STATE OF MICHIGAN

COURT OF APPEALS

BILLBOARDS BY JOHNSON, INC.,	UNPUBLISHED December 19, 2006
Plaintiff-Appellant,	
v	No. 270740 Gladwin Circuit Court
BILLINGS TOWNSHIP,	LC No. 04-001812-CZ
Defendant-Appellee.	

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the circuit court's orders granting summary disposition to defendant with respect to each of plaintiff's claims. We affirm in part, reverse in part, and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff is a commercial outdoor advertising agency. It entered into a lease agreement for property and sought to erect a billboard on M-30 in defendant Billings Township in an area within the scope of the Highway Advertising Act (HAA), MCL 252.301 *et seq*. Defendant's zoning ordinance essentially prohibits the use of property in a C-1 zoning district, which is where the property at issue is located, for off-premises signs. Plaintiff applied for a zoning permit to erect a 12-by-24-foot sign on the property. Defendant denied the application. Plaintiff then filed an appeal of that decision with defendant's Zoning Board of Appeals (ZBA), which denied the appeal on the basis that the billboard was prohibited by the ordinance. Plaintiff subsequently filed a four-count complaint in circuit court. Counts I-III essentially alleged that defendant's ordinance was unconstitutional and that it conflicted with, and was preempted by, the HAA. In count IV, plaintiff challenged the ZBA's denial of its land use application. Ultimately, the circuit court granted summary disposition to defendant with respect to each of plaintiff's claims.

As plaintiff concedes, the circuit court's dismissal of count II is controlled by *Homer Twp v Billboards by Johnson, Inc*, 268 Mich App 500; 708 NW2d 737 (2005). In light of this Court's decision in *Homer Twp*, the circuit court correctly rejected plaintiff's claim that the HAA preempted defendant's ordinance. We decline to accept plaintiff's invitation to revisit *Homer Twp*, which plaintiff asserts was wrongly decided. The decision is binding precedent. MCR 7.215(J)(1).

Plaintiff also challenges the circuit court's determination that it lacked subject-matter jurisdiction because plaintiff did not file its circuit court complaint within 21 days of the ZBA's written decision and order.

The township zoning act formerly authorized circuit court review of decisions of the zoning board of appeals, but did not specify any time limit. See former MCL 125.293a, repealed by 2006 PA 110, effective July 1, 2006.[1] This Court and the Supreme Court therefore applied the 21-day time limit for filing an appeal in circuit court pursuant to MCR 7.101(B)(1). See *Macenas v Village of Michiana*, 433 Mich 380, 388 n 11; 446 NW2d 102 (1989). That rule provides in part that except as prescribed by another statute or court rule, an appeal of right must be taken within "21 days after the entry of the order or judgment appealed from."

The dispute in this case concerns the event that triggers the running of the 21-day period for an appeal in circuit court. To the extent this issue involves the interpretation and application of a court rule and whether the trial court has subject-matter jurisdiction, we review these matters de novo. *Haliw v City of Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005); *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999).

The question of what suffices as "entry of the order" in zoning matters is addressed in *Davenport v City of Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995). There, the defendant ZBA denied the plaintiffs' request for a variance at a January 27, 1992, meeting, but did not certify the minutes of the meeting until February 25, 1992. The plaintiffs filed a claim of appeal on February 26, 1992. The defendant argued that the appeal was untimely because it was not filed within 21 days after the denial at the meeting. *Id.* at 404. This Court held:

> The Supreme Court has held that the time period for filing a claim of appeal begins to run on the date of actual entry of an order, and MCR 2.602(A) provides that the "date of signing of an order or judgment is the date of entry." This Court has held that an order or judgment does not become effective until reduced to written form. These cases evidence an emphasis on the date of formal entry of the order or judgment appealed from. Although the issue has not yet been addressed in the context of zoning appeals, we believe that the date of certification of the minutes from the January 27, 1992, meeting most appropriately serves as the date of entry of the order or judgment appealed from for purposes of MCR 7.101(B)(1) and MCR 2.602(A). Accordingly, the filing date of plaintiffs' claim of appeal fell within the twenty-one-day filing period

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[1] Effective July 1, 2006, the Michigan zoning enabling act specifies that a circuit court appeal from a decision of a zoning board of appeals "shall be filed within 30 days after the zoning board of appeals certifies its decision in writing or approves the minutes of its decision." MCL 125.3606(3). The new provisions have no effect on cases decided under the former act. MCL 125.3702.

> prescribed in MCR 7.101(B)(1) and the appeal was timely. [*Davenport, supra* at 404-405 (citations omitted).]

We disagree with plaintiff's contention that *Davenport* holds that the 21-day period commences *only* when the minutes of the board meeting are certified. Rather, the holding in *Davenport* was stated in a manner specific to the facts of that case: "Although the issue has not yet been addressed in the context of zoning appeals, we believe that the date of certification of the minutes from the January 27, 1992, meeting most appropriately serves as the date of entry of the order or judgment appealed from for purposes of MCR 7.101(B)(1) and MCR 2.602(A)." *Davenport, supra* at 405. Unlike this case, the zoning board in *Davenport* did not issue a written order. We agree with the trial court that the ZBA's written order triggered the 21-day period for filing the circuit court appeal. See *Schlega v Detroit Bd of Zoning Appeals,* 147 Mich App 79; 382 NW2d 737 (1985). Because there is no dispute that plaintiff's complaint was not filed within 21 days after the date of that order, the trial court's dismissal of count IV was proper.

However, we conclude that the untimeliness of the appeal of the ZBA decision was not a basis for dismissing counts I and III. Count I of plaintiff's complaint includes allegations that defendant's ordinance as applied to plaintiff and "to any other potential location within Billings Township" denies a right granted under the First Amendment, that the ban on billboards within the C-1 zone unlawfully infringed on commercial free speech and did not advance or was more extensive than necessary to serve a governmental interest, and that the zoning ordinance on its face and as applied to plaintiff violates due process of law. In count III, plaintiff alleged that defendant's ordinance was an "invalid, unlawful, arbitrary, capricious and unreasonable exercise of the police powers" granted by the state to defendant. These are constitutional challenges to the ordinance itself that are distinct from the challenge to the ZBA's denial of plaintiff's appeal. Accordingly, these claims were not subject to the 21-day limitation period for filing a circuit court appeal. *Sun Communities v Leroy Twp*, 241 Mich App 665, 672; 617 NW2d 42 (2000);[2] *Krohn v City of Saginaw,* 175 Mich App 193, 197; 437 NW2d 260 (1988).

Accordingly, the trial court's order is affirmed with respect to the dismissal of counts II and IV and reversed with respect to the dismissal of counts I and III. We do direct, however, that

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[2] The *Sun Communities* panel, addressing a challenge to the trial court's dismissal of constitutional claims relative to zoning because an appeal was not taken within 21 days, reversed and stated:

> 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. [*Sun Communities, supra* at 672.]

any aspects of counts I and III that relate to the HAA and preemption shall not be considered in light of *Homer Twp, supra.*

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

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly