STATE OF MICHIGAN

COURT OF APPEALS

WEISS & KLEMPP DEVELOPMENT, L.L.C., Plaintiff-Appellant,	UNPUBLISHED July 20, 2006
v	No. 267925 Genesee Circuit Court
CHARTER TOWNSHIP OF MUNDY, Defendant-Appellee.	LC No. 04-079948-CH

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiff, the owner of real property zoned for residential-agricultural use in defendant, Charter Township of Mundy, appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

I. Facts and Procedural History

Plaintiff sought site-plan approval from defendant's planning commission for a proposed 49-unit condominium development. The planning commission denied plaintiff's application for a special land use permit at a meeting on June 9, 2004, based on (1) a May 26, 2004, letter from the Genesee County Health Department indicating that a test well on adjacent property contained high arsenic levels, and (2) concerns expressed by adjacent property owners that the proposed development would cause water drainage problems. On August 20, 2004, plaintiff obtained another letter from the Genesee County Health Department regarding the results of a test well for plaintiff's development that indicated that the arsenic quality would be acceptable "once an advisory statement is approved and filed with the master deed indicating the test well result data, the health concerns associated with arsenic in ground water, and the means of treatment available to reduce the risk."

Plaintiff filed this action on October 5, 2004, challenging the planning commission's decision and the validity of the special land use review procedure in defendant's zoning ordinance for developments subject to the Condominium Act, MCL 559.101 *et seq*. Plaintiff's complaint set forth six counts labeled "invalidity of ordinance-discriminatory treatment of site condominium development" (Count I), "unlawful denial of site plan approval" (Count II), superintending control/declaratory relief/injunctive relief" (Count III), "violation of substantive due process" (Count IV), "violation of equal protection" (Count V), and "unconstitutional

taking" (Count VI). For the latter count, plaintiff sought damages in excess of $25,000 for the planning commission's allegedly unreasonable and unconstitutional action.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), challenging the trial court's subject-matter jurisdiction and addressing the merits of plaintiff's claims. Defendant also argued that a facial challenge to its zoning ordinance was moot because of amendments to the ordinance. At a hearing on the motion, the trial court identified the critical question as whether plaintiff had a duty to appeal the planning commission's June 9, 2004, decision to defendant's zoning board of appeals. The trial court granted defendant's motion, concluding that plaintiff was obligated to first appeal the planning commission's decision to defendant's zoning board of appeals. The court later denied plaintiff's motion for reconsideration.

II. Standard of Review

We review a trial court's grant of summary disposition de novo to determine if the prevailing party was entitled to judgment as a matter of law. *Conlin v Scio Twp,* 262 Mich App 379, 382; 686 NW2d 16 (2004). We review questions of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). In general, however, a dismissal based on the failure to exhaust administrative remedies is properly granted under MCR 2.116(C)(4). *Rudolph Steiner School v Ann Arbor Twp,* 237 Mich App 721, 730; 605 NW2d 18 (1999). A reviewing court may review a trial court's summary disposition ruling under the correct subrule. *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998). A trial court must consider the pleadings and evidence submitted by the parties in resolving a motion under MCR 2.116(C)(4). See MCR 2.116(G)(5); *C C Mid West, Inc v McDougall*, 470 Mich 878; 683 NW2d 142 (2004).

A decision concerning the meaning and scope of a pleading is within the sound discretion of the trial court, and reversal is appropriate only if the trial court abuses its discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A court is not bound by a party's choice of labels for its cause of action because this would place form over substance. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989); *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988). A court may look to the face of the complaint to determine its nature. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 771; 664 NW2d 185 (2003).

III. Validity of Defendant's Zoning Ordinance

Plaintiff argues that the trial court erred in dismissing its facial challenge to the validity of the special land use provision for condominiums under defendant's zoning ordinance, specifically, Count I of its complaint. Plaintiff maintains that it was not required to appeal the planning commission's decision in order to raise a challenge asserting that defendant's zoning ordinance was facially invalid. We find, however, that plaintiff has not substantiated its position that the trial court treated its complaint as containing a facial challenge to the zoning ordinance.

Indeed, we note that the trial court suggested at the summary disposition hearing that it could decide the facial validity of the ordinance, but that plaintiff's attorney responded, "Well I think we are properly before the Court to review the planning commission for this reason: There's no statutory right to appeal. . . ." Additionally, Count I of plaintiff's complaint, while labeled "invalidity of ordinance-discriminatory treatment of site condominium development," went beyond a request for declaratory relief regarding the facial validity of the special land use requirement in article IV, § 4.02(B)(12), of defendant's zoning ordinance, and sought a court order declaring that the planning commission's decision violated its constitutional rights and that it be permitted to develop the property in accordance with its site plan.

A facial challenge to a zoning ordinance challenges its very existence or enactment. *Conlin, supra* at 379. It differs from an applied challenge, which alleges a present infringement or denial of a specific right in the process of executing the zoning ordinance. *Paragon Properties Co v City of Novi,* 452 Mich 568, 576; 550 NW2d 772 (1996). Finality is not required for a court to consider a facial challenge to a zoning ordinance. *Conlin, supra* at 383.

We conclude that plaintiff pleaded a facial challenge to article IV, § 4.02(B)(12), of defendant's zoning ordinance sufficient to withstand summary disposition under MCR 2.116(C)(8), but that Count I of plaintiff's complaint was not limited to this issue. Rather, it is apparent that plaintiff was also challenging the planning commission's decision on its application for approval of its proposed condominium development. Because the trial court did not address the facial validity of the zoning ordinance, this claim is unpreserved. *Detroit Free Press, Inc v Family Independence Agency,* 258 Mich App 544, 554; 672 NW2d 513 (2003). Although we believe that plaintiff's attorney contributed to the trial court's failure to rule on the facial validity of the ordinance, we shall consider this unpreserved issue because it is necessary to a proper determination of this case. *Steward v Panek,* 251 Mich App 546, 554; 652 NW2d 232 (2002).

Nonetheless, we agree with defendant that plaintiff's facial challenge to the zoning ordinance is moot. The moving party has a heavy burden to establish mootness. *City of Novi v Robert Adell Children's Funded Trust,* 473 Mich 242, 256; 701 NW2d 144 (2005). In general, an issue is moot if an event occurs that makes it impossible for a court to grant relief. *B P 7 v Bureau of State Lottery,* 231 Mich App 356, 359; 586 NW2d 117 (1998). Defendant presented unrebutted evidence in the trial court that its ordinance has been amended so that condominium projects no longer require special land use approval. In light of this amendment, we conclude that plaintiff's facial challenge to the zoning ordinance is moot. Cf. *Conlin, supra* at 384-385. Therefore, while the trial court did not address the facial validity of the former zoning ordinance, it reached the correct result with respect to plaintiff's facial challenge to the ordinance. We will not disturb a trial court's order when it reaches the right result for the wrong reason. *Taylor v Laban,* 241 Mich App 449, 458; 616 NW2d 229 (2000).

Because we have limited our review to the mootness of plaintiff's facial challenge to the zoning ordinance, we need not address plaintiff's argument that the ordinance amendment should have been pleaded as an affirmative defense. The question of mootness is distinguishable from an affirmative defense. An affirmative defense presumes liability, but denies that the plaintiff is entitled to recover on a claim for some reason not disclosed in the plaintiff's pleading. *Citizens Ins Co of America v Juno Lighting, Inc, 247* Mich App 236, 241; 635 NW2d 379 (2001). An affirmative defense is a matter that must be stated in a responsive pleading, as originally filed or amended under MCR 2.118. See MCR 2.111(F)(3). Mootness is directed at a court's power to

hear a case based on actual controversies between adverse litigants. *City of Novi, supra* at 255 n 12.

IV. Planning Commission's Decision

Next, we consider plaintiff's arguments regarding the claims that challenge the planning commission's decision. Because the trial court granted summary disposition in favor of defendant based on plaintiff's failure to appeal the planning commission's decision to the zoning board of appeals, we consider this issue under MCR 2.116(C)(4), which permits summary disposition when a court lacks jurisdiction over the subject matter. *Rudolph Steiner School, supra* at 730. Whether a trial court has subject-matter jurisdiction is a question of law. *Id.* Plaintiff has the burden of establishing jurisdiction. *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43, 620 NW2d 546 (2000).

We find merit to plaintiff's argument that it was not required to appeal the planning commission's decision to the zoning board of appeals. The planning commission's June 9, 2004, minutes disclose that the only specific matter it decided was whether to approve a special land use permit for plaintiff's proposed condominium development. An appeal from the denial of a special land use request is required only if provided for in the applicable zoning ordinance. MCL 125.290(1). Accepting as accurate the substance of the ordinance identified by defendant's attorney at the October 24, 2005, motion hearing, we conclude that the trial court erred in finding that the ordinance established that plaintiff had a right to appeal the planning commission's decision to the zoning board of appeals. Defendant established only a statement of intent regarding the procedures for appealing to the zoning board of appeals a decision of an administrative official charged with enforcing the zoning ordinances. Cf. *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 200; 550 NW2d 867 (1996) (where ordinance did not provide for review of a request for a special land use permit by a zoning board of appeals, the township board's decision was final and subject to appellate review by the circuit court under Const 1963, art 6, § 28).

Nonetheless, we will not reverse the trial court's decision because the right result was reached. *Taylor, supra* at 458. Although plaintiff was not required to first appeal the planning commission's decision to the zoning board of appeals, dismissal of plaintiff's circuit court action challenging the planning commission's decision was warranted because the circuit court action was untimely filed.[1] Where the law provides for appellate review of a decision, but does not provide a time frame for the appeal, the court rules generally applicable to such matters are utilized. See *Krohn v Saginaw*, 175 Mich App 193, 196; 437 NW2d 260 (1988); *Schlega v Detroit Bd of Zoning Appeals*, 147 Mich App 79, 81; 382 NW2d 737 (1985). Looking to the 21-day period for appeals as of right to circuit court, MCR 7.101(B)(1), plaintiff's circuit court action, filed approximately four months after the planning commission issued its decision, was

[1] We express no opinion regarding plaintiff's claim that it properly initiated a complaint for superintending control under MCR 3.202, but note that this court rule only enforces the "superintending control power of a court over lower courts and tribunals." MCR 3.302(A).

untimely. *Krohn, supra* at 196. Therefore, to the extent plaintiff's complaint asserted claims challenging the planning commission's decision, those claims were time-barred.

Furthermore, we are not persuaded by plaintiff's argument that it pleaded a cognizable challenge to the planning commission's decision that could not have been raised in an appeal. *Krohn, supra* at 198. The fact that the "unconstitutional taking" count sought damages is not dispositive of this issue. *Krohn, supra* at 198; see also *W A Foote Mem Hosp v Dep't of Public Health*, 210 Mich App 516, 524; 534 NW2d 206 (1995). Moreover, looking to the allegations in the complaint and its supporting exhibits, we find no support for plaintiff's position that the gravamen of the taking count was a regulatory taking arising from the denial of a single-family home use for the property. That use, as pleaded in the complaint, was permitted by the zoning ordinance. Viewing the allegations in a light most favorable to plaintiff, the taking count indicates that it was based on the planning commission's decision to deny a specific condominium development, under a special land use review, based on water and drainage concerns. Plaintiff pleaded that the planning commission acted arbitrarily and capriciously and failed to advance any reasonable governmental interest.

A regulatory taking occurs when the state effectively condemns or takes private property for public use by overburdening property with regulations. *Dorman v Clinton Twp*, 269 Mich App 638, 646; 714 NW2d 350 (2006). Whether a regulation fails to substantially advance legitimate state interests has no part in a taking analysis. *Id.* at 646 n 23; see also *Lingle v Chevron USA, Inc*, 544 US 528; 125 S Ct 2074; 161 L E2d 2d 876 (2005). Arbitrary and capricious conduct, such as was alleged in plaintiff's taking count, is part of a substantive due process claim. *Dorman, supra* at 650. This type of challenge can be raised in an appeal from a decision of the planning commission. *Krohn, supra* at 198. We therefore conclude that the trial court reached the correct result in granting summary disposition in favor of defendant. *Taylor, supra* at 458. Because plaintiff was tardy in claiming an appeal, plaintiff's counts challenging the planning commission's decision were properly dismissed.

In light of our decision to uphold the trial court's decision on the basis that it lacked subject-matter jurisdiction to review the planning commission's decision, even assuming that plaintiff's complaint against defendant was sufficient to initiate the appeal, we do not address the parties' remaining arguments.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper