in light of those considerations, for the proposed use and are predesignated for the proposed use, pursuant to a master plan adopted in compliance with statutory requirements, may also be evidence of reasonableness." *Id.*

We conclude that plaintiff has failed to meet its burden of proving that the current zoning classification was unrelated to a legitimate governmental interest or that the ordinance was an arbitrary and unreasonable restriction on the use of its property, i.e., that the RSA zoning classification was a "whimsical *ipse dixit*" or that there was no room for a legitimate difference of opinion concerning the reasonableness of the classification. *Kropf*, *supra*; *Brae Burn, Inc*, *supra*. Evidence was presented at trial demonstrating that: plaintiff's proposed development would be inconsistent with the established land use pattern for this area; the proposed zoning classification would be inconsistent with the established zoning pattern and would introduce a substantially greater residential density (dwelling units per acre) pattern than allowed by current

zoning for residential property nearby (most of the property surrounding the proposed site was either agricultural or low density single family development); the proposal for a manufactured housing community was contrary to long-range development plans for the property; and, there was not a demonstrated need or market for the proposal at this location. Additional evidence was introduced that traffic generated by the proposal would substantially increase and the capacity of the roads to handle such traffic was questionable, and there was a possibility that inadequate water service and drainage would create problems. There was further concern on behalf of township officials that the proposal was incompatible with the year 2000 master plan, there was no need for additional mobile home parks in the area, other better areas were available and appropriately zoned for this type of development, and a high percentage of low cost housing was already available.

The trial record not only belies plaintiff's contention of conclusory and inadequate factual findings, but also demonstrates that plaintiff has not met its burden of showing that the ordinance itself or application of the ordinance to plaintiff's rezoning request constitute a deprivation of substantive due process. Giving considerable weight to the findings of the trial court, we conclude that plaintiff has provided this Court with no basis for overturning the trial court's conclusion that plaintiff's "facial" and "as applied" due process challenges to the zoning ordinance should be dismissed.

V

Plaintiff next contends that the trial court erred in dismissing plaintiff's exclusionary zoning claim. We disagree. MCL 125.297a states:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

Pursuant to MCL 125.297a, a zoning ordinance may not totally exclude a lawful land use if the exclusion is township-wide in scope, there is a demonstrated need for the use in the township or surrounding area, and the use is appropriate for the location. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 684; 625 NW2d 377 (2001); *Landon Holdings, Inc, v Grattan Twp*, 257 Mich App 154, 167; 667 NW2d 93 (2003); *Guy v Brandon Twp*, 181 Mich App 775; 450 NW2d 279 (1989). An ordinance need not completely exclude a use on its face to violate MCL 125.297a. *Landon, supra* at 168. "It may merely make the use a practical impossibility." *Id.*

Here, plaintiff concedes that there is already one mobile home park within defendant's boundaries. It is likewise undisputed that in addition to existing within the township, mobile home parks likewise exist within close geographical proximity to Mundy Township. Thus, plaintiff has failed to carry its burden of demonstrating that the township ordinance amounts to total exclusion. *Adams Outdoor Advertising, supra*. Further, as the trial court indicated, there was testimony that the master plan provided for density levels in other parts of the township that would be appropriate for building a mobile home park. The decision to deny plaintiff's request for rezoning applied only to this particular parcel of land and would not preclude the future

development of a mobile home park elsewhere in the township where high density housing would be compatible with the existing pattern of development. Testimony clearly indicated that a manufactured housing community that met the requirements of an RSA zoning district would be allowed under the township zoning ordinance.

Moreover, the trial court properly concluded that plaintiff failed to demonstrate a sufficient need for a mobile home park to prevail on an exclusionary zoning claim. The trial record, which included the testimony of the township's expert planner that there was no "great demand" for such housing, indicated that when the housing market was evaluated by looking beyond the township boundaries, there was insufficient demand for plaintiff's proposed housing development to require a zoning classification change. The trial court properly weighed evidence regarding the appropriate housing market, data regarding absorption rates, and the need for additional mobile home parks in the area. Plaintiff's own proofs showed that Genesee County has the largest percentage of persons living in mobile home parks anywhere in the state, and that the percentage of persons living in mobile home parks in Mundy Township is higher than the state average. Such testimony undercuts plaintiff's exclusionary zoning claim.

Finally, with regard to plaintiff's argument that the special use standards set forth in the township ordinance are impermissible and evidence an exclusionary purpose, defendant correctly notes that such an issue only arises if the property is actually zoned for mobile home park development, which it is not. We need not address this issue in light of our conclusion that plaintiff's challenges to the rezoning denial were properly dismissed by the trial court.

VI

Plaintiff next argues that the trial court failed to properly analyze the application of the township master plan, referred to as the Mundy Township Comprehensive Land Use Plan – Year 2000, to plaintiff's proposal. Plaintiff contends that the evidence shows there was no collision course that existed between plaintiff's proposal, the existing master plan, and the circumstances of the community, because the area in question is relatively undeveloped except along road frontage areas. Plaintiff cites the testimony of the drafter of the master plan, Ronald Nino, who testified that a manufactured housing community was appropriate for the site based on the master plan and his own field observations. Plaintiff contends that the trial court failed to adequately heed Mr. Nino's testimony, which should be afforded "great weight" due to his stature as the actual drafter of the master plan.

The validity of a zoning ordinance must be tested by existing conditions. *Troy Campus v City of Troy*, 132 Mich App 441, 457; 349 NW2d 177 (1984). A township's master plan is but one factor to be considered in determining the reasonableness of a zoning classification, and does not replace the balancing of interests required under an assertion of legislative or police power. *Biske v Troy*, 381 Mich 611, 619; 166 NW2d 453 (1969); *Bell River Assoc, supra* at 131; *Troy Campus, supra*. Other pertinent factors include the extent to which the goals of the master plan are advanced by the use limitations imposed on a particular parcel of land, the stability of the master plan, and the extent to which the master plan constitutes a commitment to a coherent development plan for the area which takes into account existing conditions and legitimate future expectations. *Troy Campus, supra* at 457, citing *Biske, supra* at 617-618.

Here, the record evidence indicates that at the meetings before various township authorities, both parties presented experts discussing appropriate uses for the property. Although Mr. Nino considered medium density residential use to be appropriate, other planners disagreed. Residents and members of the various township bodies that considered the matter raised numerous legitimate concerns regarding density, traffic, compatibility with existing land use, flooding, and the availability of infrastructure and services. The record reflects that the trial court properly weighed all of these factors, including the master plan and testimony concerning it, as part of the equation regarding the reasonableness of the zoning classification. Plaintiff's assertions in this regard are not supported by the record.

VII

Finally, plaintiff argues that the trial court abused its discretion in precluding the admission of portions of the rebuttal testimony of two witnesses at trial. However, the scope of rebuttal evidence is left to the sound discretion of the trial court, *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 677; 607 NW2d 123 (1999), *Fireman's Fund American Ins Cos v General Electric Co*, 74 Mich App 318, 327; 253 NW2d 748 (1977), and we find no such abuse under the circumstances, where the relevance of such testimony was questionable and should have been presented in plaintiff's case in chief. Moreover, plaintiff fails to argue how any of this proffered evidence would have changed the outcome of the case. Pursuant to MCR 2.163, an error in the admission or exclusion of evidence is not ground for granting a new trial, setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court to be inconsistent with substantial justice. Plaintiff's argument is this regard is therefore without merit.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen