

STATE OF MICHIGAN
COURT OF APPEALS

LJS PARTNERSHIP,

Plaintiff-Appellant,

and

RONALD W. SABO, Trustee of the BERNARD C.
NORKO TRUST, and WILLIAM J. BISHOP,

Plaintiffs,

v

FENTON CHARTER TOWNSHIP,

Defendant-Appellee,

and

FENTON CHARTER TOWNSHIP CLERK and
GENESEE COUNTY CLERK,

Defendants,

and

FENTON TOWNSHIP RESIDENTS
ASSOCIATION,

Intervening Defendant-Appellee.

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff LJS Partnership (plaintiff) appeals by leave granted two lower court orders granting intervening defendant Fenton Township Residents Association's (FTRA) motion to intervene in plaintiff's motion to enforce its consent judgment with defendant Fenton Township (defendant) and granting FTRA's motion to set aside that consent judgment. We reverse.

UNPUBLISHED

December 28, 2004

No. 248311

Genesee Circuit Court

LC No. 01-071444CZ

The facts of this case are essentially undisputed. In February 1998 plaintiff's request that defendant rezone property owned by plaintiff from AG (agricultural) to RMH (residential manufactured housing) to permit a 598-unit manufactured housing development was denied, as was the request for a use variance. After plaintiff's engineer met with township officials to create a less dense site plan containing nearly four hundred units, plaintiff submitted a new request for rezoning. This request, as well as plaintiff's subsequent request for a use variance, was also denied.

Plaintiff filed suit, challenging the constitutionality of the AG zoning classification as applied to its property. The parties ultimately entered into settlement negotiations and reached an agreement as to terms of a consent judgment. After a public meeting regarding the advantages and disadvantages of the terms of the consent judgment, the judgment was approved by defendant's board of trustees. The trial court entered the consent judgment on December 20, 2002. Thereafter, a group of township residents filed a petition for referendum pursuant to MCL 125.282, seeking a vote as to whether defendant should proceed with the consent judgment or should continue with litigation. Defendant approved the petitions for referendum and set a date for the referendum election.

Shortly thereafter, this Court issued its decision in *Green Oak Twp v Munzel*, 255 Mich App 235; 661 NW2d 243 (2003). Plaintiff filed a motion to enforce the consent judgment and to enjoin the referendum, asserting that *Green Oak* held that a consent judgment in a zoning dispute is not subject to a referendum under MCL 125.282. The court denied plaintiff's motion for a declaration that the zoning referendum was invalid and scheduled an evidentiary hearing regarding the intent of the consent judgment.

A referendum election was held and the township residents voted in favor of the continuance of litigation and against approval of the consent judgment. The trial court granted FTRA's motion to intervene in the case, limited to FTRA's participation in the evidentiary hearing. At that hearing, both plaintiff and defendant agreed that the consent judgment was valid and enforceable and not subject to referendum pursuant to this Court's holding in *Green Oak*. The trial court agreed with FTRA's position that the consent judgment was subject to the referendum.

Plaintiff argues that the trial court erred in finding that the consent judgment constituted a rezoning of the parcel under the TRZA and thereby invoked the right of referendum. Thus, plaintiff argues that the trial court erred by setting aside the consent judgment. We agree.

Whether a consent judgment is subject to a right of referendum under § 12 of the township rural zoning act (TRZA), MCL 125.282, is a question of law subject to review de novo. *Green Oak, supra* at 235. In *Green Oak, supra*, this Court held that consent judgments settling zoning litigation do not constitute zoning ordinances and are therefore not subject to referendum. The facts in *Green Oak* are similar to those in this case:

Defendant Kenneth B. Lipshutz petitioned the Green Oak Township Board to rezone 233 acres of land from RF (residential farming) to RMH (residential mobile home park), permitting the development of a 912-unit mobile home park. According to the township ordinance set forth in the record, mobile home communities are allowed only in districts zoned RMH. See, e.g., *Green Oak*

Township Ordinances, § 4.7.3. The board denied Lipshutz's petition. After the board's denial, defendants Lipshutz and Green Oak MHC (GOMHC), landowners of the property at issue, sued the township in the Livingston Circuit Court and reached a settlement with the township. The terms of the settlement were reduced to a consent judgment, which was accepted by a four-to-three vote of the board members, and the judgment was entered by the circuit court. The judgment allowed the development of the mobile home park for which Lipshutz initially petitioned, despite the zoning of the property.

Herbert Munzel, a property owner in Green Oak Township, filed a notice of intent to file a petition with the township clerk for a referendum on the adoption of the terms of the consent judgment pursuant to § 12 of the township rural zoning act (TRZA), MCL 125.282. That provision allows a registered elector residing in the township to submit a petition requesting that a zoning ordinance be placed before the other electors residing in the township. Thereafter, the township was presented with over one thousand signatures asking that the issue be placed on the ballot in the upcoming November election. Next, the township sued Munzel, Phil Berg (another petition circulator), Lipshutz, and GOMHC, to seek a declaratory judgment regarding whether a referendum could be properly invoked to overturn the consent judgment. GOMHC then filed a motion to declare the referendum petition invalid and to enjoin certification of the petition.

Essentially, the township, GOMHC, and Lipshutz argued that the consent judgment was valid because it did not in fact constitute a rezoning of the property, and, therefore, no right of referendum existed. On the other hand, Munzel claimed that the consent judgment actually did constitute rezoning while "disenfranchising the people[']s right to a referendum." Munzel maintained that the ordinance only allows mobile home parks in established zones. Nonetheless, the trial court ruled that the TRZA does not allow a referendum to be taken on a consent judgment. [*Id.* at 236-237.]

The Court looked to the language of MCL 125.282 to determine whether a referendum is permitted on a consent judgment. The statute specifically states:

Within 7 days after publication of a zoning ordinance under section 11a, a registered elector residing in the portion of the township outside the limits of cities and villages may file with the township clerk a notice of intent to file a petition under this section. If a notice of intent is filed, then within 30 days following the publication of the zoning ordinance, a petition signed by a number of registered electors residing in the portion of the township outside the limits of cities and villages equal to not less than 15% of the total vote cast for all candidates for governor, at the last preceding general election at which a governor was elected, in the township may be filed with the township clerk requesting the submission of an ordinance or part of an ordinance to the electors residing in the portion of the township outside the limits of cities and villages for their approval. Upon the filing of a notice of intent, the ordinance or part of the ordinance

adopted by the township board shall not take effect until 1 of the following occurs:

(a) The expiration of 30 days after publication of the ordinance, if a petition is not filed within that time.

(b) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is inadequate.

(c) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is adequate and the ordinance or part of the ordinance is approved by a majority of the registered electors residing in the portion of the township outside the limits of cities and villages voting thereon at the next regular election which supplies reasonable time for proper notices and printing of ballots, or at any special election called for that purpose. The township board shall provide the manner of submitting an ordinance or part of an ordinance to the electors for their approval or rejection, and determining the result of the election. [MCL 125.282.]

This Court noted that the language of the statute provided for the right of referendum only with regard to *zoning ordinances*. *Green Oak, supra* at 235. The statute does not refer to variances, exceptions, special use permits or other types of zoning actions. This Court interpreted the term “ordinance” as having a particularized meaning when used in the Township Rural Zoning Act (TRZA) and noted that “the enactment of a zoning ordinance is considered a ‘distinct legislative act.’” *Id.*

The Court concluded that the consent judgment in that case did not meet the “particularized requirements of a zoning ordinance or amendment” and that it therefore did not constitute the promulgation or amendment of a zoning ordinance under MCL 125.282. *Id.* at 241. It found that applying the statute to a consent judgment would be contrary to the plain language of the statute. *Id.*

Green Oak is dispositive of the penultimate legal issue presented. The holding in *Green Oak* was not premised on the presence or absence of any particular language in the consent judgment, but rather on the fact that a consent judgment does not meet the particularized definition of, and requirements for, a zoning ordinance as provided by the Legislature in the TRZA. *Id.* at 241. Because the consent judgment settling the zoning litigation did not trigger a right of referendum,¹ the trial court erred by setting aside the consent judgment.

¹ This case is distinguishable from *Inverness Mobile Home Community, Ltd v Bedford Township*, 263 Mich App 241; ___ NW2d ___ (2004). In that case, a consent judgment was entered that resolved a lawsuit concerning a zoning dispute. Paragraph ten of the consent judgment provided that “Defendant and its agents, employees, representatives, and officials hereby agree to amend the Bedford Township Master Plan, adopted in July 1993, to master plan another parcel of land in Bedford Township (hereinafter “the Future Property”) for a new manufactured home

(continued...)

Reversed.²

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

(...continued)

community development.” This Court concluded that the consent judgment, directing that the master plan would be amended by a future township board to permit a manufactured housing development, constituted an act that impermissibly contracted away the legislative powers of a future governing body. The Court stated that “the precise terms of the disputed consent judgment make it clear that the intent of the agreement is legislative in nature.” The Court expressly distinguished *Green Oak, supra*, noting that *Green Oak* involved a use variance that neither resulted in a change in the zoning ordinance nor contemplated a future change in zoning. Although the consent judgment in the present case states that the zoning classification of the parcel shall be changed from its current zoning classification of AG to RMH, the consent judgment provides for a particular and constrained use of the property that is an exception to its AZ zoning classification, but does not afford plaintiff the ability to use the property to the full extent of an RMH classification. Despite the language, the consent judgment remains akin to a variance, not to a zoning ordinance.

² In light of our resolution of this case, we need not address plaintiff’s argument that the trial court erred by allowing the FTRA to intervene in the post-judgment proceedings regarding plaintiff’s motion to enforce the consent judgment.