STATE OF MICHIGAN

COURT OF APPEALS

NATHIMA H. ATCHOO, Trustee of the NATHIMA H. ATCHOO and PETER D. ATCHOO CHARITABLE REMAINDER TRUST,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF ORION, GERALD A. DYWASUK, JILL D. BASTIAN, ALICE P. YOUNG, MICHAEL GINGELL, JOHN M. STEIMEL, ROBERT POTE, DOUGLAS ZANDE, BRAD LARE, MARK CRANE, SANDRA DYE, DICK CHRISTIE and JOHN GARLICKI,

Defendants-Appellees.

UNPUBLISHED
June 23, 2009

No. 283666
Oakland Circuit Court
LC No. 2007-081657-CZ

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff, Nathima H. Atchoo, as trustee of the Nathima H. Atchoo and Peter D. Atchoo Charitable Remainder Trust ("Trust"), appeals as of right an order granting defendant, Charter Township of Orion's, motion for summary disposition.[1] We affirm.

I. Facts and Proceedings

Plaintiff brought suit in the trial court challenging numerous Township decisions involving Trust property on Lapeer Road in the Township. Relevant to this appeal, plaintiff alleged that the circumstances surrounding a ten-month moratorium imposed to defer applications for development and rezoning in the Lapeer Road area and the Township's post-moratorium denial of her request to rezone the Trust property from Office and Professional 1 ("OP-1") to General Business 2 ("GB-2") denied the Trust property's substantive due process, use, and equal protection rights under the United States and Michigan Constitutions.

[1] Plaintiff's claims against the other defendants in this matter were dismissed prior to this order granting summary disposition and their dismissal is not challenged on appeal.

Historically, when the Achoos purchased the property in 1973, the front portion bordering Lapeer Road was zoned RB-3 (Restricted Business 3) and the remaining portion was zoned RM-1 (Multiple Family Residential 1). Despite this classification, the Achoos used a home on the property as an office for their health care practices. In 1984, the Township Board changed the classification to OP-1 (Office and Professional 1), to which the Achoos objected, noting their concern that rezoning to OP-1 would preclude future rezoning for commercial use. The Township Planning Commission retained OP-1 zoning, but voted to change the Master Plan to suggest it would consider rezoning when an appropriate commercial use was created for the property.

On March 30, 1994, a quitclaim deed transferred their interest in the property to themselves as co-trustees of the Nathima H. Atchoo and Peter D. Atchoo Charitable Remainder Trust. In 1998, the Trust received an offer to purchase the Trust property to use as a Kohl's department store for $2,000,000, but the offer was not accepted. Later that year, a $2,000,000 purchase agreement was signed with Home Depot, but that agreement was conditioned upon the completed purchase of the Clark property[2] and commercial rezoning. The Township Board subsequently denied Home Depot's request to rezone the property from OP-1 to GB-2, and consequently the sale failed. Some time after the Home Depot purchase agreement failed, Mr. Achoo suffered a stroke and could no longer serve as a trustee of the Trust. Mrs. Achoo retired in 2002, and the Trust property was vacant thereafter. The Trust property was then marketed for sale for $4,000,000.

Throughout 2004 and 2005, the state of Michigan engaged in negotiations to transfer its Bald Mountain property from its State Recreation Area in the Township to a private owner, Mike Weger. The Township opposed the transfer, as it wanted the Bald Mountain property to remain state land to reduce the chance of further development in the area that would require additional Township services. Although Weger intended to build a golf course on the Bald Mountain property within its existing Rec-2 (Recreational 2) zoning classification, the Township feared his development would be non-conforming.

Following the Bald Mountain property transfer to Weger, the Township undertook a study of the Lapeer Road area and resolved to update the Master Plan. The Township Board concluded that it would be counterproductive to allow new development, expansion, or rezoning during the study. Consequently, on June 20, 2005, it imposed a 120-day moratorium on applications for new development, expansion, or rezoning in the Lapeer Road area. However, it resolved to waive the moratorium for property owners who claimed the moratorium precluded all economic use. The Township Board extended the moratorium for 180 days, beginning on November 1, 2005.

During the moratorium period, Regency Centers offered to purchase the Trust property for $2,450,000 to use as a Target store. However, this offer was conditioned upon (1) commercial rezoning for that property to GB-2, and (2) Regency Centers' purchase of the Clark

[2] The Clark property is a 6.6 acre parcel located on the west side of Lapeer Road and south of Scripps Road.

properties and three and four-tenths acres owned by Don Nelson. On February 6, 2006, the Township Board denied Regency Centers' application for a waiver to apply for rezoning of the Trust property. One month later, the Township Board denied the Atchoo's application for a waiver to apply for similar rezoning.

On April 19, 2006, the Township Planning Commission adopted a Master Plan Update. It noted concerns regarding the development of the area surrounding the Bald Mountain property, such as increased traffic, necessary sanitary improvements, and the preservation of wetlands and woodlands. To provide a buffer or transition to residential developments establishing on the Bald Mountain property's east and west borders, the Township Planning Commission resolved that the Bald Mountain property was ideal for residential and private recreational use, such as golf, tennis, soccer, and nature trails. The Township Planning Commission further resolved that the four corners area of Scripps Road and Lapeer Road should remain free of commercial intrusion based on its proximity to schools, churches, parks, and infrastructure limitations. Finally, the Township Planning Commission noted that a commercial market analysis showed that there was "more than enough commercially zoned land" in the Township. Thus, it resolved to minimize potential "commercial development outside of the existing commercial nodes."

Following the end of the moratorium, several relevant applications for rezoning were filed. On April 21, 2006, the Township filed an application to rezone the Bald Mountain property from Rec-2 to SE (Suburban Estates) and to rezone the Clark properties from GB-2 to OP-1. Orion Land Holdings, L.L.C. ("OLH"), filed an opposing application to rezone the Bald Mountain property from Rec-2 to GB-2 and RM-2. On May 1, 2006, an application was filed to rezone the Trust property from OP-1 to GB-2 on the basis that the OP-1 classification precluded all viable use and marketability and the need for the Regency Centers sale proceeds to support the Atchoo's retirement and medical expenses.

At a meeting on August 2, 2006, the Township Planning Commission recommended that the Township Board deny OLH's application for rezoning and grant the Township's application for rezoning, providing the following reasons for doing so:

> 1) The land use surrounding the site is a mix of residential, office, and commercial uses. However, with the exception of the Home Depot, the commercial uses in the area are of a comparatively small scale and fall under the more restrictive and less intense RB-2, GB-1 [General Business 1], and OP-1; 2) In a GB-2 district, the uses are generally larger in scale and have a greater impact on the environment. Such development would create a substantial burden on the local roads and available infrastructure. Based on the current zoning map, there is adequate land zoned GB-2 within the Township. The Commercial Market Analysis in the Master Plan indicates that the Township has more than an adequate supply of commercially zoned land to meet the needs of its residents in the future; 3) The most recent surrounding development trends support development of office and residential uses in this area. This trend evidences a market for office and residential uses. The proposed zoning would not be consistent with the existing development pattern; 4) the site is located within an area predominantly occupied by residential and recreational uses, with limited office and commercial uses. The existing zoning designation is compatible with

> the existing development pattern and zoning designations within that portion of the Township. An expansion of GB-2 would be incompatible with the existing development pattern or master planned character of this part of the Township; 5) The goal of office developments in the Master Plan is to "provide exclusive areas for office uses that will have limited impact beyond the sites and which are intended to serve nearby residences or businesses." Both the 2003 Master Plan and the 2006 Lapeer Road Master Plan Update designate this site for General Office uses. The proposed zoning is inconsistent with the Master Plan designation; 6) the parcel is substantially wooded and preservation of the natural areas is important. The slopes and woodlands in the area provide appropriate buffers between the GB-2 area to the south and the zoned office use of the parcel; and 7) changing to GB-2 would have a substantial impact on the traffic and our infrastructure capacities as far as the sanitary sewer and water capacities in the area.

The Township Board followed the Township Planning Commission's recommendations and reasoning on September 18, 2006. The Bald Mountain property was rezoned from Rec-2 to SE and the Clark properties were rezoned from GB-2 to OP-1. The adjacent Trust property remained OP-1.

On October 30, 2006, Mrs. Atchoo appealed the Township Board's denial to the Township's Zoning Board of Appeals. In addition to noting the lack of a market for OP-1 zoning, she noted that the commercial developments south of the Clark properties suggested a commercial trend justifying a GB-2 classification for the Trust property. In the alternative to rezoning, a variance was requested to use the property as would be permitted under the GB-2 classification. On January 8, 2007, the Township's Zoning Board of Appeals denied the appeal and refused to grant a variance because it lacked jurisdiction to do so. This lawsuit followed.

Defendants filed a motion for summary disposition, seeking dismissal of each of plaintiff's claims, pursuant to MCR 2.116(C)(8) and (10). Plaintiff responded, seeking dismissal in her favor pursuant to MCR 2.116(I)(2). The trial court, in a thorough and well-reasoned opinion, rejected all of the arguments put forth by plaintiff, and entered an order dismissing her case. Plaintiff appeals as of right from that final order of dismissal.

II. Analysis

Preliminarily, we must first address defendants' argument that plaintiff's challenges to the moratorium, ordinance and zoning decision are not ripe for review. "An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution." *Paragon Props Co v Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996). "[A] judicial challenge to the constitutionality of a zoning ordinance, as applied to a particular parcel of land, is not ripe for judicial review until the plaintiff has obtained a final, nonjudicial determination regarding the permitted use of the land." *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 160; 683 NW2d 755 (2004). Where the possibility exists that the municipality may have granted a zoning variance, or some other remedy from the challenged provisions, the challenge is not ripe for judicial review. *Conlin v Scio Twp*, 262 Mich App 379, 382-383; 686 NW2d 16 (2004).

Plaintiff's "as applied" challenges are precluded by the rule of finality, as she only requested a variance from the Township Zoning Board of Appeals, which refused it because it lacked jurisdiction.[3] The possibility still exists that the Township Board would have granted a variance during the moratorium or afterward, in the alternative to her application to apply for rezoning and her subsequent rezoning request. *Conlin, supra* at 382-383. Therefore, we conclude that plaintiff's "as applied" substantive due process, takings, and equal protection challenges regarding the Moratorium and rezoning request are not ripe for review. Because plaintiff's underlying federal claims are not ripe for review, her corresponding federal claims for relief under 42 USC 1983 must also fail. *Paragon, supra* at 576. In any event, even if the issues were ripe for review, we would affirm the trial court's order for the reasons expressed in its written opinion.

Next, plaintiff challenged provisions in the Township's ordinance, specifically Tree and Woodlands Protection, art XXVII, § 27.12. Section 27.12(C)(1) provides:

> A personal shall not remove, transplant, or destroy . . . on any undeveloped land in the Township, any protected tree . . . without first obtaining a Tree Removal Permit . . . .

Owners of parcels less than five acres in size are excepted from the permit requirement. § 27.12(D)(1). Section 27.12(H)(1) further provides,

> For each protected tree required to be preserved under the terms and standards set forth above, and which is permitted to be removed by permit granted under this Section, the applicant shall replace or relocate trees . . . .

Replacement or relocation shall be made on the property owner's parcel, but if such replacement or relocation is not feasible and desirable, it may be made elsewhere in the Township. § 27.12(H)(3). In the alternative to replacement or relocation, property owners may propose to contribute to the Tree Fund, which shall be administered "to purchase and install trees within a reasonable proximity of the development in connection with which funds have been paid to the Tree Fund." § 27.12(H)(2)(f) and (M)(2).

In her complaint, plaintiff made "as applied" challenges to § 27.12, alleging that it violated the Trust's rights to equal protection. However, plaintiff's "as applied" challenges were not ripe for review by the trial court because § 27.12 was not enforced against the Trust property and plaintiff did not seek relief from them. *Frericks v Highland Twp*, 228 Mich App 575, 595-596; 579 NW2d 441 (1998). The trial court's ruling to that effect was correct.

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[3] We recognize that the *Braun* Court stated, "if the zoning board of appeal dismisses the petition for want of jurisdiction, then finality is also achieved." *Braun, supra* at 160. However, the plaintiff in *Braun* never appealed to the zoning board of appeals, *id*. at 156, so any discussion or statements to that effect would be dicta. Additionally, *Braun* involved both a takings claim and other constitutional claims, and this case does not involve a takings claim.

On appeal, plaintiff now frames the issue as a facial challenge to § 27.12. Finality is not required for "facial" challenges because they allege "that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market." *Paragon, supra* at 576. Because plaintiff did not make these "facial" challenges in the trial court, they are not preserved for appeal, *Attorney Gen v Pub Service Comm*, 243 Mich App 487, 494; 625 NW2d 16 (2000), and so we decline to consider them. Nevertheless, were these issues properly before us, we would again affirm the trial court for the reasons stated in its opinion.

Finally, Const 1963, art 9, § 31 of the Headlee Amendment prohibits local governments

> "from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon." [*Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 209; 591 NW2d 52 (1998), quoting Const 1963, art 9, § 31.]

Plaintiff maintains that § 27.12 imposes a tax, which is illegal and unenforceable because it was not submitted to the electorate under the Headlee Amendment. The Township counters that § 27.12 imposes a fee, not a tax, so it does not violate the Headlee Amendment. We agree with the Township.[4]

The three criteria used to determine if a fee exists are: "(1) a user fee serves a regulatory purpose, (2) a user fee is proportionate to the necessary costs of that service, and (3) a user fee is voluntary." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005). A fee is "usually in exchange for a service rendered or a benefit conferred." *Westlake Transportation, Inc v Pub Service Comm*, 255 Mich App 589, 612; 662 NW2d 784 (2003). A tax, on the other hand, is designed to raise revenue. *Id.*, quoting *Bolt v Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998).

According to the first criterion, requiring property owners to replace their removed trees or pay the Township a replacement fee ensures one of the stated purposes of the section, namely

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[4] The trial court concluded that there was no "case or controversy" because § 27.12 was not enforced against the Trust property. Generally, in order to establish standing, the United States and Michigan Constitutions require an '"injury in fact"' that is both concrete and particularized, as well as actual or imminent. *Rohde v Ann Arbor Pub Schools*, 479 Mich 336, 349; 737 NW2d 158 (2007), quoting *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 624-629; 684 NW2d 800 (2004). The Legislature may not confer jurisdiction upon the court '"unmoored from any genuine case or controversy . . . ."' *Rohde*, *supra* at 348, quoting *Cleveland Cliffs*, *supra* at 622. Some enumerated exceptions apply to this general rule, however. Applicable to this claim, Const 1963, art 9, § 32, confers upon "[a]ny taxpayer of the state" standing to bring suit to enforce the provisions of the Headlee Amendment. *Rohde*, *supra* at 349 n 11. Given this exception, plaintiff had standing to file the Trust's claim to enforce § 31 of the Headlee Amendment.

to preserve important physical, aesthetic, recreational, and economic tree resources for present and future generations. *Westlake, supra* at 612. Contrary to plaintiff's claim, there is no evidence that the purpose of the replacement or Tree Fund requirements is to raise revenue for the Township. *Wheeler, supra* at 665.

According to the second criterion, § 27.12(H)(1) permits property owners to remove trees. In exchange for this permission, the Township established the replacement requirement to plant one tree for every one tree removed. § 27.12(H)(2). This one to one ratio is proportionate. Even if property owners choose not to replace removed trees, plaintiff fails to offer evidence that the Township imposes a Tree Fund fee that is disproportionate to the costs it incurs to replace the removed trees. *Wheeler, supra* at 665-666.

Addressing the third criterion, the replacement or Tree Fund requirements are not voluntary, as they are mandated conditions to receive a permit. *Bolt, supra* at 167-168; *Wheeler, supra* at 666-668. Nevertheless, the lack of volition does not render these charges taxes where the other criteria indicate they are fees. *Wheeler, supra* at 666-668. Consequently, we conclude that the tree replacement and Tree Fund contribution requirements do not impose a tax or implicate the Headlee Amendment. The trial court properly dismissed this claim, as well as all others alleged by plaintiff.

Affirmed.

s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray