STATE OF MICHIGAN

COURT OF APPEALS

JGA DEVELOPMENT, L.L.C. and KINGSWAY BUILDERS, INC.,	UNPUBLISHED August 21, 2008
Plaintiffs-Appellees,	
v	No. 277243 Genesee Circuit Court
CHARTER TOWNSHIP OF FENTON,	LC No. 05-080843-CK
Defendant-Appellant.	

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

In this zoning case, the defendant, Charter Township of Fenton (the Township), appeals as of right from the trial court's order granting plaintiffs', JGA Development, L.L.C. (JGA) and Kingsway Builders, Inc. (Kingsway), motion for summary disposition and denying the Township's cross-motion for summary disposition. We reverse and remand for entry of summary disposition in favor of the Township.

I. Basic Facts And Procedural History

In January 2000, Kingsway purchased a 60-acre parcel of land in Fenton Township, Michigan.[1] In July 2001, JGA submitted an application to rezone the Property from R-1A, single family residential, to a planned unit development (PUD).[2] On November 12, 2001, the Township Board approved the PUD, which allowed for development up to a maximum density of 2.33 units an acre.[3] JGA then proceeded to secure a water source for the site. JGA entered into a water agreement with the City of Linden. JGA applied to the Michigan Department of Environmental Quality (MDEQ) for a Type I community well permit, and MDEQ authorized JGA to drill test wells in December 2001. After drilling three test wells, one twelve-inch well

[1] It is not clear from the record how or when plaintiff JGA Development, L.L.C., obtained an interest in the property.

[2] JGA will be used from this point on to refer to both defendants.

[3] The R-1A classification permitted residential development as a maximum density of 1 unit an acre.

and two five-inch wells, the Linden City's water consultant found that JGA's site did not have sufficient groundwater. In early 2004, JGA dug another test well but found that the water was not suitable for building a community well for the development due to mineral content. By 2004, JGA had been unable to secure a water source for the PUD and, therefore, had not submitted a preliminary site plan for approval. During this time JGA claimed to have completed various development tasks, including obtaining a wetland permit, negotiating with Edison to relocate power lines, and obtaining preliminary approval from the County Road Commission for driveway permits.

In December 2002, the Township amended its land use plan. The maximum permissible density for the medium density residential classification was changed from 2.5 units an acre to 1.5 units an acre, which was equivalent to the R-3 zoning district. On July 20, 2004, the Township's planning commission adopted a resolution calling for the property to be rezoned from PUD to R-3. JGA objected and hearings were held before the planning commission and the township board. On November 1, 2004, the board voted to rezone the property to R-3.

In February 2005, JGA filed an eight-count complaint against the Township stemming from the Township's rezoning of the PUD. The complaint alleged claims for violation of the Township Zoning Act (TZA)[4] (Count I), breach of PUD (Count II), violation of procedural due process (Count III), violation of substantive due process (Count IV), exclusionary zoning (Count V), taking without just compensation (Count VI), violation of equal protection (Count VII), and violation of federal civil rights[5] (Count VIII). The case was removed to federal court where the Township filed a motion to dismiss or for summary judgment.

The federal court subsequently disposed of all but three of JGA's claims. It first determined that JGA's takings claim was not ripe for adjudication and dismissed that claim without prejudice. It next determined that JGA's procedural due process, substantive due process, and equal protection claims were ripe, but lacked merit. The federal court further held that JGA's federal civil rights claim was not a separate claim and dismissed it with prejudice. Finally, the federal court declined to exercise its pendent jurisdiction over the state law claims in Counts I, II, and V, and remanded those claims to the trial court.

On remand, the parties stipulated to dismiss with prejudice Counts II and V, leaving Count I (violation of the TZA) as the only remaining claim to be decided by the trial court. In Count I, JGA alleged that the Township acted beyond the scope of its authority in revoking the PUD because the TZA did not specifically authorize such action. The parties filed cross-motions for summary disposition. The trial court agreed with JGA, granted their motion for summary disposition, and denied the Township's cross-motion, concluding that the TZA did not authorize the Township to revoke the PUD through rezoning. In doing so, the trial court rejected the

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[4] MCL 125.271 *et seq*. Although the TZA was repealed by 2006 PA 110, effective July 1, 2006, which enacted the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., the TZA governs this case because plaintiffs filed their complaint before it was repealed. MCL 125.3702(2).

[5] 42 USC 1983.

Township's argument that JGA was collaterally estopped from challenging its authority to rezone the PUD in light of the federal court's decision. The Township now appeals.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's decision on a motion for summary disposition.[6] The court may grant summary disposition under MCR 2.116(C)(7) when collateral estoppel bars a claim.[7] In considering a motion under this subrule, this Court considers "all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party."[8] A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim.[9] Summary disposition is proper under this subrule if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."[10] A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party.[11] We also review de novo questions of statutory construction.[12]

B. Collateral Estoppel

The Township argues that the federal court decided the issue of its authority under the TZA to rezone the property and that the trial court erred in declining to find that JGA was collaterally estopped from relitigating this issue.

"Collateral estoppel . . . precludes relitigation of an issue in a subsequent, different cause of action between the same parties . . . when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding."[13] In the subsequent action, the ultimate issue to be concluded must be the same as that involved in the first action.[14] "The issues must be identical, not merely similar."[15] In addition, the common ultimate issues must have been both actually and necessarily litigated.[16] To be actually litigated,

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[6] *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

[7] *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998).

[8] *Id*.

[9] *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

[10] MCR 2.116(C)(10).

[11] *Corley*, *supra.*

[12] *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003).

[13] *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).

[14] *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990).

[15] *Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

[16] *Qualls*, *supra*.

a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier of fact.[17] To be necessarily determined in the first action, the issue must have been essential to the resulting judgment.[18] Thus, findings of fact on which the judgment did not depend cannot support collateral estoppel.[19]

In arguing that collateral estoppel does not apply, JGA relies in part on the fact that the federal court specifically declined to decide Count I. However, collateral estoppel involves issue preclusion, not claim preclusion.[20] Thus, the mere fact that the federal court remanded the claim does not mean that a necessary issue involved with that claim was not decided. The Township's argument rests on the interpretation of the federal court's decision regarding JGA's due process claims. In resolving these claims, the federal court first had to determine whether JGA had a property interest that entitled it to due process. It agreed with the Township that a property owner in Michigan had no inherently vested property right in the zoning of his property. It stated, however, that this case involved a "particularized type of zoning," the ordinance for which provided "the owner with the right to *proceed through the subsequent planning phase*." The court was referring to the township zoning ordinance, art 3, § 3.21(E)(3)(h), which provides:

> Approval of the conceptual PUD plan shall confer upon the owner the right to proceed through the subsequent planning phase for a period not to exceed three (3) years from the date of approval. If so requested by the petitioner, an extension of a two (2) year period may be granted by the Planning Commission.

Thus, the federal court held that JGA had a property interest in its PUD through the planning phase and concluded that "[b]y revoking Plaintiff[s'] PUD, Defendant took away [that] right."

In responding to the Township's argument that, by finding that JGA had a property right, the court would be permanently preventing the Township from rezoning the PUD, the federal court stated that the Township had complete discretion to rezone the PUD after the expiration of the three-year period prescribed in § 3.21(E)(3)(h) of the township zoning ordinance or it "could revoke the PUD before the expiration of the three-year period, provided it proceeded in a manner consistent with the owner's due process rights." The Township argues that these statements show that the federal court found that it had the power to rezone the property. It asserts that because the federal court went on to find that JGA's due process claims lacked merit, the court found that it validly rezoned the property.

On the surface, the federal court's statements seem to indicate that it found that the Township had the authority to rezone the PUD. However, the court limited its consideration to JGA's federal claims, and assumed for purposes of reviewing JGA's due process claims that the

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[17] *Van Deventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988).

[18] *Qualls*, *supra*.

[19] *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994).

[20] *People v Johnson*, 191 Mich App 222, 224; 477 NW2d 426 (1991).

Township had this authority. There is no indication that the federal court reviewed the TZA to determine whether the Township had the authority under it to rezone the PUD. That was the question presented in Count I of JGA's complaint, which the federal court expressly declined to decide. Therefore, we conclude that the federal court did not actually decide the issue presented in Count I; rather, it only assumed such authority for purposes of considering JGA's other claims. Accordingly, we conclude that the trial court did not err in finding that JGA was not collaterally estopped from litigating the issue of the Township's authority to rezone the property.

C. The Township's Authority Under The TZA

The Township argues that that trial court erred in concluding that the Township lacked the authority to rezone the PUD.

"'[L]ocal governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the state constitution or state statutes or which are necessarily implied therefrom.'"[21] Pursuant to Const 1963, art 7, § 34, the powers conferred upon townships are to be liberally construed in their favor.[22] The TZA is the basic enabling act granting townships the power to pass zoning ordinances.[23] The TZA gives township boards very broad and general authority to zone "to promote public health, safety, and welfare."[24] The act also authorizes a township board to rezone property through amendments to its zoning ordinance.[25] In this case, the township zoning ordinance expressly provided the Township with the authority to zone and rezone property within its borders, which JGA does not dispute.

The Township asserts that pursuant to this general zoning and rezoning authority, it was within its authority to rezone JGA's PUD. JGA argues that because the TZA provides specific legislation regarding PUDs, the Township could only rezone a PUD if the act expressly authorized it to do so. JGA asserts that neither the TZA nor the township zoning ordinance provides for the rezoning of PUDs and, therefore, the Township acted outside the scope of its authority in rezoning the PUD.

The zoning and rezoning of property is a legislative act.[26] JGA erroneously argues that the Township's act was administrative because it focused solely on JGA's property. The rezoning of a particular piece of property is not an administrative act simply because it is confined to a particular piece of property. It still applies to the "entire community" because the

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[21] *Conlin v Scio Twp*, 262 Mich App 379, 385; 686 NW2d 16 (2004), quoting *Hanselman v Wayne Co Concealed Weapon Licensing Bd*, 419 Mich 168, 187; 351 NW2d 544 (1984).

[22] *Cornerstone Investments, Inc v Cannon Twp* (*On Remand*), 239 Mich App 98, 102; 607 NW2d 749 (1999).

[23] *Id.* at 101.

[24] MCL 125.271(1).

[25] MCL 125.284.

[26] *Inverness Mobile Home Community, Ltd v Bedford Twp*, 263 Mich App 241, 247; 687 NW2d 869 (2004).

"entire community" would be bound by a township's decision to rezone or not rezone the property.[27]

"In determining whether legislative action is beyond the scope of the authority granted to a municipal body, this Court applies the usual rules of statutory construction."[28] The goal of statutory interpretation is to determine and give effect to the intent of the Legislature.[29] "That intent is clear if the statutory language is unambiguous, and the statute must then be enforced as written."[30]

"Michigan townships are not specifically directed to authorize the development of PUD's but have the authority to do so."[31] "Under subsection 16c(2) of the TRZA, townships may establish PUD requirements and establish a review and approval process governing PUD's[.]"[32] The statute does not address revocation of a PUD, nor does the township zoning ordinance. JGA argues that because there is a specific statute addressing PUDs, the Township's general zoning authority does not apply. They contend that because the PUD statute does not expressly provide the power to revoke the PUD, the Township lacked the authority to do so. We disagree.

JGA relies on the TZA's legislative history to support its position. However, none of the materials that JGA cites suggest that the Legislature did not intend for a township to have the authority to rezone property on which a PUD has been granted. JGA also points to the recently enacted conditional rezoning statute under the Zoning Enabling Act,[33] as support for its argument that the Legislature did not intend for such authority to be read into the statute. MCL 125.3405 provides, in relevant part:

> (1) An owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.
>
> (2) In approving the conditions under subsection (1), the local unit of government may establish a time period during which the conditions apply to the land. Except for an extension under subsection (4), if the conditions are not satisfied within the time specified under this subsection, the land shall revert to its former zoning classification.

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[27] *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, 389-390, 390 n 12; 733 NW2d 734 (2007).

[28] *Conlin*, *supra* at 386.

[29] *Weakland*, *supra* at 347.

[30] *Id*.

[31] *Cornerstone Investments*, *supra* at 102, citing MCL 125.286c.

[32] *Id*., citing MCL 125.286c(2).

[33] MCL 125.3405.

We conclude that this statute does not undermine the Township's position that it had the authority to rezone JGA's PUD under its general zoning authority. The statute only provides for the automatic reversion to a previous zoning classification under certain circumstances, removing the need for the government to act in order to accomplish rezoning. The most the statute shows is that the Legislature did not intend for automatic reversion of zoning classifications unless stated otherwise. If the statute does not apply, the government must still take the legislative act to rezone property under its general zoning authority in order to effectuate a change.

JGA's reliance on cases involving permits and variances is also misplaced. In *Kethman v Oceola Township*, the plaintiff, Kethman, petitioned the defendant, Oceola Township, for a variance.[34] Oceola Township granted the land use permit, but then revoked it after a rehearing on the Kethman's petition.[35] The pertinent question before this Court was whether Oceola Township properly reconsidered Kethman's petition.[36] This Court concluded that because neither the TZA nor Oceola Township's zoning ordinance provided for the rehearing of a granted variance and Oceola Township had no inherent power to grant a rehearing, Oceola Township "acted beyond its authority in ordering the reconsideration of the validity of the plaintiff's variance several months after the original hearing."[37] And in *Hillside Productions, Inc v Duchane*, the plaintiffs, Hillside Productions, Inc. (Hillside), challenged the defendants' decision to revoke their "Special Approval Land Use" (SALU) under which they operated the Freedom Hill Amphitheater.[38] The pertinent issue was whether the city of Sterling Heights had the authority to revoke Hillside's SALU, which the court found was a valuable property interest.[39] The court held that the city lacked this authority because neither the City and Village Zoning Act[40] nor the city's zoning ordinance granted such authority.[41]

The critical distinction between these cases and the instant one is that this case involves rezoning, a legislative act, not the revocation of a variance or special land use permit, an administrative act.[42] In both *Kethman* and *Hillside Productions*, the local government revoked a permit. It did not rezone property. While the effect of the Township's rezoning in this case was to revoke JGA's PUD approval, the action taken was rezoning. The Township did not simply revoke approval of JGA's conceptual plan for the PUD. Had it done so, the PUD district would

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[34] *Kethman*, 88 Mich App 94, 97-98; 276 NW2d 529 (1979).

[35] *Id*.

[36] *Id*. at 101.

[37] *Id*. at 101-102.

[38] *Hillside Productions*, 249 F Supp 2d 880, 884 (ED Mich, 2003).

[39] *Id*. at 893.

[40] MCL 125.581 *et seq*.

[41] *Hillside Productions*, *supra* at 894-895.

[42] See, e.g., *Inverness*, *supra* at 247; *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000).

still be intact. In such a case, the analyses in *Kethman* and *Hillside Productions* might be applicable, because PUD plans appear to be akin to special land uses. But because the Township rezoned the property, JGA's focus on the effect of the Township's act is misdirected. Thus, we conclude that the specificity of the requirements for approval and denial of a PUD, essentially administrative acts, does not affect a township's general authority to rezone property.

JGA argues that even if the Township had the authority under the TZA to rezone the property, it lacked the authority under the township zoning ordinance because it rezoned based on an unwritten policy. We disagree. Lack of suitable progress was not the Township's only reason for rezoning JGA's PUD. Although the Township indicated that it was the impetus for rezoning the property in order to bring it in compliance with its master zoning plan, whether this motivating factor was a valid reason to rezone is irrelevant. The validity of a township's reasons for rezoning involves a substantive due process claim.[43] The federal court decided that rezoning to bring the property into compliance with the Township's land use plan was a valid reason to rezone it, and did not violate JGA's substantive due process rights.

In concluding that the Township had the authority under its general zoning power to rezone JGA's PUD, we reject the portion of the Township's argument that relies on vested rights cases. These cases stand for the proposition that a property owner has no right to develop the property or maintain the zoning if he has not done "work of substantial character" to the property vesting his rights in its non-conforming use.[44] Whether JGA had a property right is a separate question from whether the Township had the statutory authority to act.[45]

JGA argues that the vested rights cases do not apply because it had a PUD and, therefore, the Township could not change the PUD's conditions without the parties' mutual consent pursuant to MCL 125.286d. We disagree. MCL 125.286c(5) permits a township to approve a PUD with conditions. MCL 125.286d(3) provides that if this occurs, the imposed conditions cannot be changed without the landowner's and township's mutual consent. The flaw in JGA's argument is that the Township did not merely change the conditions under which the PUD was approved. It changed the property's zoning classification.

In sum, we find nothing in the TZA to indicate that the Legislature intended for a township's general authority to rezone property not to apply to a PUD. Therefore, we conclude that the trial court erred in finding that the Township did not have the authority under the TZA and the township zoning ordinance to rezone JGA's PUD. The effect of the Township's rezoning before expiration of the three-year planning phase, the time during which the federal

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[43] See *Conlin*, *supra* at 389-390 (ordinance is invalid if the governmental unit acted arbitrarily and unreasonably in rezoning).

[44] See, e.g., *Bevan v Brandon Twp*, 438 Mich 385, 401-402; 475 NW2d 37 (1991) (and cases cited therein); *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 574-575; 398 NW2d 393 (1986); *City of Lansing v Dawley*, 247 Mich 394, 396-397; 225 NW 500 (1929).

[45] See *Kethman*, *supra* at 102 (because Oceola Township had no authority to reconsider Kethman's variance petition, the Court concluded that it did not need to address whether Kethman's reliance on his variance created vested rights in its continuance).

court held that JGA had a property right, is not before this Court. That question properly pertains to a takings claim. The federal court even noted that JGA could bring an inverse condemnation claim if it was unhappy with the results of the Township's rezoning.

For these reasons, we reverse the trial court's decision and remand for entry of summary disposition in favor of the Township.

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot