

STATE OF MICHIGAN
COURT OF APPEALS

MAPLE BPA, INC,
Plaintiff-Appellant,

UNPUBLISHED
August 6, 2013
APPROVED FOR
PUBLICATION
September 19, 2013
9:05 a.m.

v
CHARTER TOWNSHIP OF BLOOMFIELD,
Defendant-Appellee.

No. 302931
Oakland Circuit Court
LC No. 2010-107782-CK

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Maple BPA, Inc., appeals as of right the circuit court’s order granting summary disposition in favor of defendant Bloomfield Charter Township (Bloomfield Township). After the Michigan Liquor Control Commission (the Commission) denied Maple BPA’s application for a liquor license on the basis that it did not comply with Bloomfield Township’s zoning ordinance (the ordinance), Maple BPA sought a declaratory judgment that the ordinance was unconstitutional. Bloomfield Township ultimately moved for summary disposition, which the trial court granted. The trial court based its ruling on its conclusion that state law did not preempt the ordinance and that the ordinance did not violate the Zoning Enabling Act. We affirm.

I. FACTS

A. FACTUAL BACKGROUND

Maple BPA’s property contains a mixture of land uses, including gasoline fuel pumps and a convenience food store. Under the ordinance, “retail package outlets” are a permitted use in Maple BPA’s zoning district.¹ A retail package outlet is any building in a commercial business district that is allowed to sell packaged alcohol as an ancillary use of the business.

¹ Bloomfield Township Ordinance, § 42.3.1.7(B-2)(B)(i) and § 42-3.1.7(B-3)(B)(i).

Maple BPA desired to sell packaged alcohol on its premises and in March 2007, it applied to the Commission for a specially designated merchant license. A specially designated merchant license allows the holder to engage in the retail sale of beer and wine for off-premises consumption.² The Commission may not prohibit an applicant for a specially designated merchant license from owning fuel pumps if, among other conditions, the location where customers purchase alcohol is 50 or more feet from where customers dispense fuel.³

Bloomfield Township subsequently passed a resolution that it did not want to allow “gas stations to sell beer and wine” and that Maple BPA’s registers were too close to where customers dispensed fuel. Bloomfield Township requested that the Bloomfield Township Police Department inspect Maple BPA’s premises.

Police Captain Steve Cook determined that Maple BPA did not conform with what was then Bloomfield Township Ordinance § 42-307, which required that all retail package outlets to be at least 2,640 feet from each other. Bloomfield Township in turn informed the Commission that Maple BPA’s request did not comply with Bloomfield’s zoning ordinance and that the distance between Maple BPA’s fuel pumps and its sales register is 47 feet.

The Commission denied Maple BPA’s application on November 3, 2008, finding that Maple BPA did not comply with Bloomfield Township’s zoning ordinance. Maple BPA requested a formal hearing, which the Commission held on March 26, 2009. Subsequently, the Commission affirmed its denial of Maple BPA’s application.

Bloomfield Township’s planning commission then amended the ordinance. The amendment removed the spacing requirement for retail package outlets and banned the sale of alcoholic beverages at “gasoline service stations” entirely. Maple BPA sought leave to appeal the Commission’s decision, which the trial court denied on the basis that Maple BPA’s claims were more appropriate to a declaratory judgment.

B. PROCEDURAL HISTORY

Maple BPA filed its complaint on February 16, 2010, seeking a declaratory judgment that state law preempts the ordinance, it violates the Zoning Enabling Act,⁴ and it violates Maple BPA’s rights to due process and equal protection.⁵ After the trial court denied Bloomfield Township’s initial motion for summary disposition under MCR 2.116(C)(8), Bloomfield Township moved for summary disposition under MCR 2.116(C)(10). The trial court granted Bloomfield Township’s motion on Maple BPA’s constitutional claims, concluding that Maple BPA failed to show that the ordinance was arbitrary and capricious.

² MCL 436.1111(13).

³ MCL 436.1541(1)(b).

⁴ MCL 125.3101 *et seq.*

⁵ *Id.*

In July 2010, Bloomfield Township again amended the ordinance. As amended, the ordinance provides that automobile service stations may sell alcoholic beverages if they meet certain standards,⁶ including that (1) alcohol is not sold less than 50 feet from where vehicles are serviced, (2) no drive-thru operations are conducted in the same building, (3) the store meets a minimum floor area and lot size requirements, (4) the store has frontage on a major thoroughfare and is not in a residential area, (5) the store does not perform any vehicle service operations that would require customers to wait on the premises, and (6) the store is either located in a shopping center or maintains a minimum amount of inventory.⁷ After Bloomfield Township revised the ordinance, it renewed its motion for summary disposition.

The trial court granted Bloomfield Township's renewed motion, concluding that state law did not preempt the ordinance as amended and that it did not violate the Zoning Enabling Act. It also noted that it had previously dismissed Maple BPA's constitutional claims.

II. PREEMPTION

A. STANDARD OF REVIEW

This Court reviews de novo questions of law, including whether state law preempts an ordinance.⁸

B. FIELD PREEMPTION

1. LEGAL STANDARDS

State law preempts a local regulation if (1) the local regulation directly conflicts with a state statute, or (2) the statute completely occupies the field that the local regulation attempts to regulate.⁹ The Michigan Supreme Court has established four guidelines to determine whether a statute completely occupies a field:

First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.

Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.

Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is

⁶ Bloomfield Ordinance, § 42-4.23.

⁷ Bloomfield Ordinance, § 42-4.23.

⁸ *Charter Twp of Van Buren v Garter Belt, Inc*, 258 Mich App 594, 602; 673 NW2d 111 (2003).

⁹ *McNeil v Charlevoix Co*, 275 Mich App 686, 697; 741 NW2d 27 (2007).

not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.^[10]

2. APPLYING THE STANDARDS

Maple BPA contends that the state has granted the Commission exclusive control over the sale of alcoholic beverages, and therefore state law expressly preempts the ordinance. We disagree.

The Michigan Constitution provides that the Legislature may create a Liquor Control Commission, which “shall exercise complete control of the alcoholic beverage traffic within this state”¹¹ Accordingly, the Legislature created the Commission and gave it “the sole right, power, and duty to control the alcoholic beverage traffic and traffic of other alcoholic liquor within this state, including . . . sale thereof.”¹²

Maple BPA asserts that this Court's decision *Sherman Bowling Ctr v Roosevelt Park*¹³ is analogous to this case. In that case, an ordinance required a business to obtain a local liquor license—as well as a state liquor license—to sell alcohol at outdoor dancing events.¹⁴ We held that “the city ordinance in this case is preempted” because this Court could “find no provision of the liquor law which would allow cities to regulate the sale of alcoholic beverages by establishments holding outdoor events at which entertainment is provided.”¹⁵

We conclude that *Sherman Bowling Ctr* is distinguishable because it did not involve a *zoning* ordinance and the Court in that case could not locate authority by which the state recognized local control of the area in question. Here, the Code explicitly provides that an application for a liquor license “shall be denied if the commission is notified, in writing, that the application does not meet all appropriate . . . local . . . zoning . . . ordinances”¹⁶ The ordinance in question is a local zoning ordinance. But even were *Sherman Bowling Ctr* not

¹⁰ *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977) (citations omitted).

¹¹ Const 1963, art 4, § 40.

¹² MCL 436.1201(2).

¹³ *Sherman Bowling Ctr v Roosevelt Park*, 154 Mich App 576, 584, 585; 397 NW2d 839 (1986).

¹⁴ *Id.* at 580.

¹⁵ *Id.* at 584-585.

¹⁶ Mich Admin Code R 436.1003 and 436.1005(3).

distinguishable, it was decided in 1986. This Court must follow published opinions of this Court decided after November 1, 1990.¹⁷

In contrast, this Court in *Jott, Inc v Clinton Charter Twp* did consider whether the liquor control code preempted a local zoning ordinance.¹⁸ In *Jott*, this Court concluded that the Legislature did not intend to preempt the field of liquor control.¹⁹ We reasoned that “it has long been recognized that local communities possess ‘extremely broad’ powers to regulate alcoholic beverage traffic within their bounds through the exercise of general police powers, subject to the authority of the [Commission] when a conflict arises.”²⁰ In the context of that zoning regulation, we noted that the Commission explicitly recognized local authority in the area prohibited by the local regulation, which supported our conclusion that the Legislature did not intend preemption in that context.²¹

We conclude that the Commission’s decision to recognize local zoning authority indicates that the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales. Thus, we conclude that the State has not expressly provided that its authority to regulate the field of liquor control is exclusive.

C. CONFLICT PREEMPTION

1. LEGAL STANDARDS

State law preempts a local regulation when that regulation directly conflicts with a state statute.²² “A direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits.”²³

2. APPLYING THE STANDARDS

Maple BPA contends that the state statute and the ordinance directly conflict because the zoning ordinance is more strict than the state’s statutory requirements. We disagree.

In *Noey v Saginaw*,²⁴ the Michigan Supreme Court concluded that a local ordinance that prohibited the sale of alcoholic beverages between the hours of 12:00 AM and 7:00 AM was

¹⁷ *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 285; 769 NW2d 234 (2009); MCR 7.215(J)(1).

¹⁸ *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 544; 569 NW2d 841 (1997).

¹⁹ *Id.* at 545.

²⁰ *Id.*; see *Bundo v City of Walled Lake*, 395 Mich 679, 400; 238 NW2d 154 (1976).

²¹ *Id.* at 544; also see *Charter Twp of Van Buren v Garter Belt Inc*, 258 Mich App 594, 608; 673 NW2d 111 (2003).

²² *McNeil*, 275 Mich App at 697.

²³ *Id.*

invalid to the extent that it was more strict than the state statute, which prohibited the sale of alcoholic beverages between 2:00 AM and 7:00 AM.²⁵

We conclude that *Noey* is distinguishable. In *Noey*, the local ordinance prohibited selling alcoholic beverages between 12:00 AM and 2:00 AM, despite that the Legislature expressly permitted selling alcoholic beverages at those times. Unlike in *Noey*, here, the Legislature has not expressly spoken concerning the sale of alcohol in buildings with drive-through windows, the minimum building area of buildings at which alcohol is sold, or the number of parking spaces a building requires. To the extent that the Legislature has expressly spoken on this issue, Bloomfield Township’s zoning ordinance is not more restrictive. The ordinance mirrors the statutory language—it does not provide any further constraint, or prohibit what the statute permits. Therefore, we conclude that in this case, the state statute and the local regulation do not directly conflict.

III. THE MICHIGAN ZONING ENABLING ACT

A. STANDARD OF REVIEW

We review de novo whether an ordinance complies with the Michigan Zoning Enabling Act (the Act),²⁶ because our analysis involves questions of law.²⁷

B. LEGAL STANDARDS

Municipalities have the authority to regulate land use through zoning only because the Legislature has specifically granted them that authority in the Act.²⁸ Thus, a municipality can exercise zoning authority “only to the limited extent authorized by that legislation.”²⁹ The Act provides that “regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district.”³⁰

C. APPLYING THE STANDARDS

Maple BPA contends that Bloomfield Township’s zoning ordinance violates the uniformity provisions of the Act, because the ordinance requirements for retail package outlets are not uniform. We disagree.

²⁴ *Noey v Saginaw*, 271 Mich 595; 261 NW2d 88 (1935).

²⁵ *Id.* at 597.

²⁶ MCL 125.3101 *et seq.*

²⁷ *Whitman v Galien Twp*, 288 Mich App 672, 678; 808 NW2d 9 (2010).

²⁸ *Id.* at 679.

²⁹ *Id.*

³⁰ MCL 125.3201(2).

The Act authorizes localities to provide for special land uses within a zoning district.³¹ A locality's identification of uses and activities that are special uses is consistent with the Act's uniformity requirement.³² Here, Bloomfield Township's zoning regulations treat automobile service stations as a special class of buildings within the general business zoning districts.³³ The ordinance does not apply only to some automobile service stations—it applies to *all* automobile service stations. We conclude that the ordinance does not violate the Act's uniformity requirement by treating a special class of buildings differently from other classes of buildings.

Here, Maple BPA has failed to demonstrate that Bloomfield Township's zoning ordinance is not uniform concerning the special use of automobile service stations. Additionally, we note that the uniformity requirement generally prevents a locality from making unreasonable classifications within a zoning district, such as by allowing a certain type of land use in parts of one zoning district, but not in other parts of the same zoning district.³⁴ The ordinance does not provide that automobile service stations or retail package outlets may be located in one part of Bloomfield Township's general business district, but not in other parts.

Maple BPA appears to argue that the ordinance violates the Act because it is actually an improper local business licensing requirement. We conclude that Maple BPA has not properly presented the argument for our review. A party abandons its assertions when it fails to include the issue in the statement of questions presented and fails to provide authority to support its assertions.³⁵ This issue is not contained in Maple BPA's statement of questions presented, and it has provided little authority or analysis to support this assertion. We conclude that Maple BPA has abandoned this argument.

IV. MAPLE BPA'S CONSTITUTIONAL CLAIMS

A. STANDARD OF REVIEW

This Court reviews *de novo* the trial court's determination whether a zoning decision is unconstitutional.³⁶ We also review *de novo* the trial court's determination on a motion for summary disposition.³⁷ A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment

³¹ MCL 125.3502(1); *Whitman*, 288 Mich App at 680.

³² *Whitman*, 288 Mich App at 683.

³³ Bloomfield Township Ordinance 42-3.1.7(C)(iv); Bloomfield Township Ordinance, § 42-4.23.

³⁴ See *Oshtemo Charter Twp v Central Advertising Co*, 125 Mich App 538, 543; 336 NW2d 823 (1983).

³⁵ *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

³⁶ *Kropf v City of Sterling Hts*, 391 Mich 139, 152-153; 215 NW2d 179 (1974).

³⁷ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

... as a matter of law.”³⁸ A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.³⁹

B. DUE PROCESS

1. LEGAL STANDARDS

Both the United States and Michigan Constitutions provide that the state shall not “deprive any person of life, liberty or property, without due process of law.”⁴⁰ The Due Process Clause protects the liberty and property interests of individuals from arbitrary government actions.⁴¹

We presume that zoning ordinances are constitutional exercises of government power.⁴² The party challenging the ordinance has the burden to prove that it is “an arbitrary and unreasonable restriction on the owner’s use of his property.”⁴³ To be arbitrary and capricious, “[i]t must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness.”⁴⁴

2. APPLYING THE STANDARDS

Maple BPA contends that Bloomfield Township’s ordinance in this case was arbitrary and capricious. Maple BPA concedes that regulating the use of alcohol is rationally related to public health and safety, but contends that Bloomfield Township has not shown that its ordinance advances its stated purposes.

We conclude that the trial court properly granted summary disposition. Maple BPA did not carry its burden of showing that there is a question of fact concerning whether the ordinance is arbitrary and capricious. “The burden [is] not on the defendants to establish the relationship, but upon the plaintiff to show the lack of it.”⁴⁵ Here, the burden is not on Bloomfield Township to prove the validity of its ordinance with evidence. The burden is on Maple BPA to show that *there is no relationship* between Bloomfield Township’s goals, and its means of attaining them.

³⁸ MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.

³⁹ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

⁴⁰ US Const Am XIV; Const 1963, art 1, § 17; *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

⁴¹ *General Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 370; 803 NW2d 698 (2010).

⁴² *Kropf*, 391 Mich at 162.

⁴³ *Id.*, quoting *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957).

⁴⁴ *Kropf*, 391 Mich at 163, quoting *Brae Burn, Inc*, 350 Mich at 432.

⁴⁵ *Id.* at 156, quoting *Northwood Props Co v Royal Oak City Inspector*, 325 Mich 419, 422-423; 39 NW2d 25 (1949).

Maple BPA provided no evidence that restricting the sale of alcoholic beverages at service stations fails to advance Bloomfield Township's stated purposes of reducing alcohol-related deaths and injuries or fails to advance its other stated reasons. Because Maple BPA failed to create a question of fact concerning the reasonableness of Bloomfield Township's ordinance, the trial court properly granted summary disposition.

C. EQUAL PROTECTION

Maple BPA asserts that there is no rational reason to treat a business with fuel pumps differently than a business without fuel pumps. We conclude that this equal protection challenge is also without merit.

The Michigan and United States constitutions provide coextensive protections on equal protection.⁴⁶ Both guarantee equal protection of the law.⁴⁷ When a party is not a member of a protected class and does not allege a violation of a fundamental right, "the challenged regulatory scheme will survive equal protection analysis if it is rationally related to a legitimate governmental interest."⁴⁸ "[T]he party raising the equal protection challenge has the burden of proving that the challenged law is arbitrary and thus irrational."⁴⁹

For the reasons stated in our due process analysis, we conclude that the trial court did not err in granting summary disposition on Maple BPA's due process claim. Though Maple BPA asserts that the ordinance's stated reasons for distinguishing automobile service stations from other types of buildings or land uses are merely "irrational prejudices," it provided no evidence from which the trial court could determine that a question of fact existed concerning the ordinance's arbitrariness. We conclude that the trial court properly granted summary disposition because Maple BPA failed to create a question of fact concerning whether Bloomfield Township's ordinance was arbitrary and unreasonable.

V. CONCLUSION

We conclude that state law does not preempt the field of liquor control regulation and that Maple BPA provided no evidence from which the trial court could conclude that Bloomfield

⁴⁶ Const 1963, art 1, § 2; US Const, Am XIV; *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 73; 592 NW2d 724 (1998).

⁴⁷ *Dowerk*, 233 Mich App at 73.

⁴⁸ *Id.*; see *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996).

⁴⁹ *Dowerk*, 233 Mich App at 73.

Township's ordinance was arbitrary and capricious. We also conclude that Bloomfield Township's ordinance is uniform under the Zoning Enabling Act and that it is constitutional.

We affirm.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Pat M. Donofrio