STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM E. ORTELL and SHARON S. ORTELL,

Plaintiffs-Appellants,

v

YORK CHARTER TOWNSHIP, YORK CHARTER TOWNSHIP ASSESSOR, and YORK CHARTER TOWNSHIP ZONING OFFICER,

Defendants-Appellees.

UNPUBLISHED
July 27, 2006

Nos. 259206; 260239
Washtenaw Circuit Court
LC No. 03-000875-AW

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal, partly as of right and partly by leave granted, orders granting summary disposition in defendants' favor and affirming a zoning board of appeals (ZBA) determination. Because the ZBA correctly interpreted and applied its zoning ordinance in denying plaintiffs' requests for a land-division and variance and the trial court appropriately dismissed plaintiffs' complaint, we affirm.

Plaintiffs own real property located in York Charter Township (the Township). They sought to divide their property into three parcels and filed a land division application with the Township. The Township's Board of Trustees (Board) denied their request, concluding that the proposed divisions would only be accessible from Sizemore Drive, a private road failing to comply with defendant's ordinances. Plaintiffs thereupon instituted litigation before the circuit court, which dismissed the dispute as pursued under an inapposite zoning ordinance. Plaintiffs then concurrently filed an appeal of their application with the Township ZBA, a request for a variance, and a second division application with the Board. When all three requests were denied, plaintiffs instituted the instant litigation before the circuit court.

Plaintiffs filed a motion for summary disposition and defendants filed a motion for partial summary disposition pursuant to MCR 2.116(C)(4) and (10). In a June 28, 2004 opinion and order the circuit court denied plaintiffs' motion and granted defendants' motion. On November 2, 2004, the court issued an order amending the June 28, 2004 opinion and order addressing its failure to rule on count VI of plaintiffs' complaint. The amended order dismissed that sole remaining count.

I

The determinative issue set forth in plaintiffs' appeal by leave is whether the Township and ZBA appropriately interpreted and applied its zoning ordinances. Plaintiffs first argue that the Township, ZBA and court's interpretation and application of the zoning ordinance at issue were in error and that the court thus erred in dismissing their appeal of the ZBA's interpretation of defendant's zoning ordinances and its ultimate determination. We disagree.

Circuit court review of a ZBA determination is limited to determining whether it "complies with the constitution and laws of the state," is "based upon proper procedure," is "supported by competent, material, and substantial evidence on the record," and represents the reasonable exercise of discretion granted by law." MCL 125.293a. In reviewing the circuit court decision, we "must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).

The rules of statutory interpretation and construction apply with equal force to zoning ordinances. *Macenas v Village of Michiana*, 433 Mich 380, 397 n 25; 446 NW2d 102 (1989). The primary goal of statutory interpretation is to ascertain and give effect to legislative intent. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). "Clear and unambiguous statutory language is given its plain meaning, and is enforced as written." *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005).

The Land Division Act (LDA), MCL 560.101 *et seq.*, regulates the subdivision of property within the state. In pertinent part, it provides that "[n]o lot, outlot or other parcel of land in a recorded plat shall be further partitioned or divided unless in conformity with the ordinances of the municipality." MCL 560.263.

The York Charter Township Zoning Ordinance provides as follows:

> In any zoning district every use, building or structure established after the effective date of this Ordinance, shall be on a lot or parcel that adjoins a public road or private road. A private road shall be constructed in accordance with the standards and specifications adopted by the Washtenaw County Road Commission [WCRC]. The area of a public or private road easement shall not be included in the minimum required area of the lot. [York Charter Township Zoning Ordinance, § 3.28(A).]

The ZBA did not err in concluding that plaintiffs' proposed land divisions do not meet the requirements of § 3.28(A). Pursuant to MCL 560.263, all proposed divisions must comply with existing township zoning ordinances. By its plain language, § 3.28(A) requires that proposed uses, buildings, or structures be on parcels that adjoin a public or private road. York Charter Township Zoning Ordinance, § 3.28(A). What satisfies the "private road" requirement is qualified. Any private roads that adjoin pertinent parcels must comply with WCRC standards. *Id*. It is undisputed that Sizemore Drive does not comply with these standards—it is not paved. See WCRC Procedures & Regulations for Developing Public Roads, §§ 6.10-6.17 [hereinafter

"WCRC Regulations"]. It is thus plain that plaintiffs' proposed divisions do not comply with defendant's ordinances. MCL 560.263; York Charter Township Land Division Ordinance, § VII(C).

Plaintiffs contend that the second sentence in § 3.28(A) imposes a future obligation not attendant to existing private roads. However, this language also imposes an affirmative present obligation that, where new uses are proposed, they "must" adjoin a private road "constructed" in accordance with WCRC standards. Plaintiffs' interpretation would remove the ordinance from its context, as it would render the second sentence more directly pertinent to new road construction rather than road accessibility in light of additional uses, structures or buildings. It would also violate the constitutional mandate that provisions of law concerning townships "be liberally construed in their favor." Const 1963, art 7, § 34; *Hess v West Bloomfield Twp*, 439 Mich 550, 560-561; 486 NW2d 628 (1992). Finally, it would violate the cardinal interpretative canon of divining legislative intent. Section 3.28(A) addresses street access. It is designed to ensure that access is guaranteed for the various uses within defendant's jurisdiction. See York Charter Township Land Division Ordinance, § VII(C). To permit plaintiffs' interpretation to control would be to permit development along any random two-track within the jurisdiction, utterly precluding any effort to eradicate non-conforming uses. See York Charter Township Zoning Ordinance, § 55.03. This would wholly frustrate legislative intent. See *Casco Twp, supra.*

Plaintiffs further contend that a consent judgment defendants entered into established that Sizemore Drive is a private road under § 3.28(A). This argument is essentially one for collateral estoppel. Collateral estoppel precludes relitigation of an issue in a subsequent action when: 1) a question of fact which was essential to the judgment was actually litigated and determined by a final judgment; 2) the same parties had a full and fair opportunity to litigate the issue; and 3) there is mutuality in the sense that the party who seeks to take advantage of the earlier decision would have been bound by it had it gone against that party. *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004). Collateral estoppel does not, however, apply to consent judgments. *Van Pernbrook v Zero Mfg Co*, 146 Mich App 87, 102-103; 380 NW2d 60 (1985); *American Mut Liability Ins Co v Michigan Mut Liability Co*, 64 Mich App 315, 326-327; 235 NW2d 769 (1975). To the extent that plaintiffs argue, then, that defendants are bound to treat Sizemore Drive as a private road under § 3.28(A) due to entry of a consent judgment indicating the same, this argument is without merit.

That defendants stipulated that Sizemore Drive is a private road, pursuant to § 3.28(A), leads to no different result. "'[S]tipulations of fact are binding, but stipulations of law are not binding.'" *Gates v Gates*, 256 Mich App 420, 426; 664 NW2d 231 (2003), quoting *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000). The interpretation and application of a municipal ordinance is plainly a question of law. Because the pertinent facts are undisputed, whether Sizemore Drive is a private drive under § 3.28(A) presents a question of law and this Court is not bound by the parties' stipulation on this issue.

Finally, while plaintiffs argue that, by virtue of certain 1990 land divisions it authorized, defendant has treated Sizemore Drive as a private road compliant with § 3.28(A), they did not present evidence in support of this allegation. Defendant admitted that a certain parcel was assigned separate tax identification numbers by a third party, but affirmatively indicated that it has authorized no independent land divisions. Plaintiffs presented no evidence to contradict this.

Plaintiffs next contend that the court erred in dismissing their appeal of the Board's denial of their second land division application. Again, we disagree. Under the Township Zoning Act (TZA), MCL 125.271 *et seq*., a ZBA is obligated to "hear and decide appeals from and review" determinations made by a township board of trustees (or other body charged with enforcement of an ordinance). MCL 125.290(1). Judicial review of a ZBA's determination is available in the circuit court. MCL 125.293a. Where a party is allegedly aggrieved by a zoning decision, that party is required to exhaust its administrative remedies prior to pursuing an appeal with the circuit court. *Conlin v Scio Twp*, 262 Mich App 379, 382-384; 686 NW2d 16 (2004); see also *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 159; 683 NW2d 755 (2004). On their second land division application, plaintiffs failed to do so. They opted instead to appeal directly to the circuit court. This failure precludes judicial review of plaintiffs' claim. *Conlin, supra* at 382-384. Any perceived futility of plaintiffs' appeal to the ZBA, given its decision on plaintiffs' initial petition, is irrelevant for exhaustion purposes. See, e.g., *Paragon Properties Co v City of Novi*, 452 Mich 568; 550 NW2d 772 (1996). Though the court dismissed plaintiffs' appeal because it found the appeal on this specific issue duplicative of appeal on other issues, it is axiomatic that we will not reverse a trial court's decision if the correct result is reached for the wrong reason. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005).

Plaintiffs additionally argue that that the court erred in dismissing their appeal of the ZBA's denial of their variance request. We disagree. The Township Zoning Act authorizes a township ZBA to grant a variance. MCL 125.290(2). "A land use variance essentially is a license to use property in a way not permitted under an ordinance." *Paragon Properties Co, supra* at 575. As a general rule, "variances should be sparingly granted so that the grant of one variance in an area where many parcels are similarly situated does not result in a material change to the zoning district." *Id.*

In denying plaintiffs' variance request, the ZBA concluded that plaintiffs failed to meet several of the standards required by the York Charter Township Zoning Ordinance, § 56.11(D) to grant a variance. The ZBA's determinations on these standards were supported by the record. As to the standard set forth in § 56.11(D)(1)(b), the ZBA found, and this Court agrees, that plaintiffs' proposed actions have given rise to their need for a variance. This dispute arises out of plaintiffs' request to subdivide their property. Independent of their proposed divisions, plaintiffs enjoy full access and use of their land. Independent of their request, no variance is necessary.

As to the standard set forth in § 56.11(D)(1)(d), the ZBA properly concluded that conferring a variance would grant plaintiffs special privileges not enjoyed by similarly situated landowners. Plaintiffs would enjoy parcel division rights without further improvement of Sizemore Drive, while surrounding landowners would remain precluded from the same.

As to the standards in §§ 56.11(D)(4) and (6), plaintiffs' proposed division would not be harmonious with defendant's zoning ordinance and would be injurious to the surrounding landowners. Section 3.28(A) is designed to ensure that uses and improvements have access to streets constructed at a certain standard. As the WCRC has observed, use of public roads designed in accordance with its standards further guarantees such roads are "reasonably safe and convenient for public travel." WCRC Regulations, ¶ 1, § 1. In part, this ensures that such roads are of "adequate design and condition" so as to permit the provision of public health and safety services. Cf. WCRC Private Road Maintenance, ¶ 2(a). Plaintiffs' proposed divisions would

undermine these access and safety concerns, thereby rendering them in conflict with the Township's zoning ordinance. Further, the proposed divisions would have the additional effect of increasing traffic on Sizemore Drive, without the safeguard of additional WCRC improvements to guarantee the continued suitability of the drive for such traffic. See WCRC Regulations, §§ 5.1-5.7 (discussing road design standards and considering different use densities). This would be injurious to surrounding landowners. The ZBA determinations were supported by substantial evidence. MCL 125.293a. As a result, the trial court did not err in dismissing plaintiffs' appeal of the ZBA's denial of their variance request.

II

Plaintiffs next argue that the court erred in dismissing their request for mandamus. We disagree. We review motions for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). As the circuit court concluded, the remedy of mandamus has been superceded by the remedy of an order of superintending control to the extent it is directed toward a lower tribunal or court. MCR 3.302(C); *In re Payne*, 444 Mich 679, 687-689; 514 NW2d 121 (1994). Plaintiffs' complaint for mandamus is, in effect, an appeal of their land division denial. "[A] municipal zoning authority is subject to the circuit court's superintending control, not its power of mandamus." *Choe v Flint Charter Twp*, 240 Mich App 662, 666; 615 NW2d 739 (2000). Further, neither superintending control nor mandamus is an available remedy where an appeal from a tribunal's decision is available. *Id.* at 666-667. Given that MCL 125.293a specifically provides that judicial review of a ZBA's determination is available in the circuit court, neither mandamus nor superintending control would be a remedy available to plaintiffs.

III

Plaintiffs next argue that the court erred in dismissing their inverse condemnation claim. We disagree. "Whether the government has effected a taking of one's property is a constitutional issue . . ." we review de novo. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005).

The United States and Michigan Constitutions provide that property shall not be "taken for public use, without just compensation." US Const, Am V; Const 1963, art 10, § 2. Inverse condemnation is one method by which private property may be taken and is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004), citing *In re Acquisition of Land- Virginia Park,* 121 Mich App 153, 158; 328 NW2d 602 (1982). Inverse condemnation may arise out of the government's "regulatory taking," where property is effectively condemned (taken) by being overburdened with regulation. *Dorman v Clinton Twp*, 269 Mich App 638, 646; 714 NW2d 350 (2006).

Plaintiffs argue that defendant's interpretation of its ordinances has denied them at least $200,000 in economic gains from the sale of their proposed land divisions. However, "[a] reduction in the value of the regulated property is insufficient, standing alone, to establish a compensable regulatory taking." *K & K Constr, Inc, supra* at 553; see also *Paragon Properties Co, supra* at 579 n 13 (observing the same and that "[t]he Taking Clause does not guarantee

property owners an economic profit from the use of their land"). Plaintiffs have neither alleged nor presented evidence of government action that has caused a direct economic *loss* to their property. The "profit prediction" they allege is not the type of economic loss contemplated by the Taking Clause. *Paragon Properties Co, supra* at 579 n 13. Moreover, plaintiffs continue to enjoy economically viable use of their land. See, *Bevan v Brandon Twp,* 438 Mich 385, 403; 475 NW2d 37 (1991) (observing that "a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned"). Plaintiffs' allegations were insufficient to survive summary disposition.[1]

IV

Plaintiffs' final argument on appeal is that the court erred in dismissing their due process and equal protection claims. We disagree. Due process and equal protection challenges to zoning ordinances are reviewed de novo. See *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 30; 654 NW2d 610 (2002); *Bell River Assoc v China Charter Twp,* 223 Mich App 124, 129; 565 NW2d 695 (1997).

Plaintiffs' due process and equal protection arguments both arise from allegations that defendant permitted unrelated land divisions without requiring improvement of Sizemore Drive. Plaintiffs did not, however, present evidence in support of these allegations. As previously indicated, defendants admitted that a certain parcel was assigned separate tax identification numbers, but affirmatively indicated that no independent land divisions have been permitted. Plaintiffs presented no evidence to contradict this. In the context of a MCR 2.116(C)(10) motion, a party may not merely rest on allegations, but must affirmatively come forward with evidence demonstrating a genuine issue of material fact. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999); see also MCR 2.116(G)(4). Because plaintiffs presented no evidence to create a question of fact on this issue, the court did not err in concluding that defendants have not permitted land divisions on Sizemore Drive. Accordingly, no evidence was presented from which the court could have concluded that plaintiffs' substantive due process or equal protection rights were violated.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto

---

[1] Plaintiffs correctly observe that the court made a factual error in dismissing their claim. They note that the evidence demonstrates that they acquired their property well before the consent judgment was entered. The court concluded the opposite. From this conclusion, it determined that plaintiffs could have no reasonable "investment-backed expectations" in their purchase of the property. *K & K Constr, supra* at 577. Nevertheless, this error does not require reversal. Because plaintiffs' inverse condemnation claim was properly dismissed in any event for the reasons discussed above, the court's reliance on this unimportant factual error to further buttress its dismissal was harmless. MCR 2.613(A).