STATE OF MICHIGAN

COURT OF APPEALS

ARTHUR G. RUDD and VERNON KORTERING,

Plaintiffs-Appellants,

v

CITY OF MUSKEGON, MUSKEGON PROPERTIES COMPANY, INC., and MAC 1, INC.,

Defendants-Appellees.

UNPUBLISHED
September 14, 2004

No. 246958
Muskegon Circuit Court
LC No. 02-041514-CZ

Before: Griffin, P.J., Wilder and Zahra, JJ.

PER CURIAM.

Plaintiffs filed suit against defendants to rescind the conveyances of six parcels of land from defendant City of Muskegon (hereinafter "the City") to defendant MAC 1, Inc., which plaintiffs allege were made for no or inadequate consideration. The trial court granted summary disposition in favor of defendants and denied plaintiffs' motion for summary disposition. Plaintiffs appeal as of right. We affirm.

This case arises from the City's plans to redevelop the Muskegon Mall, located in the downtown area of the City. In 1989, the City entered into an agreement with defendant Muskegon Properties Company, Inc., to develop and expand the mall. MAC 1 is affiliated with Muskegon Properties. As part of the plan, the City acquired certain properties adjacent to the mall to allow for expansion. There is no dispute that the City spent substantial sums of money to acquire the properties. The properties were conveyed to MAC 1 in 1994, 1997 and 2000, by quitclaim deeds. Ultimately, the project failed when a third anchor store could not be secured for the mall and a competing mall was constructed in the area. One of the Muskegon Mall's existing anchor stores left to relocate to the other mall. Other tenants soon followed and the Muskegon Mall closed in 2001.

Plaintiffs allege that the City's conveyances of six parcels of property adjacent to the mall to MAC 1 violated the state constitution because the conveyances were made for no or

inadequate consideration.[1] Plaintiffs' issues all involve Const 1963, art 7, § 26, and art 9, § 18. Article 7, § 26 provides:

> Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose.

Article 9, § 18 provides:

> The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution.
>
> Investment of public funds. This section shall not be construed to prohibit the investment of public funds until needed for current requirements or the investment of funds accumulated to provide retirement or pension benefits for public officials and employees, as provided by law.

I.

---

[1] Although the trial court did not address jurisdiction, we question plaintiffs' standing in this action. Plaintiffs claim that this action is brought on behalf of the taxpayers of defendant city. "Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large." *Waterford School Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980). However, the Revised Judicature Act permits litigation to prevent the illegal expenditure of state funds or to test the constitutionality of a related statute "in the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside." MCL 600.2041(3). "A taxpayer lacks standing unless these requirements are met." *Waterford, supra* at 663. Here, plaintiffs do not challenge the constitutionality of a statute or an illegal expenditure of state funds.

Yet, even though not found in any specific statutory or court rule grant of standing to sue, our Supreme Court has judicially sanctioned actions whereby municipal taxpayers are allowed to challenge unlawful municipal acts that injure the plaintiffs as taxpayers. See *Menendez v Detroit*, 337 Mich 476, 482, 60 NW2d 319, 323 (1953). However, *Menendez* requires that the plaintiff allege a particular kind of injury:

> [I]t is clearly recognized that prerequisite to a taxpayer's right to maintain a suit of this character against a unit of government is the threat that he will sustain substantial injury or suffer loss or damage as a taxpayer, through increased taxation and the consequences thereof. [*Id.*]

Here, it does not appear plaintiffs have shown that the defendant's action will result in increased taxation.

Plaintiffs first argue that these provisions were violated because the City lent its credit to MAC 1 in these transactions. We disagree.

> Our goal in construing our Constitution is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers. To this end, we apply the rule of "common understanding." In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have "ratified the instrument in the belief that that was the sense designed to be conveyed." [*People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004) (internal citation omitted).]

Thus, if the meaning of the constitutional language is plain, resort to extrinsic evidence is inappropriate. *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000).

Pursuant to the clear terms of art 9, § 18, the state cannot grant its credit to anything not authorized by the Constitution. In *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 119-120; 422 NW2d 186 (1988), our Supreme Court observed that art 9, § 18 applies to local governments as political subdivisions of the state. Art 7, § 26 expressly addresses the ability of local municipalities to lend credit. This Constitutional provision limits the extension of municipal credit for public purpose, authorized by law. If the transaction involves a loan of municipal credit, then the two requirements in art 7, § 26 must be considered. However, if there is no loan of credit involved, then neither art 9 § 18 nor art 7, § 26 are implicated. *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 119-120; 422 NW2d 186 (1988).

In *Wayne Co Bd of Comm'rs v Wayne Co Airport Authority*, 253 Mich App 144, 181-182; 658 NW2d 804 (2002), this Court held that art 9, § 18 was not violated by the transfer of property. This Court reiterated the following principles in conjunction with the lending of credit:

> Our Supreme Court has held that where the state acquires or transfers something of value, Const 1963, art 9, § 18 is not violated. *Alan v Wayne County*, 388 Mich 210, 325; 200 NW2d 628 (1972). Courts will respect the judgment of the Legislature unless there is a clear abuse of discretion. *Alan*, pp 326-327. Const 1963, art 9, § 18 is violated only when the state creates an obligation legally enforceable against it for the benefit of another. *Sprik v Regents of the Univ of Mich*, 43 Mich App 178, 190-191; 204 NW2d 62 (1972). [*Petrus v Dickinson Co Bd of Comm'rs*, 184 Mich App 282, 297; 457 NW2d 359 (1990).]
>
> Plaintiffs complain that Act 90 violates the lending of credit provision because it requires the county to transfer to the WCAA all beneficial use and income of property acquired and used in conjunction with airport operations. With respect to the revenue bonds, however, the obligation followed the transfer of the revenues and no lending of credit occurred. Moreover, in enacting Act 90, the state did not create an obligation legally enforceable against the county for the benefit of the WCAA. See *Petrus, supra*.

Here, plaintiffs have failed to show that the conveyances of property to MAC 1 involved a lending of credit by the City. There is no evidence that the City's transfer of property created an obligation legally enforceable against it for the benefit of anyone. Further, "no 'lending of credit' is involved in a transfer of property[,] [] whether the transfer is made with or without consideration." *Sinas v City of Lansing*, 7 Mich App 464, 469; 151 NW2d 858 (1967), citing *Sommers v City of Flint*, 355 Mich 655; 96 NW2d 119 (1959).

Nonetheless, plaintiffs argue that the transactions were not supported by adequate consideration and, therefore, were unconstitutional. As previously discussed, the transfer of property did not violate the state constitution as a lending of credit. However, where a municipality transfers property, there must generally be a fair exchange of value for value. *Alan v Wayne Co*, 388 Mich 210, 325, 330; 200 NW2d 628 (1972). A transfer of property by a governmental body that is not supported with adequate consideration may violate art 9, § 18:

> There is another means by which tax increment bonds might be found outside the definition of a loan of credit, as contemplated in art 9, § 18. If the state or a municipality receives value in return for what it gives away, there is no loan of credit under the constitution. We articulated this rule in *Alan, supra*, p 325:
>
> "Michigan case law interpreting Const 1963, art 9 § 18 is neither ample nor precise. It is clear the state or its subdivision the county cannot give anything away without consideration. (Citations omitted.) Note that the constitution as far as the state and county are concerned makes no difference between a public and a private purpose in this regard. When the state acquires or transfers something of value in return for value the state does not offend Const 1963, art 9, § 18."
>
> Normally, "the Legislature or Executive Branch is the judge of what is fair value in matters in which it is concerned . . . . Their judgment, however, is subject to judicial review for abuse of judgment." *Id.*, p 330. [*Advisory Opinion of 1986 PA 281, supra* at 126-127.]

As this passage indicates, it is for the legislative and executive branches of government to determine if value was obtained, but courts will intervene if an abuse of discretion is shown.

> This Court will assume that the officers of the Legislative and Executive Branches will do their duty and exercise a proper judgment. The courts will respect that judgment unless there has been a clear abuse of discretion. Obviously, if the state or county were to make a valuable grant for next to no consideration, the courts would be forced to regard that not as an exercise of discretion, but an abuse of discretion. [*Alan, supra* at 326-327.]

So long as the governmental authorities act within their discretion and do not transcend it, or act arbitrarily or unreasonably, courts will not intervene even if mistakes were made. *Id.* at 327 n 76.

The transactions at issue in this case were supported by adequate consideration. The conveyances were part of a plan to develop and expand the mall. As part of its agreement to

develop the project, Muskegon Properties assumed many responsibilities, including acquiring other property, renovating the mall, and expending other services on this project. According to the president of Muskegon Properties and MAC 1, Muskegon Properties spent up to $9 million in developing this project. Muskegon Properties also gave up its right to pursue payments it was due under the agreement. Plaintiffs have not shown that the properties were conveyed for inadequate consideration.

II.

We also find lacking in merit plaintiffs' argument that the City could not convey the properties to MAC 1 as Muskegon Properties' affiliate. The agreements between the City and Muskegon Properties allowed Muskegon Properties to convey the properties to its affiliate. Some of the agreements specifically allowed the property to be conveyed to MAC 1. That Muskegon Properties provided the consideration, and not MAC 1, does not invalidate these transfers. See *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949).

III.

Plaintiffs also argue that the conveyances of the properties to MAC 1 violate the state constitution because they did not involve a public purpose. Because we have concluded that there was no lending of credit involved, we need not address this argument. *Advisory Opinion on 1986 PA 281, supra* at 119-120; *Gaylord, supra* at 292. However, the existing record demonstrates that at the time the properties were conveyed to MAC 1, it was for the purpose of developing the City's downtown district, consistent with the Downtown Development Authority Act, MCL 125.1651 *et seq.* The conveyances occurred while the project was still active and before the mall was forced to close. The development of the City's downtown area by expansion of the mall was a valid public purpose even if the private sector may have also benefited from the project. *In re Advisory Opinion on 1986 PA 281, supra* at 129-132. See also MCL 125.1657(i). The ultimate failure of the project does not invalidate its public purpose.[2]

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

---

[2] Plaintiffs argue that our Supreme Court's recent decision in *Wayne County v Edward Hathcock*, ___ Mich ___; 684 NW2d 765 (2004), is instructive on the phrase "public purpose" contained in Const 1963, art 7 § 26. *Hathcock* involved a county's attempted condemnation of privately-owned land, not a transfer of city-owned land to a private entity. Further, the *Hathcock* court made it clear that the phrases "public use" and "public purpose," are not synonymous, and to treat them as such is improper. *Id.* at 784-785. Therefore, we reject plaintiffs suggestions that the phrase "public use" is instructive to interpreting the phrase "public purpose."