STATE OF MICHIGAN

COURT OF APPEALS

VMG, INC, Plaintiff-Appellant,	UNPUBLISHED May 8, 2012
v	No. 303520 Kent Circuit Court
BYRON TOWNSHIP and BYRON TOWNSHIP PLANNING COMMISSION, Defendants-Appellees.	LC No. 11-000165-CZ

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this zoning ordinance case, plaintiff, VMG, Inc. appeals the trial court's grant of defendants Byron Township and Byron Township Planning Commission's motion for summary disposition under MCR 2.116(C)(8). We reverse and remand.

Plaintiff argues that the trial court erred by dismissing plaintiff's constitutional claims under MCR 2.116(C)(8). We agree.

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A reviewing court considers only the pleadings, accepts the well-pleaded allegations of the complaint as true, and construes them in the light most favorable to the nonmovant. *Id.* at 119–120. Summary disposition pursuant to MCR 2.116(C)(8) is proper where the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 396; 516 NW2d 498 (1994).

We conclude that the circuit court erred when it granted defendants summary disposition pursuant to MCR 2.116(C)(8) because although plaintiff failed to timely appeal the planning commission's amendment to the PUD, the complaint in this case raised constitutional issues that, in light of the facts as presented in the complaint, are based on a legislative decision made by defendants and are outside and separate in scope from the issues that could be raised in an appeal from the planning commission.

The trial court based its dismissal of counts II-IV entirely on the case of *Krohn v City of Saginaw*, 175 Mich App 193, 194–195, 437 NW2d 260 (1988). In *Krohn*, the defendant obtained a variance from the planning commission to build a store. The plaintiffs, adjacent

landowners, appealed that decision in the circuit court. *Id.* at 195. The circuit court dismissed the plaintiffs' appeal as untimely, and the Court of Appeals affirmed that decision. *Id.* at 196–197. The Court of Appeals, however, stated that it was necessary to consider the plaintiffs' argument that certain aspects of their complaint should not have been dismissed because they represented different causes of action not covered by the filing deadline. The Court of Appeals held that the plaintiffs' taking and due process claims did not establish separate causes of action and should be raised in an appeal from the planning commission:

> Count III of plaintiffs' complaint alleged that their state and federal due process rights were violated and that their property had been taken without just compensation as protected by the state constitution. . . . With respect to [this count and two other counts of plaintiffs' complaint], we believe that they all raise issues relative to the decision of the planning commission and the procedures employed by the planning commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the planning commission or the result reached by the commission. Accordingly, those are issues to be raised in an appeal from the decision of the planning commission. Since plaintiffs were tardy in claiming their appeal, those counts were properly dismissed. [*Id.* at 198].

Initially it would seem that *Krohn* is on point, however there is a limitation to the application of *Krohn*. Where the challenged action is legislative in nature, no appeal right exists and collateral challenges invoking the trial court's original jurisdiction are permitted. *Sun Communities v Leroy Twp*, 241 Mich App 665, 672; 617 NW2d 42 (2000). In contrast, administrative decisions are required to be raised on appeal from a decision of the planning commission, and collateral challenges are not permitted. *Krohn* 175 Mich App at 198.

In order to determine the proper course of analysis, we must resolve the question of whether, based on the facts as alleged in plaintiff's complaint, the action taken by defendants in amending the PUD to allow for a storm water basin to be located in the commercial section of the PUD constituted an administrative or a legislative decision. Plaintiff contends that this is a major change that constituted a legislative decision because the effect of the decision is to remove the storm water basin from its property and relocate it to Park West's property. Here, §15.14 of the Byron Township Zoning Ordinance provides some guidance as to which types of changes to a PUD constitute major, and which constitute minor changes:

> Minor changes to a PUD final site development plan may be approved by mutual agreement of the applicants or successors in interest and the Planning Commission, provided the changes comply with all applicable requirements of this Zoning Ordinance and all other Township regulations or state law. Minor changes include all matters that were approved by the Planning Commission in the final development plan that were not part of the preliminary development plan, the location of structures, roads, parking areas, signs, lighting, and driveways may be moved provided that they are in the same general location as approved in the preliminary site development plan as determined by the Planning Commission, and building size that does not exceed five thousand (5,000) square feet or five (5) percent of the gross floor area whichever is smaller.

> A major change to an approved PUD shall comply with the original approval procedures for a PUD. Major changes include but are not limited to increase in density or number of dwelling units, increase in land area or building size, except as noted above or addition of other uses not authorized by the original PUD approval.

In support of its position, plaintiff relies on *Sun Communities*, 241 Mich App 665. In *Sun Communities*, the defendant's zoning board denied the plaintiff's application for rezoning. *Id*. at 666-667. More than two months later, the plaintiff filed a complaint for injunctive and declaratory relief, which alleged, among other things, "a taking of private property without just compensation," "a violation of equal protection," "a violation of substantive due process," and exclusionary zoning. *Id*. at 667. Relying on *Krohn*, 175 Mich App 193, the circuit court granted the defendant's motion for summary disposition on the basis that it lacked subject matter jurisdiction to entertain the untimely complaint. *Sun Communities*, 241 Mich App 667-668. This Court initially distinguished between zoning board actions of administrative nature, like the granting of variances, "site-plan review and the approval of special use permit requests," and zoning board actions having a legislative quality, specifically, "the zoning and rezoning of property." *Id*. at 669-670.

The *Sun Communities* Court observed that although MCL 125.293a supplied an avenue for appeal of a zoning board's administrative acts, "[n]owhere in this provision, or in any other provision of the Township Zoning Act, is it mandated that a decision of a township board denying *a rezoning (a legislative act)* be appealed to the circuit court." *Id*. at 670 (emphasis added). After the Court summarized the holding in *Krohn*, which it characterized as "challeng[ing] the administrative decision of the Saginaw Planning Commission to grant a special use permit and a variance," the Court explained as follows that *Krohn* did not control the outcome in *Sun Communities*, 241 Mich App 672:

> *Krohn* is factually distinguishable from the present case. Here, plaintiff's lawsuit does not involve a challenge to the administrative activities of a municipal body acting in the capacity of a zoning board of appeals. Instead, it involves numerous constitutional challenges to the legislative actions of the township board in applying the AG zoning to plaintiff's property. *There is no authority that requires a party to pursue an appeal to challenge the constitutionality of a legislative act of rezoning*. . . . [Emphasis added.]

This Court reversed the circuit court's order because the "plaintiff was not required to pursue an appeal of the township's decision to deny . . . [the] request for rezoning in order to challenge the constitutionality of the zoning ordinance." *Id*.

The specific language of § 15.14 provides that minor changes are only allowed for matters that were not part of the preliminary development plan. Because the location of the storm water basin was a part of the PUD, this change is contrary to the ordinance's express language. Defendants' removal of the storm water basin from plaintiff's property to a location across the street, and the removal of an entire building to accommodate the change, is more similar to the types of changes considered "major" by § 15.14 (increase in density or number of dwelling units, increase in land area or building size), than those considered "minor" (moving the

location of structures, roads, parking areas, signs, lighting, and driveways in the same general location as approved in the preliminary site development plan). The storm water basin is no longer in the "same general location as approved in the preliminary site development plan." It is now across the street and in the commercial section of the PUD rather than the residential section. While the planning commission did not call this action a rezoning and characterized it as a minor regrading, it appears from the complaint that changing the PUD so that plaintiff's property, which was to be a pond with residences surrounding it, to a plot of useless swampy ground is a major change. Accepting the well-pleaded allegations in the complaint as true, and construing them in light most favorable to the plaintiff, summary disposition based on MCR 2.116 (C)(8) was improper.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause