



Washtenaw County Department of Planning & Environment

TO: Planning Advisory Board Members

FROM: Tony VanDerworp, Director
Brett Lenart, Planning Supervisor

DATE: January 9, 2007

SUBJECT: *Earl Anspaugh and Trinity of Michigan, LLC v. Imlay Township and Imlay Township Planning Commission*

Recently several inquiries were made to the Department of Planning and Environment on the impact of the State of Michigan Court of Appeals decision on December 5, 2006 in the case of Earl Anspaugh and Trinity of Michigan, LLC (Plaintiffs) v. Imlay Township, Imlay Township Board, and Imlay Township Planning Commission (Defendants). Imlay Township is located in Lapeer County. The Court of Appeals overturned a lower court decision that had been held in favor of the Township in defense of an exclusionary zoning claim.

BACKGROUND

- In June 2000, plaintiffs requested to rezone R-1 residential property to I-2 heavy industrial. The property was adjacent to the only I-2 zoned property in the Township, which pre-dated the Township ordinance.
- During deliberation on the application, Imlay Township officials acknowledged that I-2 uses were permitted in the zoning ordinance but that no land was designated for such use under the Township's land use plan. The Township went on to suggest that I-2 uses were nonetheless appropriate for the I-1 light industrial district located east of M-53.
- After this discussion, the plaintiffs secured an undeveloped parcel in the I-1 zoned area referenced by Imlay Township officials and requested the parcel be rezoned to I-2.
- In September 2001 both rezoning applications were denied on the basis that they were inconsistent with the land use plan.
- In November 2001, the plaintiffs filed suit that the Township's zoning scheme was exclusionary.
- In 2004 Imlay Township amended its land use plan and zoning ordinance to provide I-2 designated land in the Graham Road Corridor.
- Trial Court concluded that since Imlay Township had adopted a new master plan and ordinance that provided for I-2 uses, there was no merit to the claim of exclusionary zoning.
- In December 2006, the Michigan Court of Appeals overturned the trial court's decision, and found that the Imlay Township Ordinance was exclusionary.

WHAT THE COURT FOUND

In overturning the trial court decision, the Court of Appeals findings revolve around the reasonableness of the Township's Master Plan:

Is there a demonstrated need for the land use? The decision found a demonstrated need through several findings:

- That I-2 uses were included in the zoning ordinance.
- That township officials repeatedly referenced expected growth in the future.
- The submission of zoning amendment applications for the purposes of supporting I-2 uses.

Are there any areas that can accommodate the land use? The Court found, that regardless of the "correction" by Imlay Township after the fact, the zoning ordinance was exclusionary on its face at the time the plaintiffs' applications were denied. This conclusion was based on the fact that no developable land was planned for I-2.

uses. The lack of any planned land for this purpose, in the presence of the use being supported by the zoning ordinance and the demonstrated need identified above, supported the finding

Are the areas planned for the land use appropriate? Regardless of the question of timing, the Court of Appeals found that the area designated for I-2 uses by the 2004 plan and ordinance updates had the effect of excluding the uses from the Township. The Court of Appeals agreed with the plaintiff's argument that the Graham Road Corridor lacked direct access from either of the major thoroughfares that led into Imlay Township. This finding referenced the *English v Augusta Township, 204 Mich App 33, 38-39; 514 NW2d 172 (1994)* in which the Court of Appeals found that the defendant township had engaged in exclusionary zoning even though the township had provided an area zoned for mobile home parks. In the English case, the court found that the parcel that was designated by the township was likely not developable at all. In the Imlay Township case, the Court found that the Graham Road Corridor did not provide the services necessary for I-2 uses

RECOMMENDATIONS FOR LEGAL DEFENSIBILITY

Keep Your Master Plan Up to Date – In reviewing the case overview, it appears that the Township recognized the oncoming growth but failed to proactively plan for it. It is critical that the plan be continually monitored and updated as demonstrated need will continue to be a key factor in court cases (particularly in communities experiencing growth pressures)

Have a Reasonable Plan - A defensible plan should include enough socioeconomic, scientific and engineering backup information so that a court can comfortably conclude that the plan is reasonable rather than arbitrary. Reasonable data and analysis includes the following:

- Projecting future population and economic growth (a 10- 20 year period is recommended as this timeframe affords residents some certainty as to the amount and location of growth in their community and reasonable in terms of projecting growth based on historic and regional growth patterns).
- Preparing land use options that allocate land uses by type based on the projected growth and other factors such as the existing character of the community; transportation, water and sewer and school locations and capacity; soil suitability and natural features
- Providing detailed and realistic ways to provide for transportation, water, sewer and other public services needed to accommodate urban, commercial and industrial uses.

Consider Taking a Regional Approach - Townships may want to consider preparing regional land use plans for the following reasons: (1) growth projections at this level are not as accurate as regional or county-wide projections, thereby making planning for growth more difficult; and (2) some townships purposely plan to remain rural despite growth pressures resulting in challenges that the plan is unreasonable in light of regional growth demands. The recently enacted Joint Municipal Planning Act (Act 226 of 2003, as amended) provides a potential solution to these problems.

After formally approving a joint planning commission and defined territory by 2 or more jurisdictions, the jointly-developed master plan can designate land uses throughout the region and each jurisdiction no longer has to provide for all land uses within its borders. For example, if a "Manufactured Housing Community" master plan land use designation is adequately provided for in the joint master plan, then that land use does not need to be designated in the remaining areas of the participating jurisdictions.

Contrast this with the language that the Court of Appeals cited from the Township Rural Zoning Act via it's 1994 English v Augusta Twp decision (used to support the finding in the 2006 Imlay Township findings):

A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

A regional planning approach provides for land use planning to be performed on more accurate data, and provides a greater range of locations to consider for the effective and appropriate siting of land uses identified in a

joint land use plan. Alternatively, without the protection of the joint planning act, communities can face exclusionary zoning claims on a jurisdiction level when the demonstrated need refers to a greater area

The full text of the Michigan Court of Appeals decision is attached for your reference. A May 2006 memorandum on legal defensibility is also provided for reference.

STATE OF MICHIGAN
COURT OF APPEALS

EARL ANSPAUGH and TRINITY OF
MICHIGAN, LLC,

Plaintiffs-Appellants,

v

IMLAY TOWNSHIP, IMLAY TOWNSHIP
BOARD, and IMLAY TOWNSHIP PLANNING
COMMISSION,

Defendants-Appellees.

FOR PUBLICATION
December 5, 2006
9:00 a.m.

No. 262492
Lapeer Circuit Court
LC No. 01-030637-CE

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying plaintiffs' motion for partial summary disposition and granting summary disposition in favor of defendants pursuant to MCR 2.116(I)(2). We reverse and remand.

I. Basic Facts and Procedural History

In June 2000, plaintiffs applied to rezone property located along Newark Road in defendant Imlay Township from R-1 residential to I-2 heavy industrial. During the various meetings regarding rezoning of this property defendants acknowledged that I-2 land uses were permissible under the township's zoning ordinance but that no land designated for such use was currently provided for under the township's land use plan. Defendants indicated, however, that I-2 uses were nonetheless appropriate for properties in the township's I-1 light industrial zoning district located east of M-53. Plaintiffs assert that based on this and other "direction" by defendants, plaintiff Trinity of Michigan, LLC (Trinity) investigated and ultimately secured a second parcel of undeveloped land that was zoned I-1. Trinity then also applied to rezone a portion of that property from I-1 to I-2. Both requests, however, were denied by the township board in September 2001, as inconsistent with the township's land use plan.

In November 2001, plaintiffs filed the instant suit for declaratory and injunctive relief, alleging that the township's zoning scheme was violative of substantive due process and wholly exclusionary, both as applied and on its face, because it "prohibits even the possibility of I-2 uses." An amended complaint, adding allegations that the township's actions and ordinance denied plaintiffs equal protection was filed in January 2002. When defendants failed to timely

answer the amended complaint, default was entered in favor of plaintiffs. The trial court, however, finding that defendants' failure to answer the amended complaint was the result of an excusable miscommunication between defendants and their counsel, set aside the default and ordered that defendants file their answer to the amended complaint "forthwith." A second default, followed by a default judgment awarding plaintiffs their requested relief, was entered approximately three weeks later.

Defendants immediately moved to set aside the default and default judgment, asserting that their answer to the amended complaint was filed as soon as practicable. Noting that the zoning issues raised in this matter were complicated, and that the township defendants were staffed by volunteers who did not regularly meet, the trial court granted defendants' motion and set aside the default and default judgment. Plaintiffs subsequently moved for summary disposition of its claim that the township's zoning ordinance and actions were exclusionary. In response, defendants requested summary disposition of plaintiffs' suit in their favor, arguing that plaintiffs had failed to meet their burden of establishing that the township's conduct or ordinance was exclusionary or otherwise improper. The trial court, finding that defendants had, in the Fall of 2004, adopted a new master plan and zoning ordinance that provided for I-2 uses in an area of the township designated as the Graham Road Corridor, concluded that there was no merit to plaintiffs' claim of exclusionary zoning and granted defendants' request for summary disposition.

II. Analysis

A. Default and Default Judgment

On appeal, plaintiffs first argue that the trial court erred in finding that defendants had shown the good cause and meritorious defense necessary to set aside a default and default judgment under MCR 2.603(D). Thus, plaintiffs argue, the court abused its discretion in setting aside the default judgment and permitting the suit to continue to summary disposition. See *Barclay v Crown Building & Development, Inc*, 241 Mich App 639, 651; 617 NW2d 373 (2000). Because we do not find the trial court's decision to be governed by MCR 2.603, we disagree.

Rule 2.603(A) of the Michigan Rules of Court requires that a default be entered against a party who fails "to plead or otherwise defend as provided by these rules" MCR 2.603(A)(1). Plaintiff is correct that a motion to set aside such a default, or subsequently entered default judgment, may generally be granted only upon a showing of good cause and a meritorious defense. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). We agree with defendants, however, that the default judgment plaintiff seeks to reinstate was not entered by the trial court as a result of defendants' failure to abide by the rules of pleading and defense set forth by the Michigan Rules of Court, but rather, defendants' failure to comply with the trial court's order that an answer to the amended complaint be filed "forthwith." It is well settled that the trial court's are inherently imbued with the authority and discretion to sanction litigants and their counsel for failure to comply with its orders, see, e.g., *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963), and that such "power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). Concomitant with this power is the power to relieve a litigant of the burden of such sanctions should the court, in the further exercise

of its discretion, so choose. Thus, given that the default judgment at issue was entered for failure to abide by the court's order that an answer to the amended complaint be filed by defendants "forthwith," and not for any direct violation of the Michigan Rules of Court, we do not conclude that the trial court abused its discretion or otherwise erred in setting aside the judgment for the reasons stated by the court.

B. Summary Disposition

Plaintiffs also argue, however, that the trial court erred in granting summary disposition of its suit in favor of defendants pursuant to MCR 2.116(I)(2). On review de novo of the trial court's decision in this regard, see *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), we agree.

In granting defendants summary disposition, the trial court found that the township's zoning scheme was not exclusionary because the township had recently amended its zoning ordinance and master land use plan to specifically provide for I-2 land use within a designated area of the township. Before these amendments, however, the township had provided no land designated for I-2 use.¹ A zoning ordinance that creates a classification but does not apply that classification to any land is exclusionary on its face. *Smookler v Wheatfield Twp*, 394 Mich 574, 577; 232 NW2d 616 (1975). Thus, at the time plaintiffs sought rezoning of the parcels at issue here, the township zoning scheme was clearly exclusionary.

Moreover, that the township later rectified this problem by amending its ordinance and land use plan to expressly provide for I-2 uses does not, in itself, defeat plaintiffs' claim of exclusionary zoning. *English v Augusta Twp*, 204 Mich App 33, 38-39; 514 NW2d 172 (1994). In *English, supra*, this Court found that the defendant township had engaged in exclusionary zoning even though the township had provided an area zoned for mobile home parks. In rejecting the township's argument that the existence of a site zoned for mobile homes "requires a finding that mobile home parks are not totally excluded from the township," *id.* at 38, the panel quoted § 297a of the Township Rural Zoning Act (TRZA), MCL 125.271 *et seq.*, which at that time provided:

A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful. [MCL 125.297a.]

¹ We recognize that the Vlastic pickling facility located near the Newark Road parcel plaintiffs first sought to rezone was designated by the township as zoned for I-2 use prior to amendment of the township's zoning ordinance and master land use plan in late 2004. It is not disputed, however, that the facility predates enactment of the township's zoning ordinance and does not wholly meet the requirements for designation as an I-2 use. Thus, we reject defendants' reliance on the Vlastic zoning designation to support its claim that I-2 uses were not excluded under the township's prior ordinance and land use plan.

Relying on this statute,² the panel concluded that a zoning ordinance or decision “that has the effect of totally prohibiting a particular land use within a township is impermissible.” *Id.* at 37 (emphasis added); see also *Szluha v Avon Charter Twp*, 128 Mich App 402, 409; 340 NW2d 105 (1983). The panel then applied the test set forth in *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 32; 448 NW2d 727 (1989), which prohibits a zoning ordinance from excluding “a lawful land use where (1) there is a demonstrated need for that land use in the township or surrounding area, and (2) the use is appropriate for the location.” *English, supra* at 37-38. In applying this test and concluding that the township had “engaged in exclusionary zoning in violation of MCL 125.297a,” the panel took note of evidence that the site proposed by the plaintiff was appropriately suited for development of a mobile home park, whereas the area zoned by the township for mobile-home use was so undesirable that it was unlikely that the land would ever be developed. *Id.* at 36, 38-39.

Applying the test of *Eveline Twp, supra*, we too find that the I-2 zoning provided for by defendants is exclusionary. It is not disputed that the heavy industrial uses permitted by the township’s I-2 zoning designation are lawful. Moreover, by providing for such uses, the township zoning ordinance and amended land use plan themselves recognize the need for I-2 uses within the township. This need is further supported by evidence, including statements and admissions from township representatives, that Imlay Township is expected to undergo considerable growth in the near future. Furthermore, as in *English, supra*, plaintiff here has demonstrated that the I-2 land use siting provided for by the township is not appropriate to foster the commercial uses to which land designated for I-2 use must be put. Indeed, plaintiff presented evidence that there is no direct route of travel to the Graham Road Corridor from either M-53 or I-96, the only major thoroughfares servicing Imlay Township. Defendants acknowledge this problem, but contend that they are working toward development of an interchange to service Graham Road from I-96. The evidence, however, indicates that the township has for years sought to persuade the state to construct such an interchange, which the township master land use plan describes as “critical to future development of [the Graham Road] corridor,” to no avail. In contrast, there is evidence that the parcels proffered by plaintiffs for rezoning—especially the Newark Road parcel, which is near the only other designated I-2 use currently operating within the township—are already serviced by thoroughfares suitable to sustain commercial development, and are otherwise appropriately suited for the I-2 uses provided for by the township’s zoning ordinance. Given this evidence, we conclude that the township’s zoning ordinance effectively excludes lawful and otherwise appropriate I-2 uses for which there is a demonstrated need. *Id.* Accordingly, we reverse the trial court’s grant of summary disposition in favor of defendants and remand this matter for entry of an order declaring the township’s zoning ordinance to be exclusionary with respect to I-2 uses.

² Although repealed by 2006 PA 110, the TRZA still controls this case. See MCL 125.3702. We note further that the prohibition against exclusionary zoning formerly found in MCL 125.297a was recodified with near identical language at § 207 of the Michigan Zoning Enabling Act, MCL 125.3201, *et seq.* See MCL 125.3207.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski