STATE OF MICHIGAN

COURT OF APPEALS

DF LAND DEVELOPMENT, L.L.C.,

Plaintiff-Appellant,

v

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, ANN ARBOR CHARTER TOWNSHIP TRUSTEES, ANN ARBOR TOWNSHIP PLANNING COMMISSION, and ANN ARBOR ZONING BOARD OF APPEALS,

Defendants-Appellees.

UNPUBLISHED
September 15, 2009

No. 287400
Washtenaw Circuit Court
LC No. 02-000122-AS

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order denying plaintiff's zoning appeal and the circuit court order granting partial summary disposition in favor of defendants. We affirm.

On February 4, 2002, plaintiff filed a complaint and statutory claim of appeal arising from defendants' involvement in the placement and construction of a cell tower community known as the AT&T Wireless Service Project (AT&T Tower). Specifically, plaintiff asserted that it was the "holder of fee title to properties near the [AT&T] Tower including certain real property already improved by a designed and otherwise suitable cell tower." Plaintiff alleged that defendants approved the site, erection, and use of the AT&T Tower contrary to controlling ordinances and policies and procedures. It was acknowledged that defendants ultimately granted a conditional use permit to allow the AT&T Tower. However, plaintiff asserted that the site, erection, and use allowance were separate and distinct decisions from the ultimate conclusion to issue a conditional use permit.

Plaintiff alleged that defendants violated their own ordinances that required them to investigate the possibility of colocation. Colocation refers to the situation where multiple cellular carriers occupy the same tower. It was asserted that defendants allowed the AT&T Tower without investigation or study because defendants received revenue from the lease of their property. Plaintiff's complaint raised the following counts: (1) claim of appeal pursuant to MCL 125.293a; (2) mandamus and/or superintending control; (3) violation of due process; (4) vested

rights/equitable estoppel; and (5) violation of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*.

On August 1, 2002, plaintiff filed its brief in support of count one of the complaint, the claim of appeal. Specifically, plaintiff alleged that it submitted a petition for hearing to the township's zoning board of appeals regarding the issuance of the building permit for the AT&T Tower. However, one week before the hearing, plaintiff was notified that the case would not be heard. Because there was a local ordinance, Sec. 24.09, and statutory authority, MCL 125.290, governing review of zoning board decisions, it was erroneous for defendants to deny plaintiff's request for a hearing. Furthermore, the failure to allow a hearing allegedly violated plaintiff's right to procedural due process.

On September 3, 2002, defendants filed a brief in opposition to plaintiff's claim of appeal. Therein, defendants contended that the circuit court did not have subject matter jurisdiction to decide the appeal because plaintiff lacked standing to sue. As a matter of law, the claim of appeal failed because plaintiff did not constitute a "person aggrieved" for purposes of MCL 125.290, and it did not demonstrate special damages uncommon to others similarly situated. Plaintiff's financial interest in preventing the construction of new towers in an attempt to gain additional revenue did not confer standing. Defendants also asserted the claim of appeal was barred by laches because the passage of time combined with changed conditions made it inequitable to address the claim. The AT&T Tower contracts were executed, the permits were issued, and the construction was complete.

After hearing oral argument, the circuit court issued an opinion and order denying plaintiff's appeal. The court ruled:

> The Court agrees that Appellant has standing to seek review by the Court based on its status as a "person having an interest affected by the zoning ordinance…." The issue for the Court's review is whether Appellee ZBA erred in denying Appellant a hearing. Section 24.10 of the Township Ordinance and MCLA 125.290(2) provide that appeals to the ZBA may be taken by "persons aggrieved" by the decision. In order to demonstrate standing as a person aggrieved, Appellant must allege and prove that it has suffered special damage not common to other property owners similarly situated. *Village of Franklin v. City of Southfield*, 101 Mich App 554, 558 (1980). Appellant suggests that its interest or special damage is related to the fact that it owns a "cellular tower that services the same area" and that "it is the holder of fee title to properties near the Cell Tower, including certain real estate improved by a previously designed and otherwise suitable cell tower." However, interference with business or commercial advantage does not constitute "special damage." *Western Michigan University Board of Trustees v. Brink*, 81 Mich App 99, 104-105 (1978).
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> Assuming that Appellant could allege and prove special damage, the Court finds that its claim is barred under the equitable doctrine of laches. Application of laches requires proof of a party's lack of due diligence resulting in some prejudice to the other party. *Badon v. General Motors Corp.*, 188 Mich App 430, 436 (1991). The Court finds the application of laches appropriate in this case where Appellant delayed filing its petition until November 2001, many months after the

> March 5, 2001 hearing concerning the cell tower, and well after approvals were rendered and construction commenced. Construction of the cell tower is now complete. The passage of time in conjunction with the change in circumstances establishes both inexcusable delay on the part of Appellant and substantial prejudice to Appellees making it inequitable for the Court to enforce Appellant's right to a hearing on its petition. *City of Troy v. Papadelis, (On Remand)*, 226 Mich App 90 (1997).
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> In addition, the Court finds that Appellees followed proper procedure in denying Appellant a hearing based on the fact that the township ordinance prohibits review by the ZBA of decisions "regarding any issue that involves a conditional use permit…." *Ann Arbor Charter Township Ordinance, Section 24.04*. Therefore, Appellee ZBA's decision to deny a hearing complies with applicable law, represents the reasonable exercise of discretion granted by law, and is supported by competent, material and substantial evidence on the record.

On November 15, 2006, defendants filed a motion for partial summary disposition, seeking dismissal of the claims of mandamus or superintending control, violation of due process, and vested right/equitable estoppel pursuant to MCR 2.116(C)(8) and (10). Defendants asserted that the claims were barred based on the circuit court's conclusion that defendants complied with applicable law in denying the request for a hearing, defendants' actions were supported by competent, material, and substantial evidence on the whole record, and the application of the doctrine of laches. Therefore, any action taken by defendants did not deprive plaintiff of the absolute use of its cellular tower. Defendants did not interfere with the tower or the contract with providers for the use of the tower. Furthermore, the doctrine of equitable estoppel was a defense to an action, not an original claim. Therefore, dismissal of counts II, III, and IV was appropriate.

On December 18, 2006, plaintiff filed a brief in opposition to defendants' motion for partial summary disposition and requested summary disposition in its favor pursuant to MCR 2.116(I)(2). Therein, it was alleged that defendants failed to follow its colocation ordinance that encouraged the use of existing cell towers. Plaintiff alleged that defendants deliberately failed to follow its ordinances in order to lease its own property for construction of a cell tower to generate revenue. Consequently, plaintiff asserted that the vested rights in colocation of its cell tower were violated by defendants. Plaintiff further alleged that the doctrine of laches did not apply. It attempted through FOIA requests to determine the status of the AT&T Tower, but was hindered by defendants. The response filed by plaintiff did not address the claims for mandamus, superintending control, procedural due process, and equitable estoppel.

On June 19, 2007, the circuit court issued an opinion and order granting defendants' motion for partial summary disposition, holding in relevant part:

> Plaintiff's claim of a vested right to colocation is based on its argument that the purpose and intent of Defendants' Ordinance was to "financially and aesthetically" protect Plaintiff. The Court is not persuaded that there is legal authority or evidence to support Plaintiff's claim. The plain language of the Ordinance manifests a clear intent to allow construction of towers "in a manner which will maintain the integrity, character, property values and aesthetic quality

> of the affected neighborhood and the Township at large." Not only does the Ordinance fail to protect or benefit "providers" such as Plaintiff, it grants Defendants authority to sanction providers who fail to cooperate. (A provider who does not cooperate with colocation may be deemed a nonconforming use or may be prohibited from receiving approval of a new facility for a period of ten (10) years). Thus, contrary to Plaintiff [sic] assertion, according to the Ordinance, colocation exists to benefit the "Township at large" and does not exist to benefit or protect providers.
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> A mere investment in the acquisition of land for an intended use is not sufficient to create a vested right. *Detroit Edison Co. v. City of Wixom*, 382 Mich 673, 685 (1969). In addition, Plaintiff's reliance on Defendants' declaration of policy is not sufficient to create contractual or vested rights because Plaintiff has failed to overcome the well-founded presumption that government policies are subject to revision and repeal. *Dodge v. Board of Education*, 302 U.S. 74, 79, 58 S.Ct. 98 (1937). As explained in *Minty v. Bd. of State Auditors*, 336 Mich 370, 390 (1953): "… a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another."
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> Considering the evidence, the Court does not find a genuine issue of fact and, considering the applicable law, the Court agrees with Defendants that, aside from the Court's previous finding that laches bars Plaintiff's appeal, Plaintiff has failed to demonstrate that it has a "vested right" to colocation that Defendants are compelled to recognize and protect, and of which Defendants cannot deprive Plaintiff without injustice. *Cusick v. Feldpausch*, 259 Mich 349, 352 (1932).
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> For the reasons stated by Defendant [sic], Defendants' motion for summary disposition of Counts I [sic], III and IV is GRANTED. The case will proceed only on Plaintiff's remaining Count V (FOIA claim).

On August 15, 2008, the circuit court dismissed the FOIA claim based on the stipulated order submitted by the parties. Plaintiff appeals as of right.

Plaintiff first alleges that the circuit court erred in concluding that the doctrine of laches barred plaintiff's claim. However, our review of the circuit court opinion denying the claim of appeal reveals that the ruling was premised on the application of three separate principles: (1) standing as a person aggrieved; (2) laches; and (3) lack of subject matter jurisdiction when the local ordinances precluded review of the approval of a conditional use permit. Plaintiff only challenges the application of laches and does not address the other two holdings rendered by the circuit court. When an appellant fails to challenge the basis of the ruling by the trial court, we need not even consider granting the party the relief requested. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

Specifically, the circuit court held that plaintiff could not demonstrate standing as a person aggrieved. A person aggrieved must allege and prove that he has suffered special damages not common to other similarly situated property owners. *Village of Franklin v City of Southfield*, 101 Mich App 554, 557; 300 NW2d 634 (1980); *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975). In light of the failure to address this aspect of the trial court's ruling, plaintiff did not demonstrate entitlement to appellate relief.[1]

Plaintiff next alleges that the circuit court erred in granting defendants' motion for partial summary disposition. We disagree. The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). An appellant's failure to properly address the merits of a claim of error with citation to authority constitutes abandonment of the issue. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008).

Plaintiff contends that the circuit erred in granting summary disposition of counts II (mandamus/superintending control),[2] III (procedural due process), and IV (vested rights/equitable estoppel). However, review of the brief on appeal reveals that plaintiff failed to address the dismissal of the mandamus, superintending control, procedural due process, and equitable estoppel claims and did not cite any authority in support of maintaining these claims. Accordingly, the challenge to these claims is abandoned. *Woods, supra*.

A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Detroit v Walker*, 445 Mich 682, 699; 520 NW2d 135 (1994) (Citations omitted). "Deciding whether or not a right is vested is a difficult determination, with policy considerations, rather than definitions, controlling." *Ludka v Dep't of Treasury*, 155 Mich App 250, 259; 399 NW2d 490 (1986).

> It would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an

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[1] We note that the multiple aspects to the trial court's ruling is plainly apparent. In order to reach the issue of laches, the circuit court held that it would assume contrary to its earlier holding that plaintiff could plead and prove special damages.

[2] Plaintiff's statement of the issue asserts that the trial court erred in granting summary disposition of count I. However, count I of the complaint addressed the claim of appeal, an issue upon which the circuit court previously ruled. Therefore, count II is at issue.

> anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another. [*Minty v Bd of State Auditors*, 336 Mich 370, 390; 58 NW2d 106 (1953).]

There is no vested right to the continuation of an existing law by precluding the amendment or repeal of the law. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 633; 673 NW2d 111 (2003).

Plaintiff contends that defendants failed to conduct a colocation analysis in accordance with their ordinances. If defendants had conducted the analysis, "the colocation would be to the Plaintiff's cell tower. … Had the AT&T cell tower been properly collocated, the Plaintiff would have received appropriate compensation." In the present case, there has been no interference with plaintiff's use of its property. Rather, plaintiff essentially contends that the colocation ordinance must be followed and that it has a vested right in the colocation ordinance. Following plaintiff's logic, strict adherence to the colocation ordinance created a vested right in revenue for plaintiff. Irrespective of the colocation ordinance, defendants zoning laws also contain exemptions and exceptions, and an otherwise prohibited use may be altered through the authority to grant conditional use permits. In the present case, defendants leased its premises for the AT&T Tower through a conditional use permit. Therefore, plaintiff cannot contend that the colocation ordinance created a vested right.[3] *Walker, supra*; *Van Buren, supra*.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher

[3] We also note that the lease agreement involving defendants contained a colocation provision. Therein, defendants required the cell carrier to coordinate equipment in the event of colocation with other providers. Plaintiff is the fee holder of land with a lease to a cellular carrier who provides the equipment. This 1995 lease does not contain any colocation provision. Therefore, it is unclear whether the lessee or lessor would be entitled to generate revenue if a decision to collocate from the tower was rendered.