STATE OF MICHIGAN

COURT OF APPEALS

DF LAND DEVELOPMENT, LLC, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED July 13, 2010
v	No. 291362 Washtenaw Circuit Court
CHARTER TOWNSHIP OF ANN ARBOR, Defendant-Appellee/Cross-Appellant.	LC No. 07-000721-CZ

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

Plaintiff, developer DF Land Development, appeals as of right an order granting summary disposition in favor of defendant, the Charter Township of Ann Arbor, and defendant cross-appeals the same order. We affirm.

This case arises out of plaintiff's ownership of a parcel of real property located within the township's borders. The property is presently zoned a combination of R2 (single-family suburban residential) and RD (research and development), but plaintiff wishes to develop it for commercial/retail uses,[1] which would require it to be zoned C1. However, C1 zoning for the property would be inconsistent the General Development Plan (GDP), which defendant has a policy of following. Furthermore, the GDP states that the township has no need for commercial services or commercial centers.[2] Plaintiff contends that there is no C1 zoning anywhere within the township, although it appears to us that the Township Zoning Map upon which plaintiff relies does include two small areas zoned C1, albeit in areas that are completely surrounded by the City of Ann Arbor.

The evidence shows that the Charter Township of Ann Arbor was historically a 35 square mile township with what is now the City of Ann Arbor inside it, but the City of Ann Arbor has since expanded and annexed approximately half of the township. According to the United States

[1] Defendant concedes that plaintiff's proposed use is lawful.

[2] The GDP was amended during the pendency of this litigation to remove C1 zoning entirely.

Census Bureau, as of 2000, the township had a total area of only 17.74 square miles, leaving the township with what amounts to a strip of land along its northern and eastern historical boundaries, wrapping around the City of Ann Arbor to the city's north and east. Those strips are only a few miles wide at the most. There is presently a considerable amount of commercial/retail land use in areas within the historical boundaries of the township but have since been annexed. Plaintiff's expert Sharon Vokes conducted a "retail feasibility study," part of which consisted of an extensive inventory of commercial and retail land uses in the area, and a map showing "retail clusters" in the Ann Arbor area that included numerous such uses in the City of Ann Arbor and both immediately to the south and immediately to the west of the township's boundary lines.

Plaintiff commenced the instant suit on July 7, 2007, asserting facial exclusionary zoning in violation of the Zoning Enabling Act, MCL 125.3207, and in violation of substantive due process, and further asserting that its claims were ripe for judicial review notwithstanding its failure to seek any administrative relief from the township. The trial court initially granted partial summary disposition in plaintiff's favor, agreeing with plaintiff that the matter was ripe for review and that defendant's zoning ordinance facially excluded commercial/retail land uses. However, after discovery, the trial court concluded that it had been mistaken in finding a facial exclusion and further opining that plaintiff had failed to satisfy its burden of showing a demonstrated need for commercial/retail land use in the township. It therefore granted summary disposition in favor of defendant. This appeal followed.

We initially address defendant's contention that this matter is not ripe for review because of this issue's jurisdictional significance. This Court reviews jurisdictional rulings de novo, reviewing all affidavits and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). Although the plaintiff has the burden of showing jurisdiction, plaintiff "need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition." *Id*. While we find that plaintiffs should generally seek administrative relief before seeking redress from the courts for alleged facial exclusionary zoning, we decline, under the circumstances, to require plaintiff to have done so here.

Both parties correctly explain that there are two general kinds of challenges to zoning ordinances: facial and as-applied. A facial challenge to a zoning ordinance asserts that the ordinance has the effect of totally prohibiting an otherwise legitimate land use within a township; such an ordinance is impermissible absent special circumstances, and it has "a strong taint of unlawful discrimination and a denial of equal protection of the law with regard to the excluded use." *English v Augusta Twp*, 204 Mich App 33, 37-38; 514 NW2d 172 (1994). A facial challenge does not require a plaintiff to obtain a final[3] decision from its local governmental

[3] "[T]he finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 81; 445 NW2d 61 (continued…)

entity prior to seeking judicial review, whereas an as-applied challenge does. *Paragon Properties v Novi*, 452 Mich 568, 576-577; 550 NW2d 772 (1996). Defendant argues that that plaintiff really set forth an as-applied challenge rather than a facial challenge, and also that a plaintiff must seek *some* kind of meaningful relief from its local governmental entity.

We find that plaintiff has made out a facial challenge to defendant's zoning ordinance. A claim that a zoning ordinance is facially exclusionary requires a plaintiff to show that the ordinance excludes a particular land use, that that land use is needed in the area, that the use is appropriate for the location, and that the use is lawful. *Kropf v City of Sterling Heights*, 391 Mich 139, 155-156; 215 NW2d 179 (1974); *Houdek v Centerville Twp*, 276 Mich App 568, 575; 741 NW2d 587 (2007). Plaintiff has alleged that defendant's zoning scheme has the effect of totally prohibiting commercial/retail uses anywhere in the township, that there is a demonstrated need for commercial/retail land uses in the township, and that commercial/retail uses are appropriate for plaintiff's property. It is undisputed that plaintiff's proposed use is lawful. Defendant complains that plaintiff discusses facts specific to plaintiff's property, but this is expected, given plaintiff's need to demonstrate that commercial/retail uses would be appropriate on its particular property.

This Court has previously found a facial challenge—in combination with various other challenges—unripe because no final administrative decision had been rendered. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154; 683 NW2d 755 (2004), seemingly contrary to the holding in *Paragon Properties*, *supra*, 452 Mich at 576-577. We agree with this Court's explanation that the "holding in *Braun* stands for the proposition that in zoning cases where the plaintiffs assert a takings claim as well as one or more 'as applied' constitutional claims, the plaintiffs must establish finality with regard to the takings claim before the entire matter is ripe for judicial review," and the *Braun* finality requirement simply could not be applied to a pure exclusionary zoning challenge. *DF Land Development LLC v Charter Twp of Ann Arbor*, unpublished opinion per curiam of the Court of Appeals, Docket No. 275859 (decided October 23, 2008), slip op at pp 7-8. While *DF Land* is not precedentially binding, we are persuaded by its reasoning.

This Court in *DF Land Development LLC* also explained that "[w]hile a plaintiff need not satisfy the stringent requirements of the *Braun* test, a plaintiff seeking [exclusionary zoning relief] must seek and receive an administrative determination on a request regarding a particular parcel of land because a use is not necessarily excluded simply because it does not yet exist in the zoning map." *DF Land Development LLC*, *supra*, slip op at p 8, citing *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 168-169; 667 NW2d 93 (2003). We further agree. In *Landon Holdings*, this Court explained that the ordinance at issue did not set aside any land for a particular use, but it did allow the use upon following a particular procedure. *Landon Holdings*, *supra*, 257 Mich App at 167-168. In the absence of any evidence that the locality would deny a request by the plaintiff to permit that use on the plaintiff's property, the ordinance could not yet be deemed exclusionary. *Id.* at 171-173. If the municipality is not afforded the initial opportunity to decide whether to consider permitting a given use on the plaintiff's property, the

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(…continued)

(1989) (internal quotation and emphasis omitted).

courts inappropriately act as a "super-zoning" authority. *DF Land Development LLC*, *supra*, slip op at p 9.

Defendant in this case was, in fact, not afforded the opportunity to decide whether to consider permitting plaintiff's proposed land use. However, despite defendant's general protestations that rezonings and variances "will be granted" in general, the record as a whole suggests absolutely no indication that defendant would have granted one here. Furthermore, the fact that a plaintiff could seek a variance or a special permit does not necessarily cure a facially defective zoning ordinance. *Countrywalk Condominiums, Inc v City of Orchard Lake Village*, 221 Mich App 19, 23; 561 NW2d 405 (1997). The record indicates to us that any attempt by plaintiff to seek an administrative remedy from defendant would have been futile, so we decline to require plaintiff to have done so before seeking redress from the courts under the circumstances of this case. Therefore, this issue is ripe for judicial review.

Plaintiff contends that the trial court erred in finding no total exclusion of commercial/retail land use and no demonstrated need in the township for commercial/retail land use. We disagree with both contentions.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "The total-prohibition requirement of [the exclusionary zoning] statute is not satisfied if the use sought by the landowner otherwise occurs within township boundaries or within close geographical proximity." *Guy v Brandon Twp*, 181 Mich App 775, 785-786; 450 NW2d 279 (1989).[4] This Court in *Guy* analyzed the effect of former MCL 125.297a, which was enacted by 1978 PA 637 and read as follows at the time:

> 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 within the township where the use may be appropriately located, or the use is unlawful.

MCL 125.297a was repealed, and nearly-identical language re-enacted as MCL 125.3207, by 2006 PA 110; the current statute now reads as follows:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.

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[4] Because *Guy* was decided prior to November 1, 1990, it is not binding on this Court. However, as will be discussed *infra*, we find this statement of the pertinent inquiry consistent with the policy of looking to the substance and effect, rather than the technicalities, of an ordinance.

Thus, the two statutes are largely identical other than replacing the term "township" with "local unit of government."

Plaintiff argues that the land use need only be *effectively* excluded. *Surowitz v Twp of White Lake*, 50 Mich App 408; 213 NW2d 273 (1973); *Nickola v Grand Blanc Twp*, 394 Mich 589; 232 NW2d 604 (1975); *Binkowski v Shelby Twp*, 46 Mich App 451; 208 NW2d 243 (1973); *Anspaugh v Imlay Twp*, 273 Mich App 122; 729 NW2d 251 (2006), vacated 480 Mich 964 (2007). *Surowitz* and *Binkowski* pre-date both the enactment of MCL 125.297a and the decision in *Kropf*, wherein our Supreme Court explained that this Court had erred in failing to recognize that a zoning exclusion under the common law must be "*total*." *Kropf*, *supra*, 391 Mich at 155-156 (emphasis in original). It also appears that *Surowitz* actually involved an as-applied challenge to the zoning ordinance therein. *Anspaugh* was vacated by our Supreme Court, which specifically held that this Court erred in finding the zoning therein exclusionary. *Anspaugh II*, *supra*, 480 Mich at 694. Plaintiff's citation to *Nickola* appears to be to the opinion only of Justice WILLIAMS; the majority opinion affirmed the Court of Appeals in that case "for the reasons stated in our opinion in *Sabo v Monroe Twp*, 394 Mich 531; 232 NW2d 584 (1975)." In *Sabo*, the zoning ordinance was not even challenged as exclusionary. See *Sabo*, *supra*, 394 Mich at 569-570 (WILLIAMS, J., concurring). We find plaintiff's authority inapposite.

Nonetheless, *Anspaugh*, to the extent the latter remains valid and binding case law, explained that "effective exclusion" literally just means that a technically-permitted land use that is functionally impossible to utilize in any meaningful way remains excluded. In other words, the exclusion of a given land use *does* have to be "total," but it does not necessarily have to be *technically* total. This is an unremarkable application of the principle that the law looks to substance rather than formality. It follows rationally that the inquiry is whether a use is "a practical impossibility," rather than a technical one. *Landon*, *supra*, 257 Mich App at 168. Because the courts examine whether a land use is *functionally* unavailable, rather than whether it is technically permitted within the technical boundaries of the township, we find that the test set forth in *Guy*, *supra*, 181 Mich App at 785-786, is the most rationally sound approach.[5]

As discussed *supra*, a considerable amount of commercial/retail land uses exist within very close proximity to the township. The real inquiry is not technicalities, but whether the *practical effect* of a township's zoning ordinance results in the functional unavailability of a land

[5] We note that *Guy* has been alternatively both criticized and cited with approval in various unpublished cases from this Court, but it has never been overruled or criticized in any published opinion. See *ACC Industries, Inc v. Charter Twp of Mundy*, unpublished opinion per curiam of the Court of Appeals, Docket No. 242392 (Decided February 24, 2004), slip op at p 6; *Whiteford Partners LLC v Whiteford Twp*, unpublished opinion per curiam of the Court of Appeals, Docket No. 238719 (Decided June 17, 2003), slip op at p 1; *Rolison v Northfield Twp*, unpublished opinion per curiam of the Court of Appeals, Docket No. 185104 (Decided May 23, 1997), slip op at p 4; and *Propvest Ltd v Charter Twp of Orion*, unpublished opinion per curiam of the Court of Appeals, Docket No. 190380 (decided April 29, 1997), slip op at p 3; but cf *Hendee v Twp of Putnam*, unpublished opinion per curiam of the Court of Appeals, Docket No. 270594 (Decided August 26, 2008), slip op p 13 n 14, lv gtd 483 Mich 983 (2009).

use. As discussed, the evidence supports the trial court's conclusion that there is ample commercial/retail land use "within close geographical proximity" of everywhere within the township by virtue of the township's unusual shape wrapped around the City of Ann Arbor. Furthermore, the situation here is unusual in that defendant did, at one time, apparently have commercial/retail uses within its borders, but its borders changed. We agree with the trial court's analogy to a land use being "used up," and agree that there is no total prohibition.

We also agree that plaintiff has not shown a "demonstrated need," for similar reasons. "Presumably any entrepreneur seeking to use land for a particular purpose does so because of its perception that a demand exists for that use. To equate such a self-serving demand analysis with the 'demonstrated need' required by [MCL 125.3207] would render that language mere surplusage or nugatory, in contravention of usual principles of construction." *Outdoor Systems, Inc v City of Clawson*, 262 Mich App 716, 721; 686 NW2d 815 (2004). There must exist a public need for a particular land use, not merely a public demand for it. *Id*. Furthermore, MCL 125.3207 *explicitly* requires a lack of demonstrated need in the township *and in the surrounding geographical area*. For all of the reasons discussed *supra*, that area must rationally include the historical boundaries of the township that have since been absorbed by the City of Ann Arbor. Therefore, plaintiff must show that there is no demonstrated need for commercial/retail land uses within the confines of the township's borders *and also* within "the surrounding area."

We have been unable to find a concise definition of "demonstrated public need," but case law provides guidance. In *Eveline Twp v H & D Trucking Co*, 181 Mich App 25; 448 NW2d 727 (1989), the defendant operated a port in violation of zoning on Lake Charlevoix that constituted the only way for cargo boats to deliver bulk cargo to the area, and it was the only deep-water port available to two counties. *Id*. at 27-28. The evidence showed "a continuing and substantial need for these materials for road building and other construction," and that the only other way to deliver the materials was by the "considerably more expensive" method of truck. *Id*., 32-33. This Court found a demonstrated need. *Id*. In *Fremont Twp v Greenfield*, 132 Mich App 199; 347 NW2d 204 (1984), the parties' stipulated facts showed no demonstrated need for junkyard land uses even presuming a total prohibition, because the township's population was only 1,500 people, there were two more junkyards within 17 miles, and no additional evidence had been introduced showing a need for one. *Id*., 204-205. The above two cases, although not binding on this Court because were decided prior to November 1, 1990, suggest that a "demonstrated public need" depends on more than just convenience or the lack thereof.

Significantly, recent binding cases have drawn a strong distinction between *need* and *want*. In *Houdek*, *supra*, 276 Mich App at 568, the plaintiffs sought to expand their septage collection business in contravention of zoning, and this Court found that there was no demonstrated need for additional septage land because there were other septic waste treatment facilities available to accommodate the waste generated in the township, and the plaintiffs had only "offer[ed] self-serving needs such as increased distance for haulers and increased costs of pumping, rather than demonstrated public needs." In *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681; 600 NW2d 339 (1999), aff'd 463 Mich 675 (2001), the plaintiff sought to enjoin the defendant city's prohibition against certain advertising billboards as exclusionary zoning, and it introduced evidence that there was demand for billboard space in the area and that there had been a reduction of available billboard space over the years. *Id*., 683-686, 693-695. This Court concluded that there was still considerable available billboard space and

unequivocally explained that proof of a *demand* for a particular use did not suffice to demonstrate a *public need* for that use. *Id.*, 698.

In *Adams Outdoor Advertising*, this Court summarized that "demonstrated need" must "relate[] to the public need of the residents of the community, not merely to plaintiff's private economic self-interest." *Adams Outdoor Advertising, Inc*, *supra*, 234 Mich App at 698. Furthermore, from the entirety of the above cases, the public need must be more than mere convenience to the residents of the community. Plaintiff has not made a requisite showing. Rather, plaintiff has, at most, shown that township residents who choose to patronize its proposed retail establishment would find doing so more convenient and cost-effective than their present options. However, we perceive no argument from plaintiff tending to show that the existing options are, at most, more than nominally inconvenient or prohibitively expensive to access presently. The remainder of plaintiff's evidence appears to be highly site-specific and more pertinent to a discussion of whether the property is actually suitable for commercial/retail uses, not whether there is a demonstrated public need *per se*. Therefore, ignoring defendant's challenges to plaintiff's methodology, plaintiff has shown at least a question of fact that residents of the township would *benefit* from having commercial/retail uses in the township, but not that the residents *need* such uses.[6]

Particularly given the ample other commercial/retail land uses available in close geographical proximity to the township, we find that plaintiff has not shown a "demonstrated public need" for commercial/retail land uses in the township. Therefore, even if plaintiff had shown a total exclusion within the township, we would nevertheless find that plaintiff has not satisfied its burden of proving exclusionary zoning.

The final issue on appeal is whether a statutory exclusionary zoning claim pursuant to MCL 125.3207 is distinct from a "constitutional" exclusionary zoning claim at common law, pursuant to *Kropf*. The significance of this issue is allegedly that the latter claim, if it exists as a distinct claim, would theoretically not obligate a plaintiff to prove a "demonstrated public need." In light of our finding that there has been no total prohibition on commercial/retail land use, this issue is moot. However, we note that our Supreme Court has recently granted leave to appeal in a case in which it specifically directed the parties to address "whether a claim that a zoning ordinance unconstitutionally excludes a lawful use is properly analyzed without regard to whether a demonstrated need for the use exists . . . or whether the enactment of 1978 PA 637, MCL 125.297a (now recodified in nearly identical language as MCL 125.3207), superseded the analysis of *Kropf*. . ." *Hendee v Putnam Twp*, 483 Mich 983; 765 NW2d 14 (2009). It would therefore be inappropriate for us to consider this issue at this time.

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[6] Plaintiff also asserts that the mere fact that a particular kind of zoning was provided for in defendant's ordinance without zoning any land as such proves a demonstrated need. But the case upon which plaintiff relies was vacated by our Supreme Court, specifically holding that this Court erred in finding the zoning therein exclusionary. *Anspaugh II*, *supra*, 480 Mich at 694.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis