STATE OF MICHIGAN

COURT OF APPEALS

CITY/VILLAGE OF DOUGLAS, Plaintiff-Appellee,	UNPUBLISHED November 18, 2010
v	No. 292948 Allegan Circuit Court
MARK VON DER HEIDE, JOSEPH T. JOHNSON, and WATERVIEW VENTURES INC., Defendants-Appellants.	LC No. 08-043308-CK

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Defendants appeal by right the trial court's judgment upholding plaintiff's, city of Douglas's (city), grant of a planned unit development (PUD) application contingent on defendants' constructing a roadway, part of which fronted the PUD. We affirm.

In 2002 defendants submitted a proposal to the city to construct two, two-unit condominiums on a parcel of property fronting Park Drive in the Felker's Lakeshore Subdivision in Allegan County. At the time, Park Drive was an unimproved dirt road public right of way, and there were no other finished residences fronting it. The city council approved defendants PUD proposal in June 2002, on the condition that defendants improve Park Drive from Third Street to Fifth Street, a total length of approximately 415 feet, by constructing an asphalt road in accordance with Allegan County Road Commission standards. Defendants agreed and represented to the city that the roadwork would be completed. Defendants built one of the two-unit condominiums and constructed a gravel road on the Park Drive right of way that did not conform to road commission standards. In 2008, the city commenced this action seeking to compel defendants to complete the asphalt roadway. The trial court held that the city acted within its authority when it required defendants to pave Park Drive, and the court entered a judgment in favor of the city.

On appeal, defendants argue: 1) the city did not have authority to compel a single developer to improve an off-site roadway according to our Supreme Court's decision in *Arrowhead Dev'l Co v Livingston Co Rd Comm*, 413 Mich 505; 322 NW2d 702 (1982); 2) the city acted outside its authority under the zoning enabling act; and 3) the city acted outside its authority under its own zoning ordinance.

We review de novo whether the city acted within its authority as a question of law. *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). We also review questions of statutory and ordinance construction, as well as the application of law to the facts, de novo. *In re Blackshear*, 262 Mich App 101, 107; 686 NW2d 280 (2004).

First, defendants contend that *Arrowhead* is controlling in this case. We disagree. In *Arrowhead*, our Supreme Court held that the defendant road commission did not have authority to compel the plaintiff subdivision developer to complete roadwork on an offsite road under the county road law, MCL 224.1 *et seq*., or the Subdivision Control Act, MCL 560.101 *et seq*.[1] *Arrowhead*, 413 Mich at 510-512. The Court did not set forth a "general proposition of law" that bars all municipalities from imposing costs for off-site improvements on a single developer pursuant to their zoning power as defendants suggest. See e.g., *Loyer Ed Trust v Wayne Co Rd Comm*, 168 Mich App 587, 594; 425 NW2d 189 (1988); *CPW Investments #2 v City of Troy*, 156 Mich App 577, 583-584, 587; 401 NW2d 864 (1986). Instead, the proper inquiry in this case involves determining whether the city acted within its authority under the zoning enabling act and the local zoning ordinance; *Arrowhead* is not dispositive of these issues.

Second, defendants argue that the city did not have authority under the zoning enabling act to require the Park Drive roadwork. When the city exercised its zoning authority in 2002, the City and Village Zoning Act (CVZA), MCL 125.581 *et seq*., was in effect. 2006 PA 110 repealed the CVZA and replaced it with the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*. See MCL 125.3702(1). But the provisions in the CVZA and the MZEA governing a municipality's authority to approve a PUD with reasonable conditions are virtually identical. Compare MCL 125.3503(2) with the 2002 version of MCL 125.584b(2), and MCL 125.3504(4) with the 2002 version of MCL 125.584c(2). Although a new or amended statute generally "applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect," we apply the MZEA retroactively in this case because "[s]tatutes that operate in furtherance of a remedy already existing and that neither create new rights nor destroy rights already existing are held to operate retrospectively unless a different intention is clear."[2] *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992).

Under the MZEA, local units of government have authority to establish PUD requirements in their local zoning ordinances. MCL 125.3503(2). Stated succinctly, the relevant language in the MZEA provides that a local unit of government may impose "reasonable conditions" in conjunction with approving a PUD application. MCL 125.3504(4). These conditions must relate to: 1) the protection of natural resources, health, safety, and welfare, and the social and economic well-being of those who use the land or activity under consideration, the

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[1] This act is now known as the Land Division Act (MCL 560.101 as amended by 1996 PA 496).

[2] We note, however, that because the pertinent provisions in the CVZA and the MZEA are virtually identical, the outcome of this case would be the same under either act. Also, the MZEA would not apply had this litigation commenced before its effective date. MCL 125.3702(2); *Hughes v Almena Twp*, 284 Mich App 50, 59; 771 NW2d 453 (2009).

neighboring landowners and residents, and the community as a whole; 2) the valid exercise of the police powers and purposes which are affected by the proposed use or activity; and 3) the necessity to meet the intent and purpose of the zoning requirements and be necessary to insure compliance with the standards established in the zoning ordinance. MCL 125.3504(4).

In order to determine whether the city acted within its authority under the MZEA, we begin by interpreting the phrase "reasonable condition." We interpret ordinances in the same manner as statues. *Hughes v Almena Twp*, 284 Mich App 50, 61; 771 NW2d 453 (2009). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *In re MCI*, 460 Mich 396, 411; 596 NW2d 164 (1999). Unless otherwise defined by statute, every word or phrase should be accorded its plain and ordinary meaning. *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 460; 773 NW2d 730 (2009). Where a statute does not define a term, consultation of dictionary definitions is appropriate. *Id*. Statutes conferring zoning power to a local unit of government are construed liberally in favor of the local unit of government. Const 1963, art 7, § 34; *Hughes*, 284 Mich App at 62.

With respect to the term "reasonableness" in the context of zoning, our Supreme Court has noted the following: "Although the standard of review for zoning regulations and decisions is characterized as a 'reasonableness' test, it bears analogy to the 'rational basis' standard of review that is used to test the constitutionality of legislation where there are no "suspect" factors or "fundamental rights" involved or where "heightened scrutiny" is otherwise inapposite." *Kyser v Kasson Twp*, 486 Mich 514, 522 n 2; 786 NW2d 543 (2010). The Court cited its prior definition of "rational basis" by quoting *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557-558; 629 NW2d 402 (2001):

> "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." Rather, it tests only whether the legislation is *reasonably related to a legitimate governmental purpose*. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." . . . [*Kyser*, 486 Mich at 522 n 2 (Citations omitted and emphasis added).]

Black's Law Dictionary (8th ed), defines "reasonableness" as "fair, proper, or moderate under the circumstances . . . ." Applying these definitions to the facts and circumstances in this case, we conclude that the city's PUD condition in regard to Park Drive was reasonable.

At the time defendants submitted their PUD application, Park Drive was a dirt two-track road located in an isolated part of the Felker's platted subdivision. There were no other completed developments nearby at the time. Defendants proposed a two-phase project with plans to construct two, two-unit condominiums for a total of four residences. Although defendants did not complete the second phase, the city approved the PUD based on the understanding that there would eventually be four residences on the property. An improved road was necessary to ensure that the residents would have appropriate access to the property and to accommodate the wear and tear caused by vehicle traffic associated with four residences. The required improvement to Park Drive was also necessary to ensure the city could access the development to provide essential public services such as fire and police protection, emergency

medical services, garbage removal, and snow plowing. The improved road was also necessary to prevent other negative externalities such as dust. The road commission provided standards to ensure proper water runoff, the placement of culverts, and the appropriate surface and subsurface materials. Further, defendants were not required to pave a substantial distance, and the cost was not unreasonable given the total cost of the project. In sum, we agree with the trial court that the city's requirement regarding the road construction was "reasonable."

Additionally, after reviewing the record, we conclude the reasonable conditions the city imposed for approval of the PUD related to: 1) the protection of natural resources, health, safety, and welfare, and the social and economic well-being of those who use the land or activity under consideration, the neighboring landowners and residents, and the community as a whole; 2) the valid exercise of the police powers and purposes which are affected by the proposed use or activity; and 3) the necessity to meet the intent and purpose of the zoning requirements and insuring compliance with the standards established in the zoning ordinance. MCL 125.3504(4). Here, the road commission set forth standards to ensure proper management of runoff and drainage and the appropriate sub-base for the road. The improvement was necessary to provide a safe ingress and egress to the condominiums and to properly accommodate emergency and service vehicles. The improvement incorporated an economic benefit and was beneficial to the community as a whole: An improved road built in accordance with the proper standards would lower maintenance and repair costs for the city and lessen wear and tear on the residents' vehicles. The improvement fell within the ambit of the city's broad police power to zone and was necessary to ensure compliance with the purposes and standards of the zoning ordinance because the zoning ordinance provides criteria for ensuring that public services are available.

Third, we find that the city did not exceed its authority under its zoning ordinance. Section 27.04(9) of the zoning ordinance provides in relevant part as follows:

> Planned unit developments shall front onto a street with adequate capacity to safely accommodate the traffic of the development without unreasonably congesting the street. *Road improvements contiguous to the site of the PUD that would improve traffic safety and reduce congestion may be required as a condition of development approval*. [Emphasis added.]

The word "contiguous" is not defined in the zoning ordinance; therefore, consultation of a dictionary is appropriate. *Risko*, 284 Mich App at 460. *Random House Webster's College Dictionary* (1997), defines "contiguous" in relevant part as: "touching in contact . . . being in close proximity without touching; near . . . ." Considering this definition, we find that the entire portion of Park Street, from Fifth Street to Third Street, is "contiguous" to the condominium development for purposes of the ordinance. According to defendants' site plan, the distance from Fifth Street to Third Street is approximately 415 feet, and the condominium property fronts 118 feet of that distance. The portion of roadway that does not abut defendants' property is not a significant distance and it is close to the development. Additionally, we conclude that paving Park Drive improves traffic safety and reduces congestion for reasons stated earlier in this opinion. In sum, the trial court did not err in entering judgment for plaintiff.

Finally, defendants argue that the trial court erred in holding that defendant Johnson was individually liable because he did not personally participate in the PUD application process and because he did not have an agency relationship with defendant Von Der Heide. A trial court's

determination with respect to the existence and scope of an agency relationship involves a question of fact that we review for clear error. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

Although the trial court did not articulate that its holding was based on an agency theory, a review of the law and facts in this case indicates that the trial court's ultimate finding was not clearly erroneous. See *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009) ("this Court will affirm where the trial court came to the right result even if for the wrong reason"). "An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). "Actual authority of an agent may be implied from the circumstances surrounding the transaction at issue . . . [and] must show that the principal actually intended the agent to possess the authority to enter into the transaction on behalf of the principal." *Hertz Corp*, 210 Mich App at 246.

In this case, the record indicates that Von Der Heide had implied authority to act on behalf of Johnson, and that Johnson intended that Von Der Heide act on his behalf. Von Der Heide testified that Johnson was one of the original owners of the property and that he and Johnson combined the properties and formed Waterview Ventures, Inc. Von Der Heide testified that he and Johnson shared ownership of the corporation and that Johnson was president of the corporation. The articles of incorporation identify Johnson as the company president. Although Von Der Heide was primarily in control of the PUD application process, he represented to the city that Johnson was his partner in the development project, and he included Johnson's name on many of his communications with the city. Johnson did not object to Von Der Heide's representations, and, instead, he allowed Von Der Heide to include his name on numerous documents related to the application process. In sum, the trial court's finding that Johnson was individually liable was not clearly erroneous.

We affirm.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder