

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UNPUBLISHED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.

MURRAY, J. (*dissenting*)

I do not disagree with the majority's analysis of the substantive law raised by the parties in this appeal. However, in my view, the opinion is merely advisory in nature, for the appeal in this case is moot. Therefore, I must dissent.

In *Morales v Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003), we set forth the well-known standard for determining whether a case is moot:

This Court's duty is to consider and decide actual cases and controversies. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002). "To that end, this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Id.* This Court will entertain cases that are technically moot if the issues involved are of public significance and are likely to recur in the future and yet evade judicial review. *In re Wayne Co Election Comm*, 150 Mich App 427, 432; 388 NW2d 707 (1986). Generally, a case is not moot if the issues sought to be litigated are capable of repetition, yet evade review. *Ferency v Secretary of State*, 139 Mich App 677, 681; 362 NW2d 743 (1984).

Although the burden of proving mootness is a heavy one, *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 306; 633 NW2d 357 (2001), here it is clearly established. There is no dispute that the only issue on appeal in this case is whether the trial court properly allowed a referendum to occur in which the voters ultimately rejected plaintiff Petoskey Investment Group's (plaintiff) proposed development. Plaintiff was seeking to overturn that decision on appeal so that the consent judgment, which granted plaintiff the right to develop the property, would be enforced.

However, while this appeal was pending, plaintiff and Emmett County settled the case of *Petoskey Investment Group, LLC v Emmett County*, Docket No. 5: 04 CV 0059, which was filed

in the United States District Court for the Western District of Michigan. In that case, plaintiff sued Emmett County to seek approval of the same project at issue in this case.¹ The resulting consent judgment, signed by the district court on September 7, 2004, provides plaintiff the authority to build the project on the same property that was at issue in this case. There is no dispute about these facts. It is therefore abundantly clear that plaintiff has obtained permission from the only relevant zoning authority to build the same (if not larger) project as they were seeking to do by successfully prosecuting this appeal.

As a result of the foregoing, plaintiff can now proceed to build its project without any decision from this Court. We can therefore provide plaintiff with no meaningful relief in this case, and it is moot. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 537 (2000) (plaintiffs challenge to an earlier conditional use permit was moot because defendant obtained a new conditional use permit that was unchallenged); *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (“It is evident that regardless of our decision, petitioners can now proceed under the amended statute to obtain the same permission granted by the circuit court and that is the subject of these appeals.”).

Plaintiff’s arguments that this case is not moot do not hold water. Our constitutional duty is to decide the live, actual controversies that are raised by the parties in each case. *Princeton Univ v Schmid*, 455 US 100, 103; 102 S Ct 867; 70 L Ed 2d 855 (1982); *Federated Publications, Inc, supra* at 112. It is certainly not within our constitutional duty to decide issues that will have no bearing on this case, but will be helpful to one party in another case. Mootness is focused on the outcome of this case, not an unrelated case. *Federated Publications, Inc, supra* at 112. Moreover, the federal court is more than able to resolve any state law issue regarding the validity of the referendum if necessary to determine an element of damages in that case.

Additionally, plaintiff’s argument that *if* the consent judgment in this case was held invalid, it would be entitled to reopen its entire case, is without merit. The proper focus is not on what would occur if the appellant lost, but what remedy could be awarded if it won. *Attorney General v Pub Service Comm*, 244 Mich App 401, 407; 625 NW2d 786 (2001). The argument is also speculative, and fails to recognize that plaintiff has not only obtained permission to build the project, but that it has another federal lawsuit seeking damages for a temporary taking.

Finally, although this case involves an issue of public significance, it is not the sort likely to evade judicial review. *Morales, supra* at 32. Indeed, *Green Oak Twp v Green Oak MHC*, 255 Mich App 235; 661 NW2d 243 (2003), is proof enough of that.

In sum, this case is moot. Plaintiff has, through a separate federal lawsuit, obtained all the relief it could obtain if it was successful in this appeal. Other than imprudently issuing an advisory opinion, we can offer no further relief to plaintiff.

/s/ Christopher M. Murray

¹ Emmett County was sued, rather than Bear Creek Township, because Emmett County was responsible for zoning issues in the township once the township’s zoning ordinance expired.