STATE OF MICHIGAN

COURT OF APPEALS

DALE V. ARMSTRONG, Plaintiff-Appellant,	UNPUBLISHED March 18, 2010
v	No. 288027 Livingston Circuit Court
IOSCO TOWNSHIP, Defendant-Appellee.	LC No. 04-021069-CZ

Before: Judges K. F. Kelly, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

In this zoning dispute, the trial court entered an order in favor of defendant, Iosco Township, after a bench trial. Plaintiff, Dale V. Armstrong, now appeals by right. We affirm.

I. BASIC FACTS

Plaintiff owns approximately 22 acres of property located in Livingston County, Michigan. The property is situated at the northeast corner of Kern and Lange Roads in Iosco Township. The land is vacant, except for an old farmhouse on its southeastern side and some utility poles. It is not farmable because its surface consists mostly of sand and rock.

At the time of this litigation, the property was zoned agricultural-residential (A-R). Under the township's zoning ordinance, A-R zoned land is intended for agricultural and single family residential uses and is meant to achieve a low-density residential environment "that will not encroach upon neighboring agricultural uses." Iosco Zoning Ordinance, art 8, § 800. Permitted principal uses on A-R zoned land include, for example, farms and farm buildings, single-family dwellings, public parks, and forest preservation areas. Certain special land uses not explicitly allowed on A-R zoned land could be permitted "upon the issuance of a special use permit . . . ." Iosco Zoning Ordinance, art 8, §802. Section 207 of the ordinance defines "special land use" and "special land use permit," respectively, as:

> Special Land Use. A use permitted by the Township Board, with the recommendation of the Planning Commission, to accommodate certain land uses that are not normally compatible with other land uses permitted in a district or whose effect upon adjoining land uses are not immediately determinable; therefore, require certain conditional regulations to guide their development within a given district. Such uses are reviewed by the Planning Commission

including site plan review and the addition of specific requirements to insure conformity within the district.

Special Land Use Permit. The permit issued for a special land use after approval by the Township Board. [Iosco Zoning Ordinance, art 2, §208]

The special land uses that may be permitted on A-R zoned land include use as a manufactured home community, or mobile home park. Iosco Zoning Ordinance, art 8, §802. The township's ordinance does not otherwise permit or establish a zoning district specifically for manufactured housing. Thus, a landowner wishing to develop a manufactured housing community must apply for a special use permit (SUP), "subject to the standards specified in Article 19 [of the ordinance]." Iosco Zoning Ordinance, art 8, §802.

Article 19 provides the procedures for obtaining a SUP. A landowner must submit a SUP application to the township clerk, along with a detailed site plan. Iosco Zoning Ordinance, art 19, §1902. With regard to manufactured housing, part O of article 19 requires the developer to provide certain details in the preliminary site plan. Iosco Zoning Ordinance, art 19, §1905. Once an application is submitted, the township's planning commission considers whether the application should be approved, denied, or approved with conditions and provides its recommendation to the township board. Iosco Zoning Ordinance, art 19, §§1903, 1908. In the interim, a public hearing must be held on the SUP application within 60 days of its submittal. Iosco Zoning Ordinance, art 19, §1902. Once the township board receives the planning commission's recommendation, it has the discretion to approve or deny the permit.

A. PLAINTIFF'S SUP APPLICATION

In January 2001, plaintiff submitted to the township a SUP application for manufactured housing to be developed on the subject property. Plaintiff's SUP application included a preliminary site plan detailing the layout of the community and the dimensions of the lots. Plaintiff's plan envisioned a 50-unit community called "Glacier Rock Estates." The development also included a community building, some open space, three foot tall evergreen trees, a storm water retention pond, a septic tank and tile field area, and a "well house" with a an isolation radius of 200 feet. Kern Road, which intersects with Lange Road, would provide access to the development. Both roads are gravel. Plaintiff contemplated that the development would house senior citizens. At the time, no manufactured housing community existed within the township. In the same month, the township's planning commission recommended approving plaintiff's SUP application; in its view, plaintiff's application met the township's requirements under the zoning ordinance. The planning commission's recommendation was provided to the township board.

In March 2001, the township board held a public meeting, the topic of which was plaintiff's proposed manufactured housing community. During the meeting, members of the public expressed concerns regarding the proposed development's effect on the condition of the streets near the site, surrounding property values, and the "pastoral" character of area. After the meeting, the township sent plaintiff a list of questions for its further consideration.

The next month, the township board considered plaintiff's SUP application in a meeting and decided to deny the application. According to the township board, denial of plaintiff's

application was appropriate because the proposed use was "not in harmony with existing ordinances or the surrounding residential community, the bridge on Lange [Road] is [a] single lane and in poor condition, bad and unpaved roads [sic], emergency vehicles would have problems getting in/out of the proposed Park, the negative impact the park would have on nearby wells and the ground water, along with drainage issues." Accordingly, the board sent plaintiff a letter informing him of its decision.

B. PRE-TRIAL PROCEDURES

In November 2004, plaintiff filed this lawsuit against the township, asserting violations of the Equal Protection Clause and the Substantive Due Process Clause, and alleging that the current zoning was exclusionary and failed to meet a legitimate purpose in contravention of sections 297a and 273 of the Township Zoning Act (TZA), MCL 125.271 *et seq.*,[1] respectively.

In December 2005, the parties filed cross-motions for summary disposition. Initially, the trial court granted defendant's motion on the grounds that plaintiff's claims were not ripe and dismissed the case in its entirety. Plaintiff, however, moved for reconsideration and the trial court granted the motion.[2]

The matter was reset for a pretrial hearing, at which the trial court requested supplemental briefing only on the exclusionary zoning issue. During the hearing and in his supplemental briefing, plaintiff raised for the first time an argument that his exclusionary zoning claim was also based on § 7, MCL 125.2307, of the Manufactured Housing Commission Act (MCHA),[3] MCL 125.3301 *et seq.*, under which he would not have to establish that a demand for manufactured housing existed, unlike under § 297a of the TZA.

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[1] 2006 PA 110 repealed the TZA, MCL 125.271 to MCL 125.310. However, 2006 PA 110 did not void ordinances or permits based on 1943 PA 184, or otherwise affect any pending litigation that existed as of April 10, 2006.

[2] After the trial court granted plaintiff's motion for reconsideration, the matter was re-assigned to a different judge for administrative reasons.

[3] MCL 125.2307 provides in part:

> (3) A local government ordinance shall not be designed as exclusionary to mobile homes generally whether the mobile homes are located inside or outside of mobile home parks or seasonal mobile home parks.
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> * * *
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> (6) A local government ordinance shall not contain roof configuration standards or special use zoning requirements that apply only to, or excludes, mobile homes.

Ultimately, the trial court denied both parties' motions for summary disposition. It reasoned that plaintiff's claims fall under the TZA, not the MCHA, and ruled that a question of fact remained with regard to plaintiff's claims. The court set a date for bench trial.

C. BENCH TRIAL

At trial, plaintiff presented evidence and testimony that the wells that would be placed on his property for the development would provide sufficient water capacity and would not affect the water pressure, or capacity, in nearby residential properties. Plaintiff also produced testimony that the development would result in additional vehicular traffic on nearby roads, but would not cause "undue deterioration of the roads," and would actually improve drainage in the area, because components of the proposed plan, specifically the detention basin and ditches along the roads, would better direct the flow of water.

Further, Brian Frantz, a community planner, testified for plaintiff that a need for manufactured housing existed in the township. Frantz's conclusion was based on his analysis of demographic data within a three-mile radius of plaintiff's property; the data was collected from the U.S. Census Bureau, the Federal Housing Administration, and other government or organizational sources. Basically, Frantz compared the median household income of individuals residing in Iosco Township, the median cost of a house in the township, and the mortgage that approximately a third of individuals in the township could afford, and the fact that no manufactured housing units existed in the township, to conclude that available affordable housing in the community was lacking and that a need for manufactured housing existed. Frantz testified that he did not know of any other planners who had employed a similar methodology. In addition, Frantz testified that using the three mile radius was "a reasonable thing based on . . . my professional opinion . . . ."

Defendant provided the testimony of John Enos, a community planner for the township, who testified that a manufactured home community was not in harmony with the existing ordinances for the surrounding residential area. According to Enos, the surrounding area had a very natural rural character, consisting of significant woodlands, historical agricultural buildings, rolling hills and other natural areas, such as the Red Cedar River. In his view, the proposed development, which envisioned 2.2 housing units per acre was not compatible with this existing rural landscape and the township's decision to deny the SUP was entirely reasonable. Enos further testified that there was no need for manufactured housing at the site proposed by plaintiff, based on the fact that many units were already available within a six-mile radius. Specifically, on the date that plaintiff filed his SUP application in January 2001, approximately 46 manufactured home lots were available at Burkhart Ridge, four miles away from the subject property. At the conclusion of trial, the court entered an order dismissing plaintiff's claims.[4]

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[4] During trial, plaintiff stipulated dismissal of his claim based on a violation of MCL 125.273. Thus, the trial court's order only pertained to plaintiff's due process, equal protection, and exclusionary zoning claims.

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II. MANUFACTURED HOUSING COMMISSION ACT

On appeal, plaintiff argues that the trial court erred by denying his motion for summary disposition because the township's SUP requirement for mobile homes violates MCL 125.2307 of the MHCA. In plaintiff's view, MCL 125.2307 provides plaintiff with another avenue by which to pursue his exclusionary zoning claim. We disagree with plaintiff. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dorman v Clinton Twp*, 269 Mich App 638, 644; 714 NW2d 350 (2006).

At the outset, we note that plaintiff failed to specifically plead an exclusionary zoning claim based on MCL 125.2307 and did not file a motion for summary disposition under the MCHA. Rather, plaintiff raised his argument related to MCL 125.2307 for the first time at a pretrial hearing and filed a supplemental brief in support of his exclusionary zoning claim articulating this argument. The trial court addressed plaintiff's assertion by explaining that the TZA, not the MCHA, controls plaintiff's exclusionary zoning claim; thus, it made no explicit summary disposition ruling on the MCL 125.2307 "claim."

We conclude that the trial court did not err by determining that the TZA controls plaintiff's exclusionary zoning claim and not the MHCA. First, the provisions of the MCHA do not control over local zoning laws. *Silver Creek Twp v Corso*, 246 Mich App 94, 98; 631 NW2d 346 (2001). The TZA enables townships to "regulate the development and proper use of land . . . ." *Id*. The MHCA, on the other hand, "regulate[s] and provide[s] for minimum construction and safety standards with regard to mobile home businesses and parks." *Id*. at 278. Second, it is plainly obvious, given the purpose of the MHCA, that the MHCA does not provide the legal basis for an exclusionary zoning claim; it does not seek to provide a plaintiff recourse if a township attempts to exclude a lawful land use. Rather, MCL 125.297a of the TZA does. The trial court did not err.

III. CONSTITUTIONAL CLAIMS

Plaintiff also contends that the zoning ordinance violates his substantive due process and equal protection rights because it totally excludes use of land for manufactured housing and, thus, the trial court erred by dismissing those claims. We disagree. Following a bench trial, we review for clear error a trial court's findings of fact**.** *Frericks v Highland Twp*, 228 Mich App 575, 583; 579 NW2d 441 (1998). We review its conclusions of law de novo. *Id*. Constitutional questions are also reviewed de novo. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995).

The Fourteenth Amendment of the federal constitution, US Const, Am XIV, and Const 1963, art 1, § 2 guarantee equal protection of the laws. The Fourteenth Amendment and Const 1963, art 1, § 17 guarantee that no person shall be deprived of life, liberty, or property without due process of law. The former seeks to ensure "that all persons similarly situated . . . be treated alike[,]" *Great Lakes Society v Georgetown Twp*, 281 Mich App 396, 427; 761 NW2d 371 (2008) (citation and quotation marks omitted), while the latter aims to prevent the arbitrary

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deprivation of property or liberty rights, *Landon Holdings, Inc v Grattan Township*, 257 Mich App 154, 173; 667 NW2d 93 (2003).

Generally, zoning ordinances are presumed to be constitutionally valid. *Silva v Ada Twp*, 416 Mich 153, 159; 330 NW2d 663 (1982). Further, where a challenger has raised both equal protection and substantive due process claims and the challenger cannot show a suspect or somewhat suspect classification, as is the case here, the analysis under the two clauses is essentially the same. *Landon Holdings, Inc*, *supra* at 173, 177. In both instances, the challenging party has the burden of showing that the ordinance is not rationally related to, and does not advance, a legitimate state interest or that the ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the subject area. *Id*. at 175; *Houdek v Centerville Twp*, 276 Mich App 568, 574; 741 NW2d 587 (2007). "Further, in order to show that an ordinance is not rationally related to a legitimate governmental interest, a challenger must negate every conceivable basis that might support the ordinance or show that the ordinance is based solely on reasons totally unrelated to the pursuit of the State's goals." *Houdek*, supra at 583 (citation and quotation marks omitted). However, if the ordinance *totally* excludes a use, the burden is on the government to prove that the ordinance is reasonably related to a legitimate governmental interest. *Countrywalk Condominiums, Inc v Orchard Lake Village*, 221 Mich App 19, 24; 561 NW2d 405 (1997).

Because the character of the ordinance as either totally exclusionary, or not, affects our analysis, we first consider plaintiff's argument that the township's ordinance totally excludes mobile home communities. Here, the township's zoning ordinance permits the use of land for mobile homes provided a landowner obtains a special use permit. Importantly, although the ordinance requires SUPs for special uses, it nonetheless characterizes such uses as "permitted." See Iosco Zoning Ordinance, art 2, §208 (defining "special land use"). Hence, the SUP procedure is not an authorization to permit prohibited uses, like a variance or a nonconforming use. Rather, the intent of the ordinance is to permit "certain other land uses which may be necessary or desirable in certain districts, but on account of their actual or potential impact . . . . need to be carefully regulated with respect to their location for the protection of township residents." See Iosco Zoning Ordinance, art 19, §1900. Thus, the use is permitted, but the township has not yet decided where it is most appropriate. Accordingly, it cannot be said that the township's ordinance totally excludes manufactured home communities.

Plaintiff, however, asserts that the ordinance is totally exclusionary because the township has not designated any property specifically for manufactured housing. Plaintiff also points to the fact that no manufactured housing community exists in the township as evidence that the ordinance is totally exclusionary. However, these facts do not show that manufactured housing is totally excluded. Such facts are not indicative of the ordinance's character; a use is not necessarily excluded simply because it does not yet exist.

Plaintiff also relies on language *Countrywalk Condominiums, Inc*, *supra*, which states,

> [A]n ordinance which totally excludes a use recognized by the constitution or other laws of the state, carries a strong taint of unlawful discrimination and a denial of equal protection of the law.

* * *

> The fact that plaintiff could apply for a variance or *a special permit* does not cure the defect in the zoning ordinance. *Eveline Twp v H & D Trucking Co, 181 Mich. App. 25, 34; 448 N.W.2d 727 (1989).* [*Countrywalk Condominiums, Inc, supra* at 23 (some citations omitted and emphasis added).]

However, this Court in *Landon Holdings, Inc*, which involved an ordinance requiring a special use permit for certain uses, limited the applicability of the *Countrywalk Condominiums, Inc*, to its facts, noting that its reference to "a special permit" was unexplained. *Landon Holdings, Inc, surpa* at 170. The *Landon Holdings, Inc* Court further clarified that the facts of *Countrywalk Condominiums, Inc*, involved a nonconforming use, not one that was permitted under a special use permit. *Id*. After our review of the relevant facts in this case, and the township's zoning ordinance, we are of the view that the SUP procedure here is similar to that in *Landon Holdings, Inc*, and is not a permit procedure for a non-conforming use, like that in *Countrywalk*. Thus, we are not persuaded to follow the dicta in *Countrywalk Condominiums, Inc*, as plaintiff urges us to do.

Having concluded that the ordinance is not totally exclusionary, we must reject plaintiff's argument that the township failed to meet its burden of proof. Because the ordinance is not totally exclusionary, the burden was on plaintiff, not the township, to show that the ordinance is not rationally related to a legitimate state interest. *Countrywalk Condominiums, Inc, supra* at 24. And, after our review of the record, we hold that plaintiff failed to meet his burden of proof. Here, the township's planner, Enos, testified that plaintiff's proposed plan for a manufactured community situated on plaintiff's land was not in conformity with the rural character of the area. And, as this Court has recognized, preserving the character of an area is a legitimate interest that may be advanced by zoning regulations. *Dorman, supra* at 651-652. Plaintiff failed to rebut this evidence. Thus, plaintiff's constitutional claims fail.

IV. EXCLUSIONARY ZONING

Plaintiff also contends that the evidence showed that a demonstrated need for manufactured housing existed when plaintiff applied for the SUP and that the trial court's contrary finding was against the great weight of the evidence. Specifically, plaintiff contends that the trial court erroneously relied on current market conditions, improperly rejected Frantz's expert testimony, and misinterpreted an affidavit.

The TZA precludes a township from totally prohibiting a lawful land use under certain circumstances. *Frericks, supra* at 610. Specifically, MCL 125.297a[5] provides:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location with the township where the use may be appropriately located, or the use is unlawful.

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[5] This provision was recodified in nearly identical language as MCL 125.3207.

To prevail on a claim of exclusionary zoning, a plaintiff must show "(1) that the challenged ordinance has the effect of totally excluding the land use within the township, (2) there is a demonstrated need for the excluded land use in the township or surrounding area, (3) the use is appropriate for the location, and (4) the use is lawful." *Houdek*, *supra* at 575. It is not necessary for a plaintiff to show than an ordinance excludes a use on its face, rather it will suffice to show that the ordinance makes a use a "practical impossibility." *Landon Holdings, Inc*, *supra* at 168.

We find it unnecessary to address plaintiff's argument relating to his burden to show that a demonstrated need exists because plaintiff has failed to show "that the challenged ordinance has the effect of totally excluding the land use within the township." *Houdek*, *supra* at 575. As we have already determined in our analysis under section III, the township's zoning ordinance requiring a SUP is not facially, totally exclusionary. Thus, to prevail on his claim, plaintiff should have produced evidence showing that the ordinance's practical effect was exclusionary, or that the SUP procedures were illusory. Plaintiff, however, presented no evidence showing that the township intentionally seeks to preclude the development of manufactured housing communities or otherwise has a practice of prohibiting manufactured housing communities under the SUP procedures. And, as we have already explained, the fact that no manufactured housing communities currently exist in the township and the fact that the township has no area specifically designated for manufacturing housing, does not necessarily mean that the ordinance effectively excludes such a use. Accordingly, the trial court appropriately granted judgment in defendant's favor.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William C. Whitbeck
/s/ Henry William Saad