STATE OF MICHIGAN

COURT OF APPEALS

ERVIN J. HACKERT,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF PERE MARQUETTE,

Defendant-Appellee.

UNPUBLISHED
March 9, 2004

No. 244781
Mason Circuit Court
LC No. 00-000536-CH

Before: Fitzgerald, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the Order and Judgment in defendant's favor following a bench trial in this zoning-related action. We affirm.

On appeal, plaintiff argues that defendant's zoning ordinance provision imposing a 35-foot height limitation on single-family dwellings is unconstitutional on its face and as applied to his property because it violates his substantive due process rights. We disagree. This Court reviews de novo the trial court's ruling on a constitutional challenge to a zoning ordinance, but gives considerable weight to its factual findings. *Bell River Assoc v China Charter Twp*, 223 Mich App 124, 129; 565 NW2d 695 (1997).

A citizen is denied substantive due process by enactment of legislation that has no reasonable basis for its existence. *Kropf v Sterling Heights*, 391 Mich 139, 157; 215 NW2d 179 (1974). There are two grounds on which a substantive due process claim can rest: first, "there is no reasonable governmental interest being advanced by the present zoning classification itself," or, second, the ordinance is "unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question." *Id*. at 158. However, an ordinance is presumed to be constitutional unless invalid on its face or the challenging party affirmatively proves that the ordinance is an arbitrary and unreasonable restriction on the owner's use of his property. *Gora v Ferndale*, 456 Mich 704, 720; 576 NW2d 141 (1998); *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 571; 398 NW2d 393 (1986).

Article III, Section 304 is the zoning regulation for the R-1 low density residential district at issue and provides:

> Sec. 304:1 PURPOSE
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> The R-1 Low Density Residential District is established to provide areas for single-family residential development and to limit and prohibit business, commercial, or industrial use of land in the said district, except special land uses which are determined to be appropriate for neighborhood and residential services, and which do not adversely affect the character of the district. It is further the purpose of the R-1 District to minimize and discourage traffic other than that necessary to service residences, and to limit the need for public services to those required in orderly residential areas. District regulations have been designed to accommodate several levels of developmental density based on the availability of utilities and environmental character of the area.
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> Sec. 304:2 DISTRICT REGULATIONS
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> All principal, accessory, and conditional uses and structures in the R-1 District shall be subject to the area, location and height restrictions as specified in the Schedule of District Regulations (Section 320).

The Schedule of District Regulations provides that R-1 low density residential district single-family dwellings are permitted to have a maximum height of 35-feet. Section 1202:8 provides the definition of "Height of Structure" as follows: "The vertical distance measured from the average established grade at the front of the structure to the highest point of the structure whether it be a roof, wall, parapet or similar appurtenance of the structure."

Plaintiff acknowledges in his brief on appeal that height regulations have been found to be constitutional in this State and that they are generally regarded as legitimate, including by the United States Supreme Court in *Euclid Village v Ambler Realty Co*, 272 US 365, 387; 47 S Ct 114; 71 L Ed 303 (1926). He claims, however, that the 35-foot limitation is purely arbitrary and does not further a reasonable governmental interest. But, the stated purpose of the district regulations, including the height restriction, was "to accommodate several levels of developmental density based on the availability of utilities and environmental character of the area." Plaintiff fails to explain why the height restriction of 35-feet does not further that objective or why this objective does not preserve or promote the public health, safety, and general welfare of the residents. See *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310, 322-323; 471 NW2d 321 (1991). Plaintiff's own expert admitted that a 35-foot height restriction is common, defendant's expert testified that it is common throughout the country, and case law confirms that assertion.

Plaintiff, the general contractor of this project, and his architect admitted that they did not attempt to build the house in compliance with the height requirement. Nevertheless, plaintiff argues that the restriction is unreasonable because (1) the township master plan does not mention it, (2) environmental controls ensure adequate air, light, and ventilation, (3) neighboring residential districts allow taller structures, and (4) he designed his home "in keeping with an R-1 zoning district's intent and for the particular site involved." We reject these arguments – they

are not sufficient to overcome the presumption of reasonableness. Plaintiff's argument essentially appears to be that the height restriction is no longer necessary in this district, but this Court is not the authority to decide that issue. See *Lamb v Monroe*, 358 Mich 136, 143-144; 99 NW2d 566 (1959), citing *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425; 86 NW2d 166 (1957). In sum, plaintiff failed to rebut the presumption that the ordinance provision is reasonable and the trial court properly concluded that it is not unconstitutional on its face or as applied to plaintiff's property.

Next, plaintiff argues that the zoning board of appeals violated the Open Meetings Act, MCL 15.261 *et seq*. We disagree. An issue of statutory interpretation is reviewed de novo as a question of law. *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). Plaintiff's argument is twofold—first, he claims that the zoning board of appeals unlawfully delegated its governmental authority to the township attorney when it asked him to write a recommendation regarding the variance request and that such recommendation constituted a "decision" within the contemplation of the OMA. Second, plaintiff argues that the OMA was violated because public comment was foreclosed at the second meeting regarding plaintiff's variance application.

MCL 15.263(2) provides: "All decisions of a public body shall be made at a meeting open to the public." Pursuant to MCL 15.262(d), "decision" is defined as "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL 15.263(3) provides: "All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public . . . ."

First, we reject plaintiff's contention that any input or assistance from a source outside of the public body regarding a matter under its consideration is deemed a "decision" within the contemplation of the OMA. Plaintiff contends that *Schmiedicke v Clare Co School Board*, 228 Mich App 259; 577 NW2d 706 (1998) and *Federated Publications, Inc v Board of Trustees of Michigan State Univ*, 221 Mich App 103; 561 NW2d 433 (1997), rev'd on other grounds 460 Mich 75 (1999), support his position. They do not. In *Schmiedicke, supra*, a school board established an advisory committee to consider the effectiveness of its administrator evaluation system. *Id*. at 261. The committee deliberated in closed sessions on the issue, without any public involvement, and formulated a recommendation which was effectively adopted by the school board without any public meeting. *Id*. This Court held that the committee was improperly delegated a governmental function and violated the OMA by failing to open their sessions to the public during deliberations and decision-making. *Id*. at 264. That case is factually distinguishable since here the zoning board of appeals did conduct a public meeting, several persons voiced their opinions regarding the variance request and, at its conclusion, the board requested the township attorney to draft two recommendations – one granting and one denying the variance. At the subsequent meeting, the board considered and voted on the recommendation denying the variance. The township attorney did not decide the ultimate issue, the board decided the issue.

Similarly, in *Federated Publications, Inc, supra*, the board of trustees created a presidential search committee that was charged with the duty to review and interview more than 150 candidates for the position. *Id*. at 106, 115. In private sessions, the committee eventually narrowed the eligible candidates to four, who were then interviewed and voted on by the board of trustees in a public meeting and a president was elected. *Id*. at 106-107. This Court held that the committee's actions with regard to the candidate selection/screening process were not merely ministerial in nature but constituted a "decision" that was subject to the requirements of the OMA. *Id*. at 115. This result makes sense because at least 146 candidates were excluded from the board of trustee's review as a consequence of the committee's rejections of the candidates. *Id*. That case, too, is factually distinguishable since here the township attorney did not exclude an option, i.e., make a decision as to whether the variance should or should not be granted; rather, he presented draft recommendations of both results and the zoning board of appeals actually made the decision.

In sum, the township attorney did not render a "decision" within the contemplation of the OMA, MCL 15.262(d), but merely provided the ministerial service of drafting recommendations that granted and denied the requested variance for consideration by the zoning board of appeals. This case is more similar to the case of *Morrison v East Lansing*, 255 Mich App 505, 522; 660 NW2d 395 (2003). There, plaintiffs also claimed a violation of the OMA because defendant's city council appointed an advisory committee to make recommendations concerning the development of a community center. *Id*. at 507-508. This Court rejected the claim, holding "[w]here the delegating entity retains the ultimate decision-making authority, the delegation is lawful." *Id*. at 522. Because the city council retained ultimate authority to reject the committee's recommendations regarding the project, the recommendations could not be considered "decisions." *Id*. at 523. The same analysis applies to this case; the zoning board of appeals retained the ultimate authority to grant or deny the variance request, accordingly, there was no "decision" by the township attorney and no unlawful delegation of authority to him.

Next, plaintiff's argument that the OMA was violated because public comment regarding his variance request was not permitted in the second meeting on the issue is without merit. The OMA provides that persons "shall be permitted to address a meeting of a public body," but it also limits that right by allowing the public body to establish rules. MCL 15.263(5). Here, the record reveals that over two hours of public comments were permitted on the issue before it was closed by the vice chairman. Plaintiff, his architect, builder, and attorney were all allowed to speak on the application for a variance; accordingly, the OMA was not violated.

Plaintiff also argues that he was denied his right to "fair and just treatment" under Article 1, §17 of the Michigan Constitution because the zoning board of appeals delegated "its entire deliberation and decision making authority to the township attorney." Although plaintiff pleaded this claim in his complaint, the trial court did not consider and decide it and plaintiff did not pursue a decision; accordingly, this issue is not properly before this Court. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, even if we were to consider the issue and even if we concluded that the "fair and just treatment" clause was applicable to this matter, the zoning board of appeals did not unlawfully delegate its authority to the township attorney, as discussed above; therefore, this issue is without merit.

Finally, plaintiff argues that the doctrine of equitable estoppel should apply to prohibit defendant from enforcing the 35-foot height restriction against his building. We disagree. Equitable actions are reviewed de novo and the trial court's findings of fact are reviewed for clear error. *Webb v Smith (After Second Rem)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

Equitable estoppel may arise when: "(1) a party, by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 141; 602 NW2d 390 (1999); see, also, *American Electrical Steel Co v Scarpace*, 399 Mich 306, 308; 249 NW2d 70 (1976). Here, plaintiff has failed to set forth the exact nature of defendant's purported representation that induced him to believe facts, that he relied on, to his detriment. Defendant issued a written building permit for a 33-foot building, in compliance with its zoning ordinance. If plaintiff had built a 33-foot tall building, there would not be a problem. Instead, plaintiff built a 42-foot building in violation of the building permit and the height restriction ordinance. That plaintiff failed to read or comply with the height ordinance's clear and explicit definition of "height" cannot be imputed to defendant. Accordingly, the equitable estoppel doctrine has no application to the facts of this case.

However, even if we considered the application of the equitable estoppel doctrine on the ground that plaintiff submitted building plans that illustrated a height problem and still was issued a building permit, albeit one within the zoning ordinance, plaintiff would still not be entitled to benefit from the doctrine. Generally, a municipality is not estopped from enforcing its ordinances even if a permit has been improperly granted. See *Fass v Highland Park*, 326 Mich 19, 27, 31; 39 NW2d 336 (1949). However, when exceptional circumstances militate against the rule's strict application, estoppel may apply. In *Pittsfield Twp v Malcolm*, 375 Mich 135; 134 NW2d 166 (1965), the defendant was issued a building permit to construct an animal kennel and did so. *Id*. at 137. Ten months after the building was completed and in use as a kennel, the township, plaintiff, filed a lawsuit seeking a permanent injunction, claiming that the use was not permitted under its zoning ordinances even though its own building inspector issued the permit. Our Supreme Court denied the request for injunction, holding that (1) both parties acted in good faith, (2) notice of the construction was proper and adequate, (3) defendant spent $45,000 on the construction of the unique, specialty building, and (4) plaintiff waited over 10 months after its construction, occupancy, and operation before challenging defendant's right to use the building as a kennel. *Id*. at 148.

The record facts of this case are far different from those established in *Pittsfield Twp*. Here, (1) a building permit to construct a building 33-foot tall was issued and was facially valid in that it was in compliance with the zoning ordinances, (2) plaintiff, acting as general contractor on the construction, testified that he did not know the height of his proposed roof, was not concerned about it, and did not review the township ordinances, (3) Carl Utz, the administrator who issued the permit, testified that he notified plaintiff's architect of the potential height problem before construction on the house began, (4) plaintiff's architect testified that she did not know there was a height restriction ordinance and would seek a variance if it was a problem, (5) plaintiff's neighbor testified that he advised plaintiff of the height limitation before construction on the house began, (6) Terry Wahr verbally instructed plaintiff to stop construction on the home as early as July 28, 2000, but plaintiff did not stop construction until August 10, 2000, and (7)

Wahr testified that only about 20% of plaintiff's roof exceeded the height limit and Albert Wheeler testified that the height of the roof could be reduced by simply reconfiguring the truss system. In short, even if the equitable estoppel doctrine was applicable, it is not justified by the existence of even one exceptional circumstance in this case. Accordingly, this claim was properly dismissed.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra