

STATE OF MICHIGAN
COURT OF APPEALS

CRAIG NELSON,

Plaintiff-Appellee,

v

CITY OF PONTIAC,

Defendant-Appellant.

UNPUBLISHED

February 1, 2007

No. 269536

Oakland Circuit Court

LC No. 05-068766-CH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court order denying its motion for summary disposition. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Plaintiff owned certain rental property in the city of Pontiac and filed this action after his property was condemned pursuant to provisions of state statute and city ordinance. Plaintiff challenged the validity of the condemnation and of the condemnation proceedings. Defendant in turn argued that the circuit court was without jurisdiction to consider this matter because plaintiff had failed to exhaust his administrative remedies.

A circuit court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A dispositive motion premised on the plaintiff's failure to exhaust administrative remedies "attacks subject matter jurisdiction." *Bruley Trust v Birmingham*, 259 Mich App 619, 623; 675 NW2d 910 (2003). In reviewing a motion brought under MCR 2.116(C)(4), we must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other evidence show there was no genuine issue of material fact. *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000). Whether the circuit court has subject-matter jurisdiction over a case is a question of law that is reviewed de novo on appeal. *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004).

The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, a party must seek such relief before petitioning the court. *Trever v Sterling Heights*, 37 Mich App 594, 596; 195 NW2d 91 (1972). Generally, an "as applied" challenge of an ordinance is subject to the rule of finality, which concerns whether the initial decisionmaker has made a definitive decision on the issue. *Paragon Properties Co v*

Novi, 452 Mich 568, 576-577; 550 NW2d 772 (1996). However, this doctrine does not apply to a facial challenge of an ordinance. *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 524; 569 NW2d 841 (1997). “The exhaustion of remedies requirement does not apply to a facial challenge to a zoning ordinance.” *Id.* “A facial challenge is one that attacks the very existence or enactment of the ordinance; it alleges that the mere existence and threatened enforcement of the ordinance adversely affects all property regulated in the market as opposed to a particular parcel.” *Id.* at 525.

Defendant asserts that plaintiff was required to exhaust his administrative remedies before resorting to the circuit court because his arguments regarding the constitutionality of the condemnation ordinances and policies were “as applied” challenges rather than facial challenges. After reviewing the record, we agree with defendant that plaintiff did not completely exhaust his administrative remedies in this case. We further agree that several of the allegations in plaintiff’s complaint consist of “as applied” challenges rather than facial challenges. However, after a searching review of the pleadings filed in this matter, we have determined that plaintiff has raised certain facial challenges to the constitutionality of defendant’s ordinances and policies as well. In short, although plaintiff raises several “as applied” challenges, and although the complaint may be inartfully worded, plaintiff also attempts to challenge the facial constitutionality of defendant’s ordinances and overall condemnation policies. Specifically, plaintiff alleges at several points in the pleadings that defendant’s condemnation ordinances and policies are arbitrary and capricious. A claim that an ordinance or policy is arbitrary and capricious “is a challenge of the ordinance on its face.” *Bruly Trust, supra* at 626. With respect to the portion of plaintiff’s complaint that sought to attack the general constitutionality of defendant’s condemnation ordinances, we conclude that plaintiff was not required to exhaust his administrative remedies. *Id.* at 626-627. “[T]here is no sense in forcing [plaintiff] to plod through the lengthy administrative process when only the courts have the authority to resolve the controlling constitutional issue[s]” that are presented in this matter. *Id.* at 627, quoting *Michigan Supervisors Union OPEIU Local 512 v Dep’t of Civil Service*, 209 Mich App 573, 578; 531 NW2d 790 (1995). Insofar as plaintiff raised facial constitutional challenges, he was exempt from the exhaustion requirement.

As noted, plaintiff also raised several “as applied” challenges to defendant’s ordinances and policies. Under defendant’s ordinance, a housing official’s enforcement decision may be appealed to the city council. Plaintiff takes issue with the notice provided in this case and the proceedings as conducted, but never appealed those issues to the city council. However, any such appeal would have been futile, given the city council’s subsequent decision to order demolition of the property. Exhaustion of administrative remedies may be excused when an administrative appeal would be futile. *Trojan v Taylor Twp*, 352 Mich 636, 638-639; 91 NW2d 9 (1958). The city council’s decision that led to the demolition order is not subject to further administrative review, but is appealable directly to the circuit court. MCL 125.542. Therefore, while plaintiff was technically required to exhaust all administrative remedies with respect to his “as applied” challenges, such remedies would not have provided meaningful recourse under the specific facts of this case. Plaintiff’s only effective avenue of relief was circuit court review. The circuit court did not err in denying defendant’s motion for summary disposition.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper