STATE OF MICHIGAN

COURT OF APPEALS

RICHMOND PLACE,

Plaintiff-Appellant,

v

CITY OF RICHMOND,

Defendant-Appellee.

UNPUBLISHED
December 4, 1998

No. 203930
Macomb Circuit Court
LC No. 94-000351 CZ

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff's constitutional challenge of a zoning ordinance "as applied." We affirm.

In February 1971, plaintiff purchased a thirty-acre tract of vacant land in the Macomb County City of Richmond. At the time of plaintiff's purchase, the land was zoned I-1, which permitted industrial use of the property. In response to plaintiff's petition for rezoning, defendant's city council in 1976 rezoned the land as an R-4 classification, which allowed for mobile home residential use. In January 1993, plaintiff informed defendant that it was prepared to proceed with its plan to develop the vacant land for mobile home use. However, defendant informed plaintiff that the land had been rezoned in 1991 from R-4 back to I-1. In March 1993, plaintiff requested that defendant's city planning commission rezone its property as R-4, but the planning commission refused. In April 1993, defendant's city council also denied plaintiff's rezoning request. Plaintiff then filed the instant suit alleging that the zoning ordinance was unconstitutional as applied to its property. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on the basis that plaintiff had failed to apply to the board of zoning appeals for a use variance, as required by *Paragon Properties Co v City of Novi*, 452 Mich 568; 550 NW2d 772 (1996).

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition on the basis that plaintiff failed to exhaust its administrative remedies when it was futile for

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

plaintiff to seek a zoning variance from the board of zoning appeals. We review the trial court's decision on a motion for summary disposition de novo to determine whether the moving party is entitled to judgment as a matter of law. *International Business Machines v Dep't of Treasury*, 220 Mich App 83, 86; 558 NW2d 456 (1996).

In *Paragon*, *supra*, the Supreme Court made the following statements that apply equally to the instant case:

> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality.
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> The finality requirement aids in the determination whether a taking has occurred by addressing the actual economic effect of a regulation on the property owner's investment-backed expectations. As noted in *Williamson* [*Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 191; 105 S Ct 3108; 87 L Ed 2d 126 (1985)], factors affecting a property owner's investment-backed expectations "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Investment-backed expectations are distinguishable from mere financial speculation.
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> The [defendant's] denial of [the plaintiff's] rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury [the plaintiff] may have suffered as a result of the ordinance. While, the city council's denial of rezoning is certainly a decision, it is not a final decision . . . because had [the plaintiff] petitioned for a land use variance, [the plaintiff] might have been eligible for alternative relief from the provisions of the ordinance. [*Paragon, supra* at 576, 578-579, 580 (footnotes omitted).]

Paragon's finality requirement clearly applies in the instant case where plaintiff is seeking relief from defendant's zoning ordinance as applied.[1]

However, to escape the finality requirement, plaintiff attempts to persuade this Court that any attempt to obtain a use variance would be futile, because defendant's ordinances do not allow the board of zoning appeals to grant a use variance under the circumstances of this case. In light of the clear language of defendant's zoning ordinances,[2] plaintiff's futility argument is meritless. Richmond Ordinances, art XIX, § 1904(2), authorizes the board of zoning appeals to issue a zoning use variance

> where by reason of exceptional narrowness, shape or area of a specific piece of property at the time of enactment of this Ordinance or by reason of exceptional topographic conditions or other extraordinary or exceptional conditions of such property, the strict application of the regulations enacted would result in peculiar or exceptional practical difficulties to or exceptional undue hardship upon the owner of such property provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this Ordinance.

The clear language of the zoning ordinance is sufficiently broad to allow plaintiff the opportunity to make a case for the issuance of a use variance for any number of reasons. However, in arguing that its slim chance of success for obtaining a use variance equals futility, plaintiff seems to misunderstand the concept of administrative finality and its underlying judicial policy. Plaintiff is not required to seek a final administrative decision because the courts have an interest in seeing that plaintiff ultimately receives the land use variance it is due. Instead, exhaustion of the administrative process is necessary as one step in the factual development of plaintiff's case: "[A]bsent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury [plaintiff] may have suffered as a result of the ordinance." *Paragon*, *supra* at 580. Because plaintiff has failed to show that it was futile for it to seek a land use variance from defendant, the trial court did not err in summarily disposing of plaintiff's case.

Next, plaintiff argues that it complied with the finality requirement after initiating the instant case by applying for a use variance, which the board of zoning appeals denied on November 14, 1996. The Supreme Court stated in *Paragon*, *supra* at 581, that after the board of zoning appeals denies a use variance request, plaintiff's next step is to appeal this decision to the circuit court, as MCL 125.585(11); MSA 5.2935(11) authorizes. Apparently, plaintiff has pursued this form of relief, and that appeal is pending before the circuit court in Docket No. 96-007555 AZ. The circuit court has not yet addressed this appeal. Plaintiff must resolve its pursuit of a variance in that proceeding. Moreover, notwithstanding its eleventh-hour request for a variance, plaintiff has still failed in the instant case to establish a triable issue regarding the nature and extent of its injuries. The trial court and this Court are still without "information regarding the potential uses of the property that might have been permitted," which is essential to establish the damages plaintiff incurred as a result of the zoning ordinance. *Paragon*, *supra* at 580.

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), because the correct subrule under which to grant summary disposition, if at all appropriate, was MCR 2.116(C)(4), which authorizes summary disposition where "[t]he court lacks jurisdiction of the subject matter." This argument does not affect our decision on appeal. If summary disposition is granted under one part of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subrule. *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996). When reviewing a motion for summary disposition under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the

affidavits and other proofs show that there was no genuine issue of material fact. *Walker v Johnson & Johnson Vision Products, Inc*, 217 Mich App 705, 708; 552 NW2d 679 (1996). Here, because we have concluded that, due to plaintiff's failure to seek a final decision from the board of zoning appeals, plaintiff failed to establish a genuine issue regarding the nature and extent of its damages, it is apparent that the lower court record permits review under MCR 2.116(C)(4). The trial court's alleged failure to grant summary disposition under the correct subrule was not fatal. As for plaintiff's related, cursory argument that "the Trial Court's dismissal of this matter under MCR 2.116(C)(10) operates as an adjudication on the merits with res judicata consequences," we refuse to address it. Plaintiff did not raise a res judicata argument in the trial court; consequently, plaintiff has failed to preserve this issue for appeal. *Royce*, *supra* at 545. Moreover, whatever res judicata consequences might result from the trial court's ruling have not adversely affected plaintiff yet. The trial court is the appropriate forum in which to address this issue if and when it ever arises.

Accordingly, we conclude that the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Robert J. Danhof

[1] The Supreme Court distinguished those cases in which the plaintiff challenges zoning ordinances as applied from those cases in which the plaintiff attacks the very existence or enactment of an ordinance. See *Paragon*, *supra* at 576-577. Plaintiff at one point argued before the trial court that this case was in the latter category. According to plaintiff's argument, the procedure that defendant used to rezone its property from R-4 to I-1 violated its right to procedural due process because defendant allegedly failed to notify plaintiff of the intended change. Plaintiff has not raised this argument on appeal and does not contest the trial court's finding that plaintiff "is essentially challenging the ordinance 'as applied.'"

[2] Statutory interpretation is a question of law that is reviewed de novo on appeal. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). If the plain and ordinary meaning of statutory language is clear, judicial construction of the statute is normally neither necessary nor permitted. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). The rules of statutory construction also apply to ordinances. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998).