STATE OF MICHIGAN

COURT OF APPEALS

1ST RURAL HOUSING PARTNERSHIP, LLP, d/b/a FIRST RURAL HOUSING PARTNERSHIP, LLP,

Plaintiff-Appellant,

v

CITY OF HOWELL,

Defendant-Appellee.

UNPUBLISHED
February 5, 2004

No. 241192
Livingston Circuit Court
LC No. 00-018194-CZ

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting defendant's motion for summary disposition on the basis that the circuit court lacked subject matter jurisdiction because the issue presented was not ripe for judicial review. We reverse and remand.

Plaintiff is the owner of a 3.86-acre parcel of real estate located in the city of Howell. The property is zoned RM (multi-family residential). Rezoning to B-1 (local business) was unsuccessfully sought in 1998. A second rezoning request in 2000 was also denied, after which a use variance was pursued with the Zoning Board of Appeals. The variance was denied. Thereafter, plaintiff filed the instant action seeking, inter alia, declaratory relief alleging that defendant's zoning ordinance, as applied, constituted an unconstitutional taking and inverse condemnation of plaintiff's property. The trial court concluded that it lacked jurisdiction over this case because plaintiff filed an original action alleging a confiscatory taking rather than by appealing from the adverse decision of the ZBA on the variance request.

In *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996), the Supreme Court held that a property owner who alleges that a zoning ordinance is confiscatory on its face may immediately file an original action in the circuit court because the finality doctrine does not apply. But where a property owner, as here, is challenging the zoning ordinance as being confiscatory as applied, the finality doctrine does apply and there must be a final decision from the zoning authority before the matter may move into the courts. *Id.* at 576-577. The Court in *Paragon* interpreted this to include the necessity for the property owner to seek alternate relief, such as a variance, before the matter is ripe for judicial review. *Id.* at 577.

The question which arises then is whether plaintiff, having sought and been denied alternate relief in the form of a variance, must appeal that decision of the ZBA to the circuit court before (or contemporaneously with) an original action in circuit court challenging the zoning ordinance itself. Plaintiff in essence argues that, having completed the process within the city to no avail, it is free to abandon the pursuit of a variance and proceed directly to circuit court with its original action challenging the zoning ordinance itself. Defendant, and the trial court, would have us conclude that plaintiff must continue to pursue the variance issue through the circuit appeals process.

We believe that this issue is controlled by our decision in *Sun Communities v Leroy Twp*, 241 Mich App 665; 617 NW2d 42 (2000). In *Sun Communities*, the plaintiff sought the rezoning of its property, which request was denied. The plaintiff then filed an original action in circuit court, alleging, inter alia, a taking of private property without just compensation. This Court concluded that there was no need to pursue an appeal from an administrative decision of the ZBA when the plaintiff is challenging the legislative decision regarding rezoning.

> Here, plaintiff's lawsuit does not involve a challenge to the administrative activities of a municipal body acting in the capacity of a zoning board of appeals. Instead, it involves numerous constitutional challenges to the legislative actions of the township board in applying the AG zoning to plaintiff's property. *There is no authority that requires a party to pursue an appeal to challenge the constitutionality of a legislative act of rezoning.* Indeed, "neither a city council's decision to rezone land nor a zoning board of appeal's decision to grant a variance is relevant to the constitutionality or unconstitutionality of an ordinance's provisions." *Paragon Properties Co v Novi*, 452 Mich 568, 580, n 15; 550 NW2d 772 (1996). [*Sun Communities, supra* at 672 (emphasis added).]

This case is controlled by the emphasized language above that there is no authority requiring an appeal to challenge the constitutionality of the legislative act of rezoning. Therefore, we conclude that plaintiff had the option in this case to either pursue the variance issue by appealing the adverse decision to the circuit court, or to abandon the variance issue and merely bring an original action in the circuit challenging the zoning ordinance itself, or both. While it may be that plaintiff limited its options by abandoning the variance issue and only challenging the rezoning issue, that is plaintiff's choice to make.

We briefly note that defendant raises various additional arguments, such as plaintiff not having shown that it could have obtained approval of a different plan that gave it the beneficial use of its property without requiring rezoning. These arguments, however, go to the merits of plaintiff's claim, not to whether the trial court has jurisdiction over this matter. It is only the latter question that we need answer in this appeal.

Finally, plaintiff requests that we award sanctions against defendant for pursuing a frivolous defense. Although we disagree with defendant's position, given that the defendant was able to convince the trial court that is was correct and the complex nature of this issue in light of the *Paragon* decision, we cannot say that defendant's position is frivolous. Therefore, we decline to award sanctions against defendant.

Reversed and remanded to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski