STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN ASSOCIATION OF REALTORS and RODGER SYMONDS,

Plaintiffs-Appellants,

v

CITY OF DEARBORN,

Defendant-Appellee.

UNPUBLISHED
January 29, 2002

No. 220475
Wayne Circuit Court
LC No. 99-903635-CZ

Before: Owens, P.J., and Holbrook, Jr., and Talbot, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff Michigan Association of Realtors (MAR), an association of real estate firms, brokers and salespersons, and plaintiff Rodger Symonds, a real estate salesman, appeal as of right from the trial court's order granting summary disposition in favor of defendant City of Dearborn, thereby dismissing plaintiffs' challenges to the constitutionality of three city ordinances. We reverse and remand.

Three Dearborn city ordinances are at issue in this case. The first ordinance, referred to by the parties as the "C of O" sales ordinance, Section 11-43 of § 2.3 of the Housing Code, as amended by Ordinance 97-707, makes it "unlawful for an owner, lending institution, real-estate firm, broker, or salesman to assist in consummating a sale of real property until the aforementioned has provided a certificate of occupancy issued by the building and safety department." Plaintiffs challenge the constitutionality of this ordinance on the grounds that it is vague, overbroad, and violative of due process and equal protection.

The second ordinance, referred to as the "noxious weed" ordinance, Section 13-207 of Ordinance 81-92, § 2, imposes a duty on "the owner or occupant of land, or any person having charge of any lands within the limits of the city" to control the growth of vegetation on the land. In its complaint, plaintiffs asserted that MAR members have been threatened with enforcement of the noxious weed ordinance when the grass on listed properties was higher than eight inches and that, in order to avoid being fined, the MAR members have had to "contact the clients and ensure that the clients did cut the grass."

The third ordinance at issue concerns appearance tickets, Section 2-596, Ordinance No. 86-357, which authorizes certain public servants to issue an appearance ticket for a variety of code violations. Plaintiffs assert that MAR members were threatened with fines on listed

properties and were forced to contact their clients and "police" their clients' private property in order to avoid being fined.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). Defendant argued that plaintiffs lacked standing to challenge the constitutionality of the noxious weed ordinance and the appearance ticket ordinance because defendant had never enforced, or threatened to enforce, these ordinances against plaintiffs. Defendant argued that summary disposition was proper with respect to the C of O ordinance on the authority of *Butcher v City of Detroit*, 131 Mich App 698; 347 NW2d 702 (1984) and *Butcher v City of Detroit*, 156 Mich App 165; 401 NW2d 260 (1986), in which this Court upheld the constitutionality of a similar ordinance. After hearing argument from both parties, the trial court granted summary disposition. The trial court did not specify the grounds for summary disposition, but based its ruling on "the reasons stated in defendant's brief."

We review a trial court's ruling on a motion for summary disposition de novo. *Bingham Twp v RLTD Railroad*, 463 Mich 634, 641; 624 NW2d 725 (2001). Generally, summary disposition is premature if discovery concerning a disputed issue is incomplete. *Harkins v Northwest Activity Center, Inc*, 434 Mich 896; 453 NW2d 677 (1990); *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). In the instant case, little or no discovery had been conducted when the trial court granted summary disposition. We conclude that the lack of an adequate record precludes meaningful review of these issues and remand for further proceedings.

In particular, with respect to the C of O ordinance, plaintiffs allege that the enforcement of this ordinance effectively blocked a closing of an "as is" sale. Plaintiffs maintain that the ordinance is overbroad and impedes the freedom of contract because it has no mechanism for the buyer to assume responsibility for the necessary repairs and therefore prohibits "as is" sales of property. Plaintiffs argue that the ordinance operates to deprive plaintiffs of their livelihood. Plaintiffs attempt to distinguish the *Butcher* cases, upon which defendant relies, on the basis that the ordinance at issue in those cases permitted the buyer to assume the cost of necessary repairs after the sale.

Defendant responds that the *Butcher* cases are dispositive and that plaintiffs were not required to obtain a full C of O to proceed with the sale in question. Defendant argued below that its ordinance "only requires a 'non occupancy' C of O such that a closing may occur without an inspection." Defendant provided no evidentiary support for this assertion. On appeal, defendant impermissibly attempts to expand the record by explaining that the city has three distinct categories of certificates of occupancy in order "to insure that the ordinance was as specific and nonrestrictive as possible." Notably, the lower court record is devoid of any evidence or discussion of different certificates of occupancy. There is no indication whether these separate categories of certificates of occupancy are contained in a city ordinance, which would provide some context to interpreting the ordinance at issue, or whether they are a matter of administrative practice. We decline to decide the constitutionality of this ordinance without the benefit of a fully developed record.[1]

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[1] We note that the supplemental authority submitted by plaintiffs in support of their equal protection challenge to the C of O ordinance, *Muskegon Area Rental Ass'n v City of Muskegon*,
(continued…)

With respect to the noxious weed and appearance ticket ordinances, plaintiffs assert that these ordinances are unconstitutional as applied to them. Plaintiffs allege in their complaint that although their listing agreement with clients confers no control over the properties, defendant has enforced or threatened to enforce these ordinances against plaintiffs. In its motion for summary disposition, defendant argued that plaintiffs have no standing to bring this claim because no tickets were issued nor were threats of enforcement made. The parties submitted conflicting affidavits regarding defendant's enforcement or threat of enforcement of the ordinances against plaintiffs. We find a factual dispute regarding the threshold question of plaintiffs' standing to bring this claim. The facts as alleged do not preclude standing and plaintiffs have demonstrated a question of fact which would be aided by discovery. See *Kuhn v Secretary of St*, 228 Mich App 319, 332-333; 579 NW2d 101 (1998).

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

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot

(…continued)

244 Mich App 45; 624 NW2d 496 (2000), was recently reversed by our Supreme Court. *Muskegon Area Rental Ass'n v City of Muskegon*, ___ Mich ___; 636 NW2d 751 (2001) (Docket No. 118416, rel'd 12/18/2001).