STATE OF MICHIGAN

COURT OF APPEALS

GARY STONEROCK and ONALEE STONEROCK, Plaintiffs-Appellants,	UNPUBLISHED May 28, 2002
v	No. 229354 Oakland Circuit Court
CHARTER TOWNSHIP OF INDEPENDENCE, Defendant-Appellee.	LC No. 99-016357-CH

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

In this zoning case, plaintiffs challenge defendant's decision to re-zone plaintiffs' real property from a C-3 (highway commercial) zone to an OS-2 (office service) zone. The trial court granted summary disposition to defendant under MCR 2.116(C)(10). Plaintiffs appeal as of right from that decision. We affirm.

I. Ripeness

Plaintiffs first argue that the trial court erroneously considered defendant's motion under MCR 2.116(C)(10) without first deciding whether plaintiffs' claims were ripe for circuit court review. Initially, we question whether plaintiffs are aggrieved parties on this issue. Plaintiffs argued below that their claims were ripe. The trial court, in effect, accepted plaintiffs' position and went on to address the merits. In any event, because we conclude that plaintiffs' claims were ripe for review under *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996), the trial court did not err in addressing the remainder of defendant's motion.

In *Paragon*, *supra* at 576, our Supreme Court noted that a property owner can challenge a land use ordinance either "as applied" or "on its face," and explained the two types of challenges as follows:

> A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. An "as applied" challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution. [Internal citations omitted.]

The Court then explained that a challenge to the validity of a zoning ordinance "as applied" is subject to the rule of finality. *Id.* However, "[f]inality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance." *Id.* at 577.

We conclude that plaintiffs' challenge to defendant's re-zoning decision qualifies as a facial challenge, rather than a challenge to the ordinance "as applied." Plaintiffs allege that the OS-2 zoning adversely affects the value of all the properties along the M-15 corridor and curtails opportunities to sell those properties on the open market. Further, before the trial court, plaintiffs argued that it would have been futile for them to request a variance or special use permit from defendant because plaintiffs had no specific development plan for their parcel. Plaintiffs also argued that they did not desire a variance or a special use permit, but wanted the township to allow their development of any uses previously permitted under the C-3 highway commercial classification. We conclude that plaintiffs have challenged the township's re-zoning decision "on its face," rather than "as applied." Therefore, the *Paragon* finality requirement does not apply to plaintiffs' claims. *Id.* The trial court did not err in addressing the substance of defendant's motion for summary disposition under MCR 2.116(C)(10).

II. Substantive Due Process

Plaintiffs next argue that the trial court erroneously granted defendant summary disposition on plaintiffs' substantive due process claim. We disagree.

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion brought under that rule, courts must consider the affidavits, pleadings, depositions, and other documentary evidence in the light most favorable to the non-moving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The moving party bears the initial burden of supporting its position with affidavits, depositions, admissions, or other documentary evidence. *Id.* at 455. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* In the present case, in order to avoid summary disposition, plaintiffs were required to go beyond the contents of their pleadings and set forth specific facts showing that a genuine issue of material fact existed on their substantive due process claim. *Id.* Because they failed to present documentary evidence establishing the existence of a material factual dispute, we conclude that the trial court properly granted defendant's motion. *Id.*

Both parties agree that the test for challenging the constitutionality of a zoning ordinance is set forth in *Kropf v Sterling Heights*, 391 Mich 139, 157; 215 NW2d 179 (1974):

> A plaintiff-citizen may be denied substantive due process by the city or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence.

In determining whether a municipality had a reasonable basis for adopting a zoning ordinance, this Court should apply the following principles:

> In looking at this "reasonableness" requirement for a zoning ordinance, this Court will bear in mind that a challenge on due process grounds contains a

> two-fold argument; first, that there is no reasonable governmental interest being advanced by the present zoning classification itself . . . or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question. Though each of those arguments are founded upon due process, in reality they are distinct arguments, each requiring different proofs. [*Id*. at 158.]

We first address plaintiffs' contention that there was "no reasonable governmental interest being advanced" by defendant's decision to re-zone plaintiffs' property from C-3 to OS-2. Plaintiffs argue that commercial uses have long existed along the M-15 corridor, and that the area is particularly well-suited to intense commercial uses because it is located at an I-75 interchange. In support of their argument, plaintiffs cite the general purpose and intent of the C-3 district, as described in the township code:

> The intent of this district is to provide areas in the township where the principal use of land is for establishments offering accommodations, supplies, or services to motorists and for certain specialized uses which, because of their use, and because of the need for quick highway and neighborhood access, must serve the township by being located along the various highways within the township. The Highway Commercial District is intended to be located along numbered State of Federal highways. [Independence Township Ordinance § 18.01.]

Plaintiffs argue that this exactly describes the I-75 interchange at M-15, and argue that the M-15 corridor is particularly well-suited to the development of intense commercial uses, including fast food restaurants with drive-through service. Such uses are permitted as of right in a C-3 district, but are not permitted in an OS-2 district.

In contrast, defendant argues that it possessed numerous legitimate reasons for re-zoning the M-15 corridor from a C-3 district to an OS-2 district. First, defendant argues that it wanted to accommodate the increasing trend of residential use surrounding the M-15 corridor, and that it judged office use as more compatible with neighboring residential uses than intense commercial uses would be. Second, defendant argues that it wanted to lessen the intensity of uses along the M-15 corridor, due to traffic safety considerations. Third, defendant argues that it wanted to accommodate the growing demand for office use in the area of the M-15 corridor. Finally, defendant argues that other areas within and immediately outside the township had recently experienced significant commercial development, reducing the need for intense commercial development on the M-15 corridor.

The trial court found that defendant had articulated legitimate reasons for the re-zoning, and that plaintiffs had failed to present any evidence that the re-zoning "constitutes an arbitrary fiat, a whimsical ipse dixit or that there is no room for a legitimate difference of opinion concerning its reasonableness." Therefore, the trial court granted summary disposition to defendant on plaintiffs' substantive due process claim.

We conclude that the trial court properly granted defendant's motion for summary disposition. Plaintiffs may have raised an issue regarding the reasonableness of commercial use along the M-15 corridor. However, they have not introduced sufficient facts to show that "no reasonable governmental interest" was advanced by the OS-2 zoning. While plaintiffs' property

is located near an I-75 interchange, that is not the sole factor to be considered in determining how the property should be zoned. The township demonstrated that it considered numerous other factors, such as current use of surrounding properties, traffic patterns, and development trends both within and outside the township. While both commercial and office use might be construed as reasonable uses for the property, plaintiffs have not shown that office use was unreasonable. Further, although plaintiffs argue that intense commercial use would constitute the highest and most valuable use of their property, such an argument does not rebut the showing of reasonableness on the part of the city. *Kropf, supra* at 160.

Next, we address plaintiffs' contention that defendant's re-zoning of the subject property was arbitrary and capricious. Plaintiffs rely on *Raabe v City of Walker*, 383 Mich 165; 174 NW2d 789 (1970), for the proposition that zoning ordinances cannot be amended absent a change of conditions or circumstances. Plaintiffs contend that no change of conditions has occurred in the M-15 corridor sufficient to support the re-zoning to an OS-2 district, and therefore defendant's re-zoning decision was arbitrary and capricious.

In *Raabe*, the City of Walker re-zoned 180 acres of agricultural land for heavy industrial use. *Id*. at 168. Surrounding residential property owners challenged the re-zoning. *Id*. at 169. The circuit court found that the re-zoning was invalid, and our Supreme Court affirmed that decision. *Id*. at 167, 179. In so ruling, the *Raabe* Court quoted the following passages from 8 McQuillin, Municipal Corporations (1965 Rev), §§ 25.06 and 25.68:

> Amendment or repeal of zoning laws should be just as carefully considered and prepared, perhaps more so, since private arrangements, property purchases and uses, the location of business in commercial or industrial zones, and the making of homes in residential districts, occur with reasonable anticipation of the stability of existing zones.
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> Since the purpose of zoning is stabilization of existing conditions subject to an orderly development and improvement of a zoned area and since property may be purchased and uses undertaken in reliance on an existing zoning ordinance, an amendatory, subsequent or repealing zoning ordinance must clearly be related to the accomplishment of a proper purpose within the police power. Amendments should be made with utmost caution and *only when required by changing conditions*; otherwise, the very purpose of zoning will be destroyed. In short, a zoning ordinance can be amended only to subserve the public interest. [*Raabe, supra* at 177 (emphasis added).]

In the present case, defendant contends that it did identify a sufficient change of circumstances to justify re-zoning the M-15 corridor from C-3 to OS-2. In particular, defendant points to a report prepared for the township in November 1998, entitled "M-15 Analysis: Land Use, Zoning, Master Plans, and Traffic Conditions." That report documents a significant increase in residential development in the area surrounding plaintiffs' property, between 1973 and 1995. According to that report, only 27% of the properties surrounding the M-15 corridor were developed as residential in 1973, whereas 74% of the properties had been developed to that use in 1995. The report concludes that the "evolution of the predominant residential patterns

required the Township to review land use patterns and arrive at non-residential uses along the M-15 frontage that are compatible with residential areas."

Further, the report indicated that existing uses developed along the M-15 frontage were predominantly office uses, not commercial uses. In the area surrounding the M-15 corridor, approximately 55% of the land was zoned for residential use, 41% was zoned for highway commercial use, and 3% was zoned for office use. While most of the properties were vacant and awaiting development, only a single parcel was developed for commercial use (a gas station) and 15% of the area was actually devoted to office use. The report also concluded that the high percentage rate of vacant land among those parcels zoned for commercial development indicated that "there has been a lack of demand to develop properties in the study area in a commercial manner."

Based on the detailed documentation provided by defendant, we conclude that defendant did identify a sufficient change of circumstances to justify re-zoning the M-15 corridor from C-3 to OS-2. Plaintiffs have failed to show that the township's re-zoning of the M-15 Corridor was arbitrary and capricious.

In addition, plaintiffs argue that the township's re-zoning decision is invalid because it excludes intensive commercial uses from most of the township, with the exception of a small area along the Dixie Highway where such uses are permitted. Plaintiffs contend that the re-zoning decision therefore violates MCL 125.297a. However, defendant correctly points out that plaintiffs' argument lacks merit because where a use is permitted somewhere within the community, it may not be deemed "excluded." *Fremont Twp v Greenfield*, 132 Mich App 199, 204-205; 347 NW2d 204 (1984).

We conclude that the trial court properly granted defendant's motion for summary disposition on plaintiffs' substantive due process claim, under MCR 2.116(C)(10).

III. Inverse Condemnation

Finally, plaintiffs argue that the trial court erroneously granted defendant summary disposition of plaintiffs' inverse condemnation claim. We disagree.

Our Supreme Court's holding in *K & K Construction, Inc v DNR*, 456 Mich 570; 575 NW2d 531 (1998), sets forth the test that a trial court must apply when considering a party's claim that a taking has occurred. The Court noted that land use regulations effect a taking in two general situations: (1) when they do not substantially advance a legitimate state interest or (2) when they deny an owner "economically viable use of his land." *Id.* at 576. On appeal, plaintiffs argue that the present case falls into the second of the above categories because the township's decision to re-zone plaintiffs' property denied them the "economically viable use" of their land.

When reviewing this type of claim, courts again apply a two-prong test:

> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial

> or productive use of land," or (b) a taking recognized on the basis of the application of the traditional "balancing test" . . . [*Id*. at 576-577 (internal citations omitted).]

The present case clearly does not involve a "categorical" taking, which involves a "physical invasion of the property by the government . . . or where a regulation forces an owner to 'sacrifice *all* economically beneficial uses [of his land] in the name of the common good.'" *Id*. at 577 (emphasis in original). Therefore, in order to state a valid claim, plaintiffs needed to demonstrate the existence of a genuine issue of material fact under the traditional "balancing test" approach, explained by the *K & K* Court as follows:

> In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. [*Id*. at 577.]

Plaintiffs argue that the trial court's grant of summary disposition must be reversed because the trial court failed to analyze the factors involved in the above balancing test. We conclude that plaintiffs are not entitled to relief because they did not allege sufficient facts to support a finding that the township denied plaintiffs the "economically viable use" of their land and did not establish a genuine issue of fact under the above balancing test.

At his deposition, plaintiff Gary Stonerock testified that he received an offer to purchase the property, after it was re-zoned to an OS-2 district, for $300,000. The prospective buyer wished to build a medical clinic on the property, a use that would have been consistent with the OS-2 zoning. However, Stonerock considered the offer so low that he "didn't even want to talk about it" with the prospective buyer. Stonerock also admitted that he received a subsequent offer to purchase the property for $400,000. However, Stonerock testified that he had listed the property for $535,000, and that he refused to even speak to anyone who came in with an offer less than $500,000. Plaintiffs did not show that they were denied the "economically viable use" of their property.

Nor did plaintiffs establish a genuine issue of fact under the balancing test. Defendant presented evidence that the property tax assessment of plaintiffs' property actually *increased* after the re-zoning to an OS-2 district, from $216,000 in 1999 to $221,800 in 2000. Plaintiffs offered no concrete evidence to rebut this apparent increase in value. As defendant points out, plaintiff offered no expert testimony or appraisal evidence indicating that the value of their real property suffered in any way, as a result of the re-zoning. Rather, plaintiffs relied on the bare assertion that the property is worth less when marketed for office purposes than it would be worth if marketed for commercial purposes.

Given the complete lack of evidence that the re-zoning from C-3 to OS-2 had any

negative economic impact on plaintiffs' property, we conclude that plaintiffs failed to raise sufficient facts to avoid summary disposition.

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White