STATE OF MICHIGAN

COURT OF APPEALS

DWC DIVERSIFIED, INC., WAYNE MOGG, and CHARLENE MOGG,

Plaintiffs-Appellants,

v

VILLAGE OF ROSEBUSH and VILLAGE OF ROSEBUSH BOARD OF ZONING APPEALS,

Defendants-Appellees.

UNPUBLISHED
March 11, 2004

No. 244999
Isabella Circuit Court
LC No. 01-001119-CE

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal by right from a grant of summary disposition for defendants, claiming defendants engaged in unlawful conditional zoning by refusing to rezone plaintiffs' property unless plaintiffs first put a fence around it. We reverse and remand.

The trial court held that MCL 125.584c(2) authorized defendant to impose conditions on rezoning requests. We disagree. MCL 125.584c(2) allows the imposition of "[r]easonable conditions" only "in conjunction with the approval of a special land use, planned unit development, or other land uses or activities permitted by discretionary decision."

Plaintiffs correctly argue that this statute applies only to administrative approvals, like special land uses and planned unit developments, not to rezoning requests. The distinction between the discretionary decisions associated with such special uses and the legislative actions associated with zoning (or rezoning) has long been recognized in Michigan. See *Mitchell v Grewal*, 338 Mich 81, 87-88; 61 NW2d 3 (1953). Rezoning involves the amendment of zoning ordinances, and is a legislative act. *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000). The approval of special uses, with or without associated conditions, is an administrative act. *Id*.

This distinction is clear within the statute. The provision in the Village Zoning Act that describes the procedures for zoning and rezoning, MCL 125.584, confers the authority for such activity exclusively on the legislative body of the city or village:

> (1) The legislative body of a city or village may provide by ordinance for the manner in which regulations and boundaries of districts or zones shall be

determined and enforced or amended, supplemented, or changed. . . .

A different section, MCL 125.584a, authorizes the designation of special land uses *within a zoning district* and allows for the imposition of discretionary conditions on such approvals:

> (1) A city or village may provide in a zoning ordinance for special land uses which shall be permitted in a zoning district only after review and approval by the commission appointed to formulate and subsequently administer the zoning ordinance, an official charged with administering the ordinance, or the legislative body. The ordinance shall specify the following:
>
> (a) The special land uses and activities eligible for approval consideration and the body or official charged with reviewing special land uses and granting approval.
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> * * *
>
> (4) The body or official designated in the zoning ordinance to review and approve special land uses may deny, approve, or approve with conditions, requests for special land use approval. . . .

The statutory provision at issue in this case, MCL 125.584c, describes the conditions that may be imposed by the approving authority:

> (1) If a city or village zoning ordinance authorizes the consideration and approval of special land uses or planned unit developments pursuant to sections 4a or 4b, or otherwise provides for discretionary decisions, the requirements and standards upon which the decisions are made shall be specified in the ordinance. . . .
>
> (2) Reasonable conditions may be required in conjunction with the approval of a special land use, planned unit development, or other land uses or activities permitted by discretionary decision.

Thus, MCL 125.584c(2), which allows the imposition of discretionary conditions, applies only to administrative approvals of special uses within a zone, not to the legislative act of zoning or rezoning. Rezoning requires amendment of a zoning ordinance, an act committed solely to the legislative body. *Sun Communities*, *supra*; MCL 125.584a. In the instant case, plaintiffs sought a rezoning of their property – a legislative amendment to the zoning ordinance – not approval of a special land use. Therefore, MCL 125.584c(2) does not apply.

Next, plaintiffs claim defendants' zoning ordinance does not impose a fencing requirement. We agree. Section 5.4 of the Rosebush Village Zoning Ordinance states, "Junk yards and open storage areas may be licensed only in the industrial district and shall be enclosed or screened from the view of any public street or road." As plaintiffs point out, the ordinance clearly provides an option for either an enclosure, like a fence *or* view screening.

Defendants argue that, because plaintiffs failed to adequately screen and contain the first

section of property that was rezoned in 1997, defendants were justified in requiring plaintiffs to enclose their property with a fence before granting another rezoning request. However, the ordinance does not countenance that approach; instead it allows the screening alternative in all cases without providing that fencing becomes the only option for a landowner who has previously failed to comply with the ordinance. Defendants admit that they had other options available to force compliance with the ordinance, apart from ignoring its screening option here.

Finally, plaintiffs assert constitutional claims of denial of substantive due process, violation of equal protection, and a governmental taking of their property. Because we have determined that plaintiffs are entitled to relief under the applicable statutory and ordinance provisions, we need not reach these constitutional questions. See *MacLean v State Bd of Control for Vocational Ed*, 294 Mich 45, 50; 292 NW 662 (1940) (constitutional questions need not be decided where a case may be disposed of without such a determination).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra