STATE OF MICHIGAN

COURT OF APPEALS

FIFTY EIGHT LIMITED LIABILITY COMPANY and TOUCHSTONE CORPORATION,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF LYON, LYON TOWNSHIP BOARD OF TRUSTEES, and LYON TOWNSHIP PLANNING COMMISSION,

Defendants-Appellees.

UNPUBLISHED
July 15, 2008

No. 276574
Oakland Circuit Court
LC No. 2006-072229-CZ

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

O'CONNELL, J. (*concurring*).

I concur with the result reached by the majority opinion. I write separately to address what I perceive as a conflict in the law when considering summary disposition in the context of zoning claims.

In my view, there appears to be a "Catch-22." To preclude summary judgment, plaintiffs must show that reasonable minds could differ as to whether the zoning ordinance is an arbitrary and unreasonable restriction on the use of the subject property. *Campbell v Kovich*, 273 Mich App 227, 229-230; 731 NW2d 112 (2006). However, to show that the ordinance is invalid, plaintiffs must show that there can be no legitimate difference of opinion as to the ordinance's reasonableness. *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Thus, for a plaintiff to survive summary disposition, it must show that reasonable minds could differ as to whether no difference of opinion could exist—an unwinable proposition at best.

However, if a plaintiff were able to show that there was no room for a legitimate difference of opinion concerning the ordinance's reasonableness, i.e. that every legitimate opinion would agree that the ordinance was unreasonable and arbitrary, the plaintiff would have been entitled to summary disposition in their favor. It would appear, then, that only two solutions are possible: 1) find that summary disposition is proper and hold that a challenger must either prove it is entitled to summary disposition or be dismissed on a motion for summary disposition by the state entity, thereby rendering all future challengers subject to trial by summary disposition; or 2) find that this problematic standard always precludes summary disposition and force all parties to trial on this issue.

Under the circumstances, I conclude that the former is preferable. Where the issue is whether there can be any legitimate difference of opinion as to an ordinance's reasonableness, evidence cannot support both positions. It must either show that there can be a reasonable difference of opinion, or that all reasonable minds would agree that the ordinance was unreasonable. Such a showing, either way, will be determinative and will not create a factual issue, making summary disposition appropriate. At the time of summary disposition under MCR 2.116(C)(10), a plaintiff should be able to provide enough evidence to support the arbitrariness or unreasonableness of an ordinance such that a trial court can make an appropriate determination as to whether reasonable minds could legitimately differ on that issue.

This position is also supported by the fact that the burden placed upon the challenger of the ordinance is heavily weighted in the government's favor. All that need be shown by the state entity is that reasonable minds could differ as to the ordinance's reasonableness or arbitrariness. Such a showing would preclude a plaintiff from being able to meet his burden, as he could not prove an element of his claim—namely, "that there is not room for a legitimate difference of opinion considering [the ordinance's] reasonableness." *Frericks*, *supra*. Although problematic to challengers, this heavy burden is consistent with the rule that "where the legislative judgment is supported by any state of facts either known or which could reasonably be assumed, although such facts may be debatable, the legislative judgment must be accepted." *Detroit v Qualls*, 434 Mich 340, 366; 454 NW2d 374 (1990) (internal quotes and citations omitted; emphasis removed). This is not to say that a challenger can never win. A mere difference of opinion between a property owner and a zoning authority does not establish a debatable question. *Alderton v City of Saginaw*, 367 Mich 28, 33; 116 NW2d 53 (1962). "If this were the case, no ordinance could ever be successfully attacked." *Id.*

Because the same result is reached in this case under this standard, I concur in the result.

/s/ Peter D. O'Connell