

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CARL A. DEMING, KAREN E. DEMING, and  
SMR ACQUISITIONS, L.L.C.,

UNPUBLISHED  
February 15, 2002

Plaintiff-Appellants,

v

TOWNSHIP OF IMLAY,

Defendant-Appellee.

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No. 226101  
Lapeer Circuit Court  
LC No. 99-027221-CH

Before: K.F. Kelly, P.J., Hood and Doctoroff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order entered in the trial court granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiffs' motion for partial summary disposition similarly brought under MCR 2.116(C)(8) and (10). We affirm the trial court's denial of plaintiffs' summary disposition motion and reverse the trial court's order granting defendant's motion.

I. Basic Facts and Procedural History

This case involves a dispute over the zoning of plaintiffs' property located in Imlay Township. Plaintiffs own approximately 190 acres which is currently zoned R-1, single family residential. Plaintiffs requested that defendant rezone their property to MH, Mobile Home Park, to permit them to develop a 1,079 space manufactured housing community. This request was denied and plaintiffs appealed to defendant's zoning board of appeals for a use variance. The zoning board of appeals denied plaintiffs' appeal. Thereafter plaintiffs filed a three count complaint alleging due process and equal protection violations under the Michigan Constitution, exclusionary zoning, and a public policy claim alleging that defendant's zoning ordinance and master plan does not comport with the dictates of MCL 125.273.<sup>1</sup>

All parties sought summary disposition. Plaintiffs filed pursuant to MCR 2.116(C)(8) and (10) on the exclusionary zoning issue and defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court characterized plaintiffs' complaint as

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<sup>1</sup> Part of the Township Rural Zoning Act.

encompassing five issues: exclusionary zoning, violation of the rights to due process and equal protection under the Michigan Constitution, unconstitutional taking and a statutory count alleging the township's zoning ordinance violates MCL 125.273. After hearing oral argument, the trial court granted defendant's motion on all five issues and denied plaintiffs' motion. Plaintiffs appeal as of right the trial court's ruling with regard to the first three issues identified. We now affirm the trial court's decision relative to plaintiff's motion on the exclusionary zoning issue and reverse the trial court's order granting defendants summary disposition.

## II. Standard of Review

This Court reviews de novo a trial court's grant of a motion for summary disposition. *Silver Creek Tp v Corso*, 246 Mich App 94, 97; 631 NW2d 346 (2001). When considering a motion brought pursuant to MCR 2.116(C)(10), this Court reviews all documentary evidence to determine whether there exist genuine factual issues or whether a party is entitled to judgment as a matter of law. *Id.* Conversely, a motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Kokx v Bylenga*, 241 Mich App 655, 660; 617 NW2d 368 (2000). Accepting all factual allegations in support as true, including any reasonable inferences or conclusions that may be drawn there from and construing them in a light most favorable to the nonmoving party, a (C)(8) motion may be granted only when the claim is 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' *Id.* (Citation omitted.)

## III. Exclusionary Zoning

Plaintiff argues that the zoning ordinance excludes mobile home parks from the Township in contravention of MCL 125.297a which provides:

A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

Pursuant to statute therefore, a zoning ordinance may not exclude an otherwise lawful use of land where: (1) a demonstrated need exists for the land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful. *Bell River Associates v China Charter Tp*, 223 Mich App 124, 135; 565 NW2d 695 (1997). In the case at bar, lawful use is not at issue.

The next question is whether plaintiffs demonstrated a need for the land use within the township or "surrounding area." On this factor, plaintiffs submitted census data establishing that there is an increase in the population within Lapeer County along with an affidavit of Pam Phelps, a real estate agent familiar with residential properties. In her affidavit, Phelps indicated that there is a shortage of single-family homes priced below \$100,000 in Imlay Township. To that end, Phelps would testify that many older individuals seek to retire in the township along with younger couples just starting out thus creating a demand for housing for less than \$800.00 per month. Currently, the demand for decent housing in the township exceeds the supply. Further, Phelps indicated that manufactured housing provides quality living at an affordable

price thus giving rise to the inference that a manufactured home community within the township would meet the current demand.

On the contrary, defendant submitted evidence suggesting that the region's market for mobile homes is saturated. To that end, defendant submitted the affidavit of David Birchler, the president of a company employed as the Township Planner for Imlay Township. Birchler would testify that pursuant to the Lapeer County Mobile Home Park survey, there is currently a 16.6 percent vacancy rate. Further, Birchler opined that when the two new mobile home parks within Lapeer County are ready for occupancy, that will increase the vacancy rate to 23.5 percent thereby establishing the lack of a demand.

The trial court ruled that plaintiffs' documentary evidence fails, as a matter of law, to establish "whether there is any demand for a mobile home park in the township." We disagree. A review of the documentary evidence submitted by both plaintiffs and defendant demonstrate the existence of genuine factual issues concerning whether there exists a need for a manufactured housing community within the township thus rendering judgment as a matter of law inappropriate.

Similarly, there exist genuine factual issues as to whether the use sought is appropriate to the location. *Id.* On this point, defendant argues that according to the Township's Land Use Plan, plaintiffs' property is within an area designated very low density residential. Defendants submitted documentary evidence establishing that plaintiffs' request to rezone the subject property entails permitting a high density residential use which is inconsistent with the township's land use plan as well as the surrounding land use pattern. Indeed, the Township's Master Plan provides for higher density residential land use in areas closer to the city which can more readily support an increase in population density. Permitting a high density residential use would generate more traffic as well as create an additional demand for school, fire and police protection not originally anticipated in the Master Plan. Finally, the subject property is not currently served by public sewer and water service further demonstrating that the requested use is inappropriate for the proposed location. We disagree.

A review of the Township's Master Plan includes mobile homes as an appropriate land use classification. Additionally, Imlay Township's Zoning Ordinance similarly provides for Mobile Home Park Districts. Thus, since the Master Plan and the Imlay Township Zoning Ordinance both provide for the requested use, the use is thus appropriate. Moreover, a review of the record reveals that like plaintiff's property, the property ceded from defendant to Imlay City for the development of the Maple Grove mobile home park had an R-1 zoning classification before its transfer as did other property suggested by defendant as more appropriate for defendant's proposed development.

At this stage of the proceedings, genuine factual issues exist on plaintiff's exclusionary zoning claim thus rendering summary disposition premature. It may very well be that plaintiffs' proposed development is inappropriate to the location. However, on the record here before us, that determination is one appropriately resolved by the trier of fact as opposed to determined as a matter of law. Accordingly, we reverse the trial court's decision granting defendant's motion for summary disposition and affirm the trial court's denial of plaintiffs' motion for summary disposition on this issue.

#### IV. Due Process and Equal Protection Challenge

Finally, plaintiffs argue that defendant's actions in refusing to rezone plaintiff's property to permit the development of a mobile home park denied plaintiffs substantive due process and equal protection of the law in accord with the Michigan Constitution. While it is axiomatic that zoning ordinances enjoy a presumption of validity, *Countrywalk Condominiums Inc, v City of Orchard Lake Village*, 221 Mich App 19, 23; 561 NW2d 405 (1997), at the same time, "an ordinance which totally excludes a use recognized by the constitution or other laws of the state, carries a strong taint of unlawful discrimination and a denial of equal protection of the law." *Id.* quoting *Kropf v. Sterling Heights*, 391 Mich 139, 156; 215 NW2d 179 (1974). There is no dispute that mobile home parks constitute an appropriate and legitimate use of land.

In the case at bar, a review of the Master Plan reveals that a mobile home park is a recognized land use classification. Additionally, the township's zoning ordinance provides for mobile home park districts. However, there is no land zoned with an "MH" designation. In light of our prior ruling that there exist genuine factual issues relative to whether defendant's zoning ordinance unlawfully excludes mobile home parks from the township, there are thus genuine factual issues regarding plaintiff's substantive due process and equal protection claims. If the finder of fact determines that defendant's zoning ordinance unlawfully excludes mobile home parks, then the ordinance loses its cloak of validity and instead carries the "strong taint" of discrimination and the denial of equal protection. *Countrywalk, supra* at 23. The issue would therefore become whether defendant's zoning ordinance relative to plaintiffs' property bears a rational relation to legitimate governmental objectives. *Dowerk v Charter Tp of Oxford*, 233 Mich App 62, 73; 592 NW2d 724 (1998).

Upon the record herein presented for our consideration, we do not have sufficient facts to address and determine, as a matter of law, the constitutional issues raised by plaintiffs at this juncture. Accordingly, the trial court's grant of summary disposition to defendants on plaintiffs' substantive due process and equal protection claims was premature.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly  
/s/ Harold Hood  
/s/ Martin M. Doctoroff