STATE OF MICHIGAN

COURT OF APPEALS

VILLAGE OF LINCOLN,

Plaintiff-Appellant,

v

VIKING ENERGY OF LINCOLN, INC,

Defendant-Appellee,

UNPUBLISHED
August 24, 2004

No. 246319
Alcona Circuit Court
LC No. 00-010619-CE

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition for defendant under MCR 2.116(C)(10) in an action brought by plaintiff to enforce section six of zoning ordinance 96-2. We affirm by concluding that section six is unconstitutional as applied to this defendant under these circumstances, but reverse the trial court's holdings regarding the remainder of ordinance 96-2.

We apply the de novo standard of review to both a trial court's grant of summary disposition, Beaudrie *v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001), as well as the underlying issue of constitutional law. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

There are two ways in which to challenge the constitutionality of an ordinance: a "facial" challenge and an "as applied" challenge. *Bruley v Birmingham*, 259 Mich App 619, 626; 675 NW2d 910 (2004). As the terms imply, a "facial" challenge is based upon the mere existence of and threatened enforcement of an ordinance, while an "as applied" challenge alleges a particular injury based upon the actual enforcement of the ordinance. *Id.* All parties agree that plaintiff in the present case presented the trial court with an "as applied" challenge to section six of the ordinance.[1]

[1] Moreover, plaintiff's verified complaint alleged that a nuisance and nonconforming use existed based only upon an alleged violation of section six of ordinance 96-2.

Plaintiff argues that the trial court erred in ruling that plaintiff's ordinance violates defendant's substantive due process rights. To establish a violation of substantive due process, a party must show that "there is no reasonable governmental interest being advanced by the present zoning classification," or that 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." *Kropf v Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974). Zoning ordinances are presumed to be reasonable unless the party challenging the ordinance shows otherwise. *Id*. A zoning ordinance, to be valid, must "'bear a real and substantial relationship to the public health, safety, morals, or general welfare.'" *Id*. at 151, quoting *Gust v Canton Twp*, 342 Mich 436, 442; 70 NW2d 772 (1955).

Plaintiff asserts that its ordinance is reasonably related to the public health, safety, and welfare because it seeks to limit dust, odors, and traffic associated with major emitting facilities. This argument is persuasive as far as the setback requirement in sections three and four of ordinance 96-2 is concerned. The 1996 report by the Michigan Department of Environmental Quality (MDEQ) on which plaintiff relies, as well as MCL 324.5502(1), establish a reasonable relationship between the thousand-foot setback requirement and the public health, safety, and welfare. We agree with plaintiff that whether defendant's fuel is technically classified as solid waste is irrelevant in determining the reasonableness of the setback requirement, because burning solid waste for fuel in a power plant has the same potential to generate traffic, dust, and odors as burning solid waste in a disposal facility.

As for section five of ordinance 96-2, which regulates the storage of defendant's fuel stockpiles, neither party presented any evidence concerning that section's reasonableness. The burden of rebutting the presumed reasonableness of a zoning ordinance is on the party challenging the ordinance. *Kropf, supra* at 158. Because defendant presented no evidence showing that section five was unreasonable, the presumption of reasonableness holds. *Northville Area Non-Profit Housing Corp v Walled Lake*, 43 Mich App 424, 432-433; 204 NW2d 274 (1972). Accordingly, the trial court erred in finding sections three, four and five of the ordinance unconstitutional.[2]

However, the trial court did not err in concluding that section six of ordinance 96-2 violates this defendant's right to substantive due process. Plaintiff's argument that section six is rationally related to the government interest in protecting citizens from dust and odors is unpersuasive. Defendant presented unrefuted evidence that burning more tire derived fuel (TDF) *decreases* the total amount of solid waste fuel used by defendant's facility by 69.8 tons per day and 24,885 tons per year. Defendant also showed that increasing TDF reduces the amount of particle board and pentachlorophenol-treated wood burned in defendant's facility, without increasing emissions over permissible levels. Furthermore, defendant presented evidence from the MDEQ indicating that burning TDF significantly *decreases* "the vast majority of emissions,

[2] We are uncertain why the trial court ruled on any section other than section six. Ordinance 96-2 has a severability clause (section seven), and as noted, plaintiff's verified complaint only sought enforcement of section six.

including particulate and most heavy metals" and *reduces* the emission of fine particulate matter by thirty tons per year. Therefore, we conclude that, as applied to this defendant, section six of plaintiff's ordinance is not reasonably related to a legitimate government interest because it restricts the burning of alternative fuels to levels that require burning a *larger* total amount of solid waste and producing *more* emissions, without any showing by plaintiff that the levels prescribed by section six are in some way related to the public welfare.

For these reasons, we agree with the trial court that, because of the unique circumstances regarding the amount and content of what this defendant was burning, defendant successfully rebutted the presumed reasonableness of section six. Once a presumption is rebutted by contrary evidence, the party in whose favor the presumption operated has the burden of going forward with the evidence. *Christiansen v Hilber*, 282 Mich 403, 406; 276 NW 495 (1937). Because plaintiff did not present evidence contrary to that offered by defendant to demonstrate the reasonableness of section six or its relationship to the public health, safety, and welfare, plaintiff's claim must fail.

Next, plaintiff claims it has authority to prohibit the burning of alternative fuels under the Natural Resources and Environmental Protection Act (NREPA). MCL 324.5542 expressly disclaims preemption of any local air pollution control ordinance "having requirements equal to or greater than the minimum applicable requirements of this part." While the NREPA may not preempt plaintiff's ordinance, it does not prove its reasonableness either, particularly where the ordinance does not purport to regulate pollution, but only the type and amount of material burned. Thus, the trial court did not err in holding that section six violates defendant's substantive due process rights.

Next, plaintiff claims the trial court erred in holding that ordinance 96-2 violates defendant's equal protection rights. We agree. Unless a zoning ordinance impinges on fundamental personal rights or is based upon a suspect classification, the distinctions made by the ordinance are presumptively constitutional and need be only rationally related to a legitimate government interest. *New Orleans v Dukes*, 427 US 297, 303; 96 S Ct 2513; 49 L Ed 2d 511 (1976). This Court has noted that municipalities may enact zoning ordinances that regulate unique land uses such as public utilities. *In re Acquisition of Lands*, 137 Mich App 161, 174; 357 NW2d 843 (1984). Therefore, defendant's ordinance does not run afoul of equal protection simply because it applies to a single entity within the village.

Here, we must determine whether plaintiff's classification is rationally related to a governmental objective. *Crego v Coleman*, 463 Mich 248, 269; 615 NW2d 218 (2000). The classification "major emitting facility" is defined by the Legislature in MCL 324.5501(o) as a stationary facility that emits one hundred tons or more per year of particulates, sulfur dioxides, volatile organic compounds, or oxides of nitrogen. Defendant is the only major emitting facility in the village. Defendant contends that this classification has no rational basis because plaintiff has not shown that defendant's emissions are more dangerous than those of any other industrial user. Such a showing is not necessary, so long as such a fact may "reasonably be assumed." *Crego*, *supra* at 259-260. We hold that the classification of "major emitting facility" is rationally related to the health and safety of the public because it may "reasonably be assumed" that those facilities are responsible for heightened levels of pollution. Therefore, the classification is valid and ordinance 96-2 does not violate defendant's equal protection rights.

Next, plaintiff claims the trial court erred in holding that public policy did not bar a challenge to plaintiff's enactment of the zoning ordinance. We agree. In *Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482; 608 NW2d 531 (2000), this Court dismissed a challenge to the procedures used to enact a zoning ordinance brought nearly ten years after enactment of the ordinance, stating, "Where a zoning ordinance is not challenged until several years after its enactment, a challenge on the ground that the ordinance was improperly enacted is precluded on public policy grounds." *Id*. at 493, citing *Richmond Twp v Erbes*, 195 Mich App 210, 217; 489 NW2d 504 (1992), overruled on other grounds, *Bechtold v Morris*, 443 Mich 105, 108-109; 503 NW2d 654 (1993); *Northville Area Non-Profit Housing Corp, supra* at 434-435.

In the instant case, plaintiff enacted ordinance 96-2 in February 1997. Defendant first challenged the ordinance in March 2001. This Court has previously held that a lapse of four years after the enactment of a zoning ordinance bars a procedural challenge to a zoning ordinance. *Northville, supra* at 435. Therefore, we conclude that a challenge to plaintiff's ordinance on procedural grounds is barred as a matter of public policy. However, this public policy applies only to challenges based on *procedural irregularities* in the enactment of the ordinance; it does not bar defendant's constitutional challenges to plaintiff's ordinance. *Id*. at 434.

We affirm the trial court's judgment that section six of ordinance 96-2 as applied violates defendant's substantive due process rights. We reverse the remainder of the trial court's judgment. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell