STATE OF MICHIGAN

COURT OF APPEALS

FIFTY EIGHT LIMITED LIABILITY COMPANY and TOUCHSTONE CORPORATION, Plaintiffs-Appellants,	UNPUBLISHED July 15, 2008
v	No. 276574 Oakland Circuit Court
CHARTER TOWNSHIP OF LYON, LYON TOWNSHIP BOARD OF TRUSTEES, and LYON TOWNSHIP PLANNING COMMISSION, Defendants-Appellees.	LC No. 2006-072229-CZ

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In this zoning dispute, plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

In January 2004, plaintiff Fifty Eight Limited Liability Company entered into an agreement to sell 18.633 acres of property located in the northeast corner of Ten Mile Road and Milford Road of Lyon Township to Milford Ten, L.L.C. Under the agreement, Milford Ten was permitted to seek rezoning or rescind the agreement during a specified period. Milford Ten later assigned its interest in the purchase agreement to plaintiff Touchstone Corporation. In June 2005, Touchstone applied to Lyon Township to have the property rezoned from R-1 (residential-agricultural) to B-2 (community business). After the Lyon Township Planning Commission (the "Lyon Planning Commission") recommended that the application be denied, the Lyon Township Board of Trustees (the "Lyon Board") voted to deny the application in October 2005. Touchstone then sought an appeal or variance to permit a commercial use of the property from the Lyon Township Zoning Board of Appeals, which determined that it lacked jurisdiction to consider the matter. In February 2006, plaintiffs Touchstone and Fifty Eight, L.L.C., filed the instant action in circuit court, alleging various constitutional claims and a claim under 42 USC 1983 against defendants Lyon Township, the Lyon Planning Commission, and the Lyon Board.

Plaintiffs first claim that the trial court erred in granting summary disposition for defendants. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Although defendants moved for summary disposition under both MCR 2.116(C)(8) and (10), the trial court

did not specify under which subrule it granted the motion. However, because a motion under MCR 2.116(C)(8) is limited to the pleadings alone, and it is clear that the trial court considered evidence outside the pleadings when granting the motion, we shall review the motion under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006). The moving party bears the initial burden to support its position with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to show a genuine issue of material fact. *Id.* at 362. "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Campbell*, *supra* at 229. The motion should only be granted if proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

As a threshold matter, we consider whether plaintiffs' claims related to discovery matters precluded consideration of defendants' summary disposition motion. The appropriate inquiry where a party claims that incomplete discovery precludes summary disposition is whether discovery stands a fair chance of uncovering factual support for the nonmoving party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). A party opposing summary disposition on this ground must at least assert that a dispute exists and support the allegation with independent evidence. *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006).

Plaintiffs argue that the trial court's denial of their motion to compel depositions prevented them from obtaining necessary information that would permit them to counter defendants' motion for summary disposition. A party making such a claim must comply with MCR 2.116(H). *Coblentz v City of Novi*, 475 Mich 558, 570; 719 NW2d 73 (2006). In the present case, plaintiffs failed to file an affidavit in accordance with MCR 2.116(H). Accordingly, any argument that their inability to take depositions of members of the Lyon Board or the Lyon Planning Commission precluded summary deposition is barred. *Id* at 570-571.

Additionally, the trial court's denial of plaintiffs' motions to compel depositions did not prevent plaintiffs from filing such an affidavit. When considering plaintiffs' motions to compel, the trial court's concern was whether plaintiffs demonstrated a relevant purpose for any depositions sought. The court determined that the motion was improperly directed at irrelevant information pertaining to the motives of the Lyon Board and the Lyon Planning Commission. We review a trial court's decision regarding a discovery matter for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Generally, zoning and rezoning are legislative functions charged to the responsibility of the local legislative body, making the validity of a zoning ordinance and a refusal to rezone subject to the same tests ordinarily applied to the validity of legislation. *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000). Thus, neither the motives of a

planning commission in making a recommendation, nor the motives of a zoning authority in denying a rezoning application, are relevant. *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525; 656 NW2d 212 (2002). Accordingly, the trial court's denial of plaintiffs' motion to compel depositions because the motion was improperly directed at irrelevant information pertaining to the motives of the Lyon Board and the Lyon Planning Commission was not an abuse of discretion.

Moreover, the court denied plaintiffs' motion without prejudice to plaintiffs showing a relevant purpose for the depositions. Thus, even ignoring the requirements of MCR 2.116(H), had plaintiffs shown a relevant purpose for the depositions, the trial court evidenced a willingness to permit them. Because the trial court did not abuse its discretion in denying plaintiffs' motion to compel depositions, and plaintiffs failed to exercise their remedy under MCR 2.116(H), we conclude that plaintiffs have not established any matter related to discovery that precluded consideration of defendants' summary disposition motion.

Turning to the merits of plaintiffs' constitutional claims, we first consider plaintiffs' claim that there was factual support for their substantive due process claims based on an "as applied" challenge to defendants' zoning action. An "as applied" challenge to an ordinance "alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution." *Paragon Properties Co v City of Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996). Because the only body with the power to make zoning decisions is the Lyon Board, we must determine whether the Lyon Board's refusal to rezone the property in October 2005 constituted a denial of substantive due process. To the extent that plaintiffs suggest that there might be other "actions" by defendants that were actionable, we deem this issue abandoned because plaintiffs have failed to brief their position. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Regardless of whether a plaintiff pursues a facial or "as applied" challenge to an ordinance, the plaintiff must show "(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of the other types of legitimate land use from the area in question." *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). There must be proof that the zoning ordinance does not serve any rational relation to the public health, safety, welfare, and prosperity of the community. *Dorman v Clinton Twp*, 269 Mich App 638, 651; 714 NW2d 350 (2006) (internal quotes and citations omitted). Each case is evaluated under existing facts and conditions, not some potential future condition. *Frericks*, *supra* at 608. However, plaintiffs' particular circumstances are not relevant to the validity of the zoning decision because zoning ordinances represent general policy decisions that apply to the entire community. *Greater Bible Way Temple v City of Jackson*, 478 Mich 373, 389-390; 733 NW2d 734 (2007). The zoning authority must be prepared to accommodate all projects falling within the scope of the rezoning when ruling on the matter. *Id.*

The three basic rules that apply have been stated as follows:

> (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owners use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of

> opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Frericks, supra* at 594, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

Here, the third rule is not applicable because this matter was decided on summary disposition under MCR 2.116(C)(10). Instead, we must determine whether, drawing all reasonable inferences from the admissible evidence in favor of plaintiffs, reasonable minds could differ with respect to whether the zoning ordinance is an arbitrary and unreasonable restriction on the use of the subject property. *Campbell*, *supra* at 229-230. There must be no room for legitimate difference of opinion concerning reasonableness. *Frericks*, *supra* at 594.

Examining the evidence in light of these standards, we conclude that plaintiffs' evidence merely proved that there was room for legitimate differences of opinion. The affidavits of plaintiffs' expert planners, Paul LeBlanc and Leslie Meyers, focused on attempting to justify the proposed rezoning to a B-2 district, but their opinions differed from that expressed by Lyon Township's planner, Christopher Doozan. "The question always remains: As to this property, in this city, under this particular plan (wise or unwise though it may be), can it be fairly said there is not even a debatable question? If there is, we will not disturb [the zoning decision]." *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 433; 86 NW2d 166 (1957). Even discounting Doozan's affidavit, the evidence on which plaintiffs base their claim shows a debatable question. The Lyon Township Master Plan documents do not unequivocally support plaintiffs' assertion that rezoning their property as commercial is the only reasonable outcome. Similarly, the meeting minutes and recommendations to the Lyon Planning Commission related to plaintiffs' application, as well as that of Quadrants, Inc., clearly show reasonable minds can differ as to the appropriate use of the property. Specifically, the findings sent to the Lyon Planning Commission related to plaintiffs' rezoning application provided, in part:

> 1. The proposed rezoning would be inconsistent with the Future Land Use Map which calls for low density residential on the subject site and on all surrounding lands east of Milford Road. However, the rezoning would be consistent with the intent of the Master Plan to concentrate development at one or two commercial notes along Ten Mile Road.
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> 2. The proposed rezoning would be out of character with surrounding and existing single family residential land use and zoning. However, development within the B-2 district can occur in a manner that is compatible with surrounding residential development, with proper attention to design details.

These are not unequivocal statements that show rezoning the property for commercial use is the only reasonable outcome, but rather heavily support the conclusion that it is a debatable issue.

Plaintiffs also failed to demonstrate that evidence concerning the master plan created a genuine issue of material fact for trial. Adherence to a master plan is only one factor in determining if a zoning ordinance is reasonable. *Troy Campus v City of Troy*, 132 Mich App 441, 457; 349 NW2d 177 (1984). In any event, we find no support for plaintiffs' argument that the master plan could be construed as designating the subject property for a commercial use. The phrase "small commercial node" must be given meaning in the context of the master plan as

a whole. Cf. *Grand Traverse Co v Michigan*, 450 Mich 457, 463-464; 538 NW2d 1 (1995) (in the statutory context, courts endeavor to look at the entire law to determine intent and provide a harmonious whole). In light of both the evidence that the future land use map was part of the master plan and plaintiffs' failure to rebut defendants' evidence that the future land use map only provided for a commercial use in the northwest corner of Ten Mile Road and Milford Road at the time of plaintiffs' rezoning application, there is no factual support for plaintiffs' claim of ambiguity. We find that the future land use map does not create ambiguity, but rather clarifies the planned location at the intersection.

Finally, we are not persuaded that plaintiffs have demonstrated anything about commercial developments in other areas of Lyon Township, or the prior action involving Quadrants, Inc., that creates a genuine issue of material fact with respect to their claim that the Lyon Board's denial of the rezoning request violates substantive due process. Therefore, we uphold the trial court's grant of summary disposition in favor of defendants on this issue.

We also find no basis for disturbing the trial court's dismissal of plaintiffs' equal protection challenge to the Lyon Board's denial of the rezoning application. "The validity of [a] classification is measured by one of three tests, depending on the type of classification involved and the nature of the interest affected." *Brinkley v Brinkley*, 277 Mich App 23, 35; 742 NW2d 629 (2007). Under the rational basis test applicable to plaintiffs' claim, plaintiffs were required to show that the zoning action was arbitrary and, therefore, irrational. *Dowerk v Oxford Twp*, 233 Mich App 62, 73; 592 NW2d 724 (1998). Our analysis of plaintiffs' substantive due process claim likewise demonstrates that plaintiffs failed to meet their burden of showing a genuine issue of a material fact with regard to whether the Lyon Board acted arbitrarily in refusing to change the zoning classification for the property.

With respect to plaintiffs' taking claim, we agree that the trial court applied an incorrect analysis to the extent that it relied on the ripeness doctrine discussed in *Braun v Ann Arbor Charter Twp*, 262 Mich App 154; 683 NW2d 755 (2004). But we will not reverse a trial court's summary disposition ruling when the right result was reached for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

Plaintiffs argue that they should have been permitted to proceed to trial under the balancing test for a taking claim set forth in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). We disagree. Under this test, there is no set formula for determining if a taking occurs. *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 588; 575 NW2d 531 (1998). Instead, a court's review focuses on three factors: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation interfered with distinct, investment-backed expectations." *Id.* at 577. The plaintiff must show that the property was, as zoned, unsuitable for the use or unmarketable. *Dorman*, *supra* at 647. Applying these factors in this case to determine

whether a genuine issue of a material fact was shown, we confine our review to the use of the property that was the subject of the rezoning application.[1]

With respect to the first factor, the action involved is a zoning decision, followed by a refusal to rezone to another use requested by the assignee of a purchaser of the property. With respect to the third factor, plaintiffs have failed to establish any distinct, investment-backed expectations that were interfered with by the zoning action. Focusing on the second factor, the economic effect is generally measured, at a minimum, by comparing the value removed by a regulation with the value that remains. *K & K Constr*, *supra* at 588. Here, however, plaintiffs did not present any admissible valuation evidence for applying this test. Plaintiffs' reliance on the affidavits of their proposed planning experts is misplaced, given that neither affiant indicated that a valuation analysis was conducted or that expert testimony could be provided in this area. An expert's testimony must meet the standards of reliability in MRE 702. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). Further, the deposition testimony of Touchstone's owner, Todd Wyett, regarding opinions that he received from developers or individual members of the Lyon Board outside a board meeting did not create a genuine issue of material fact, because opinions and inadmissible hearsay generally do not establish disputed facts. *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Considering all three factors, we conclude that plaintiffs failed to show a genuine issue of material fact. We reject plaintiffs' attempt to shift the burden to present evidence to defendants through MCR 2.116(G)(4). Although defendants also failed to present valuation evidence, they adequately supported their motion as required by the court rule. The evidence, viewed in a light most favorable to plaintiffs, does not support a reasonable inference that the property was unsuitable for use or unmarketable as zoned. Accordingly, we uphold the trial court's grant of summary disposition with respect to the taking claim.

Having concluded that there is no factual support for plaintiffs' constitutional claims, we also uphold the trial court's grant of summary disposition with respect to plaintiffs' claim under 42 USC 1983. As a matter of law, 42 USC 1983 is not an independent source of substantive rights, but only provides a remedy for the violation of rights guaranteed by the federal constitution or a federal statute. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 30; 703 NW2d 822 (2005). To the extent that plaintiffs summarily suggest that actions other than the denial of the rezoning application exist, which could independently support a constitutional claim upon which to pursue relief under 42 USC 1983, plaintiffs do not sufficiently brief this argument and, therefore, we decline to consider it. *Prince*, *supra* at 197.

Next, we reject plaintiffs' argument that the trial court erred in denying their motion in limine and, specifically, their motion to remove the presumption of validity accorded to a zoning ordinance. This presumption applies to the constitutional validity of a zoning ordinance because it is subject to the same tests ordinarily applied to legislation. *Bevan v Brandon Twp*, 438 Mich

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[1] As plaintiffs do not address the effect of the delay in constructing the sewer and water main improvements, we consider that issue abandoned. *Prince*, *supra* at 197.

385, 398; 475 NW2d 37 (1991); *Sun Communities*, *supra* at 669. Plaintiffs have not substantiated their position that a court of equity can remove it.

Likewise, we reject plaintiffs' argument that the trial court erred by refusing to recognize a presumption that township officials would have given testimony adverse to defendants. A court can impose this evidentiary presumption as a sanction where a party deliberately destroys or fails to produce evidence. *Hamann v Ridge Tool Co*, 213 Mich App 252, 255; 539 NW2d 753 (1995). The instant case does not involve any claim of misconduct, but rather a dispute between the parties that was resolved adversely to plaintiffs by the trial court. We are not persuaded that a sanction is appropriate in this circumstance.

Finally, in light of our decision affirming the trial court's summary disposition order, plaintiffs' challenge to the trial court's denial of their motion to bar certain township officials from testifying at trial is moot.

Affirmed.

/s/ Donald S. Owens
/s/ Alton T. Davis