

STATE OF MICHIGAN
COURT OF APPEALS

PETOSKEY INVESTMENT GROUP, LLC,

Plaintiff-Appellant,

v

BEAR CREEK TOWNSHIP,

Defendant-Appellee,

and

ZACHARY M. KUZNICKI,

Intervening-Defendant.

UNPUBLISHED

December 2, 2004

No. 246641

Emmet Circuit Court

LC No. 01-006542-CH

WALLACE WEBURG, JR.,

Plaintiff-Appellant,

v

BEAR CREEK TOWNSHIP,

Defendant-Appellee,

and

PETOSKEY INVESTMENT GROUP, LLC,

Intervener.

No. 248203

Emmet Circuit Court

LC No. 02-007393-AW

PETOSKEY INVESTMENT GROUP, LLC,

Plaintiff-Appellant,

v

No. 248801

Emmet Circuit Court

BEAR CREEK TOWNSHIP,

LC No. 01-006542-CH

Defendant-Appellee,

and

ZACHARY M. KUZNICKI,

Intervening-Defendant/Appellee.

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

These consolidated cases arise from the dispute between the terms of a consent judgment that altered the zoning of a parcel of property to allow for mixed-use development, and citizen action to preclude any change in zoning. After a consent judgment was approved by defendant township, citizens took action to preclude the project from continuing by requesting that the issue of the parcel's zoning be subject to referendum. The developer moved the trial court to enforce the consent judgment and prevent any referendum from occurring. The township asserted that it was acting in good faith to abide by the terms of the consent judgment, but took no position and submitted no legal argument regarding the validity of the consent judgment. The trial court denied the request to enforce the consent judgment and preclude any referendum.¹ After the referendum was completed, the property owner filed a quo warranto action, alleging irregularities in the referendum process and constitutional violations. The trial court denied the quo warranto petition.² We reverse the trial court's denial of the motion to enforce the consent judgment and the conclusion that the referendum could proceed.³

¹ This ruling is the subject of Docket No. 246641.

² This ruling is the subject of Docket No. 248203.

³ At oral argument, defendant township asserted that the appeal had been rendered moot based on a settlement agreement reached in federal court. After the blanket assertion, we ordered the parties to submit supplemental briefs. Review of the federal settlement agreement reveals that it was not executed between the parties to this appeal, but rather between plaintiff Petoskey Investment Group, LLC, and Emmet County. This federal settlement agreement contained the following provision:

11. All the provisions of this Consent Judgment shall be binding upon, and inure to the benefit of Plaintiff and Defendant, and their respective heirs, successors, assigns, commissions, affiliates and transferees, and reference in this Consent Judgment to Plaintiff and/or the County shall also mean and refer to Plaintiffs' and County's successors and/or assigns. It is the intent of the parties to control the development of the Property with this Consent Judgment, regardless of any

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Plaintiff, Petoskey Investment Group, LLC, met with defendant Bear Creek Township's planning commission, seeking to rezone property from one family residential and farm and forest to mixed-use planned unit development. Plaintiff alleged that the current zoning was unsuitable in light of the fact that the surrounding area consisted of commercial development. Although the planning commission voted to approve the project, defendant's board did not approve the proposed rezoning. Thereafter, plaintiff filed suit, alleging that the decision to deny the rezoning was arbitrary and capricious as well as various constitutional violations.

The parties entered into a consent judgment that allowed for rezoning of the parcel to mixed use planned unit development with retail/commercial and residential uses. This agreement provided that defendant "duly approved" the terms and agreed to be bound by the judgment. The judgment set forth the size of the respective portions of the mixed used development. It further provided that "PUD-2 development" was "authorized by this Consent Judgment." The agreement expressly provided that preliminary approval for the project was granted, and that defendant would not interfere with any necessary approvals. Additionally, the agreement provided that any conflict in zoning would be governed by the terms of the consent judgment. Moreover, township successors were to be bound by the terms of the consent judgment.

While the litigation was pending, residents of defendant township did not seek to intervene in the action, and the consent judgment was not appealed by defendant township. However, after the consent judgment was approved, defendant advised plaintiff of its intent to publish a notice of amendment to interim zoning ordinance to conform to the provisions of the consent judgment based on the request of a township resident. Plaintiff objected to the publication of an amendment and an attempt to invoke the referendum process to circumvent the

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other prior legal judgment, including the March 26, 2002 Consent Judgment entered in Emmet County Circuit Court. Plaintiff shall not be prohibited from seeking redress in any other proceeding against other parties.

The burden of establishing mootness is a heavy one. *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 306; 633 NW2d 357 (2001). To deprive a party seeking redress in court by having the appeal dismissed as moot, the party requesting mootness must make a "very convincing showing that the opportunity for an appellate court to review the matter should be denied." *Id.* We will not reach moot questions or declare principles or rules of law that have no practical legal effect unless the issue is one of public significance and likely to recur, yet evade judicial review. *Federated Publications, Inc v Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002). Defendant township has failed to establish that the issue is moot. *MGM, supra*. The federal litigation did not involve the parties to this appeal. Irrespective of the language of the federal settlement, indicating its intent to supersede the consent judgment in this case, the federal settlement agreement does not resolve the significant issue of the application of the referendum process to the consent judgment. Additionally, the federal settlement allows this appeal to proceed, by noting that plaintiff was entitled to seek redress in other proceedings against other parties. Accordingly, the mootness challenge based on the federal litigation does not preclude a decision in this case.

terms of the consent judgment. Defendant township alleged that it was acting in good faith to abide by the terms of the consent judgment, but failed to present any legal argument in support of enforcement of the judgment and in opposition to the submission of the issue of rezoning to a referendum.⁴ The trial court denied the motion to enforce the consent judgment and to intervene in the referendum process.⁵ These consolidated appeals seek to enforce the terms of the consent judgment and prevent the referendum process from circumventing its terms.⁶

An agreement to settle a pending lawsuit constitutes a contract and is governed by legal principles applicable to the construction and interpretation of contracts. *Columbia Associates, LP v Dep't of Treasury*, 250 Mich App 656, 668-669; 649 NW2d 760 (2002). The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). If the contract language is clear and unambiguous, its meaning presents a question of law for the courts to determine. *UAW-GM Human Resource Center v KSL Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

The propriety of submitting a zoning ordinance for referendum following entry of a consent judgment was addressed in *Green Oak Twp v Munzel*, 255 Mich App 235; 661 NW2d 243 (2003). In *Green Oak*, the developer and township entered into an agreement to rezone acres of land from residential farming to residential mobile home park. *Id.* at 236. The consent judgment was approved by a majority of the township board, and judgment was entered by the circuit court. After the filing of the consent judgment, a property owner in the township filed a

⁴ The trial court granted the petition for intervention filed by a citizen, noting that without the intervention, the trial court would be forced to decide the issue without benefit of hearing argument from both sides. The propriety of allowing citizen intervention is not an issue challenged on appeal.

⁵ After the referendum was held, the property owner of the parcel and plaintiff Petoskey Investment Group, as an intervener, filed a petition for quo warranto to challenge the process and the constitutionality of the referendum in light of the consent judgment. Quo warranto is an extraordinary remedy provided for by law. *Sobocinski v Quinn*, 330 Mich 386, 389; 47 NW2d 655 (1951); see MCR 3.306. In light of our conclusion that plaintiff was entitled to relief based on the terms and enforcement of the consent judgment and appellate case law, we need not address the extraordinary remedy of quo warranto.

⁶ Plaintiff also filed a delayed application for leave to appeal after the trial court declined the initial request to enforce the consent judgment. This delayed application was denied by order of this Court dated November 4, 2002 (Docket No. 244243). However, on May 30, 2003, the Supreme Court remanded the case to this Court for consideration as on leave granted (Docket No. 248801). Based on the resolution of the issues in docket no. 244641, we need not address the issues raised in docket no. 248801. Additionally, we do not reach the issue of any claimed violation of the separation of powers. Judicial review of constitutional questions must not be decided if a case may be disposed of on other grounds. *J & J Construction Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 733-734; 664 NW2d 728 (2003).

notice of intent to file a petition for referendum addressing the adoption of the terms of the consent judgment pursuant to the township rural zoning act (TRZA), MCL 125.282. This statute allows a registered elector in a township to submit a petition requesting that a zoning ordinance be submitted to the residing electors in the township. *Id.* at 236-237.

After examining the plain language of MCL 125.282, this Court concluded that the right of referendum applied to zoning ordinances only, and the consent judgment was “neither the promulgation of a zoning ordinance nor an amendment of a zoning ordinance as contemplated by MCL 125.282.” This Court rejected the contention that the right of referendum on the zoning issue was permissible despite the terms of the consent judgment, noting that the argument would “be in conflict with the plain language of the statute, but would also lead to an unreasonable result whereby any zoning board decision could potentially be subject to a right of referendum.” *Id.* at 241. Additionally, this Court noted that the effect of the consent judgment was “akin to a use variance,” in that, the zoning board had given permission to allow a use in a zoning district that would not otherwise be allowed. *Id.* at 242-243.

Although defendant township did not take a position with regard to this issue in the trial court, on appeal, it alleges that the trial court’s decision was consistent with the *Green Oak* decision. Specifically, defendant alleges that the *Green Oak* panel held that a right of referendum exists when there is an enactment of a new ordinance or an amendment to an existing ordinance, and the trial court held that this was an amendment to an existing ordinance. We disagree. The *Green Oak* Court concluded that MCL 125.282 provides for a right of referendum as applied to a *zoning ordinance*, and a consent judgment does not comport with the requirements of a zoning ordinance or amendment as contemplated by MCL 125.282. *Id.* at 240-241. Moreover, this Court held that the impact of the consent judgment was akin to a variance. *Id.* at 242.

In the present case, a new zoning ordinance was not at issue. Additionally, we note that the consent judgment in the present case provided that the agreement was approved in accordance with applicable law, provided that the PUD development was deemed approved, set forth the terms and limitations on the type of development authorized, and provided that, *where there was any conflict in zoning, it would be resolved in favor of the consent judgment*. Consequently, the attempt to distinguish this case from the scenario presented in *Green Oak* is without merit. Additionally, we agree with the *Green Oak* panel that terms of the consent judgment in this case could readily be construed as a variance.⁷ Accordingly, the trial court erred in denying the motion to enforce the consent judgment and allowing the issue of a referendum with regard to the zoning of the parcel addressed in the consent judgment.⁸

⁷ Although defendant township asserted that it was acting in good faith to abide by the judgment, it did not note that the parties’ modification of zoning could easily be classified as a variance or special use exception.

⁸ We note that a brief was filed by amicus curiae asserting that the right of referendum should be taken very seriously and that municipalities seek to retain the flexibility of allowing a right of referendum on an issue in a consent judgment where appropriate. Any holding that a referendum
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Reversed.

/s/ Stephen L. Borrello
/s/ Karen M. Fort Hood

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may be held on issues resolved in a consent judgment would obviate the settlement process. Municipalities would be hard pressed to find a developer willing to enter into a settlement agreement only to have the issues submitted to a referendum and rejected. Moreover, the contention by amicus curiae that the appeal is moot based on the expiration of the township zoning is without merit. This assertion ignores the language of the settlement agreement providing that the agreement governs when in conflict with any other zoning and is binding on successors. *Sobczak, supra*.