STATE OF MINNESOTA
IN COURT OF APPEALS
A09-655

Bruce E. Bucknell, et al.,
Appellants,

vs.

County of Fillmore,
Defendant,

Sumner Township,
Respondent.

Filed March 30, 2010
Affirmed
Minge, Judge
Concurring specially, Randall, Judge[*]

Fillmore County District Court
File No. 23-C2-04-000695

Thomas M. Manion, Jr., Manion & Wheelock, PLLP, Lanesboro, Minnesota (for appellants)

Jason J. Kuboushek, Iverson Reuvers, Bloomington, Minnesota (for respondent)

Considered and decided by Minge, Presiding Judge; Bjorkman, Judge; and Randall, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellants challenge the district court's summary judgment denial of relief against respondent Sumner Township for effectively denying their subdivision plat. We affirm.

FACTS

In July 2002, appellants Bruce E. Bucknell and Linda M. Bucknell purchased 46 acres of land in Sumner Township, Fillmore County, planning to subdivide the property. Over a period of five years (1) appellants sought approval of a plat; (2) Fillmore County conditionally approved a conditional use permit (CUP) for a subdivision; (3) respondent township took a variety of actions that precluded final approval of appellants' subdivision; (4) appellants initiated a lawsuit against the county and respondent township; (5) court orders were entered; and (6) the parties appealed aspects of the controversy to this court. *Bucknell v. County of Fillmore*, A07-1768, 2008 WL 2579137, at *4-5 (Minn. App. July 1, 2008) (*Bucknell I*). That opinion of this court recounts the factual and procedural background of this controversy. We make reference to that opinion for the history of this case.

In *Bucknell I*, we held (1) that respondent township had independent zoning authority, and thus the district court erred in determining that the county's tentative approval of the CUP application constituted a triggering event under Minn. Stat. § 15.99 (2006); (2) that respondent township remained a party to the action; and (3) that the district court erred in denying claims against respondent township. *Id*. We remanded the case for consideration of the claims against respondent township. *Id*. at *6.

Pursuant to our remand order, appellants and respondent township submitted cross-motions for summary judgment. The district court granted summary judgment for respondent township, holding that its final zoning ordinance effectively prohibited appellants from proceeding with their subdivision. This appeal followed.

D E C I S I O N

On appeal from summary judgment, we ask whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In our review of the record on summary judgment, we consider the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellamo*, 504 N.W.2d 758, 761 (Minn. 1993). The interpretation of an ordinance is a question of law that this court reviews de novo. *Eagle Lake of Becker County Lake Ass'n v. Becker County Bd. of Comm'rs*, 738 N.W.2d 788, 792 (Minn. App. 2007). An appellate court's "authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked." *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 175 (Minn. 1982).

I.

The first issue we address is whether respondent township's land-use controls are unenforceable because respondent township failed to pass a resolution "taking over" planning and zoning authority from Fillmore County.

Minnesota's Municipal Planning Act provides that municipalities (including townships) have independent zoning authority. *See* Minn. Stat. § 462.353, subd. 1 (2008)

("A [township] may carry on comprehensive municipal planning activities for guiding the future development and improvement of the municipality and may prepare, adopt and amend a comprehensive municipal plan and implement such plan by ordinance and other official actions in accordance with the provisions of section 462.351 to 462.364."). To the extent a township's ordinance is not less restrictive than the county's ordinance, the township ordinance applies. Minn. Stat. § 394.33, subd. 1 (2008).

Minnesota law also provides that a township may contract with a county board for joint land-use planning activities, or for the county to provide planning and zoning services. Minn. Stat. § 394.32, subds. 1, 2 (2008). When such a cooperative agreement is in place, the township "may . . . by resolution . . . take over planning functions . . . for which a county has adopted official controls." Minn. Stat. § 394.32, subd. 3 (2008).

Here, respondent township effectively took over zoning authority from Fillmore County when the township board of supervisors voted to adopt its own land-use plan and zoning ordinance on May 20, 2005. In enacting its final zoning ordinance, which, except for three more restrictive provisions, was the same as Fillmore County's zoning ordinance, respondent township was exercising its independent zoning authority. We have already recognized this power in this litigation. *Bucknell I*, 2008 WL 2579137, at *4-5. Because respondent township's ordinance is not less restrictive than Fillmore County's ordinance, its ordinance applies. *See* Minn. Stat. § 394.33, subd. 1. Respondent township did not need to pass a separate resolution taking over zoning authority from the county, as appellants contend, because it never entered into a cooperative agreement with the county for zoning services pursuant to section 394.32.

Respondent township's adoption of its final zoning ordinance and land-use plan was sufficient to establish respondent township as the primary zoning authority.

We conclude that the district court did not err in rejecting appellants' argument that respondent township was required to adopt a special resolution to comply with Minn. Stat. § 394.32.

II.

The second issue raised by appellants is whether their claimed subdivision qualified as a preexisting, nonconforming use allowed to continue under respondent township's final zoning ordinance.

The county's zoning ordinance, which has been incorporated by reference in respondent township's zoning ordinance, defines a nonconforming use as a "use lawfully in existence on the effective date of this Ordinance and not conforming to the regulations for the district in which it is situated." Here, there was not a preexisting, nonconforming use because the use at issue—subdividing the land into lots—had not been accomplished when respondent township's zoning ordinance went into effect on May 20, 2005. Final approval had never been given. We conclude, therefore, that appellant's claimed subdivision was not a nonconforming use allowed to continue under respondent township's zoning ordinance.

III.

The third issue raised by appellants is whether they acquired a vested right in developing their subdivision. The doctrine of vested rights is a basis for granting property owners and developers relief from certain egregious determinations by

government agencies. *Concept Props., LLP v. City of Minnetrista*, 694 N.W.2d 804, 819 (Minn. App. 2005), *review denied* (Minn. July 19, 2005). A right to develop property becomes "vested" when it has "arisen upon a contract, or transaction in the nature of a contract, authorized by statute and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it." *Id.* at 819-20 (quotation omitted). To acquire a vested right, a developer must have made significant progress on a project or made a binding commitment to develop the property, but the purchase of property or acquisition of a building permit is not enough. *Id*. at 820. The Minnesota Supreme Court has held that even though a developer had purchased land, expended over $250,000 in anticipation of the financing, and received preliminary approval from the city council, the developer failed to acquire a vested right in tax-exempt financing for residential housing. *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 294 (Minn. 1980). The court reached this result because the legislature changed the law to prohibit the financing before the specific financing had been finalized and before the contract between the developer and a government entity had been signed. *Id.*

Here, like in *Ridgewood*, there was no agreement between appellants and a government entity to develop the proposed subdivision. To the contrary, appellants were aware of respondent township's concerns regarding the proposed development as early as October 28, 2002, when appellant Bruce Bucknell attended a township meeting. We further note that Minnesota law provides that although the county board has the power to regulate platting of a subdivision of land, approval of the town board is a prerequisite to final county approval. *See* Minn. Stat. § 505.09, subd. 1 (2008). Here, the county

observed that statutory provision. The CUP that the county issued to appellants to develop the subdivision expressly stated that it was not final plat approval and that the county would neither approve the final plat nor any land-use permit without approval of the town board. While appellants argue that they purchased the land with the expectation of developing the subdivision, expended considerable money in planning, paid real estate taxes, and recorded the plat, a "mere expectation, desire, or intention to develop a property" does not create a vested right. *See Concept Props.*, 694 N.W.2d at 820. Also, it is noteworthy that the record indicates that appellants had not yet begun construction of the development and that expenditures similar to appellants' did not establish a vested right in *Ridgewood*. 294 N.W.2d at 292, 294. We conclude that appellants did not acquire a vested right in developing the subdivision.

IV.

The fourth issue on appeal is whether respondent township is equitably estopped from enforcing its final zoning ordinance as to appellants' subdivision. This claim is similar to the vested-rights argument just considered.

To establish equitable estoppel in the context of land-use disputes between a developer and a government entity, a developer must show that "relying in good faith on an act or omission of the government, [the developer] made such a substantial change in position or incurred such extensive obligations that it would be unjust to destroy the rights ostensibly acquired." *Concept Props.*, 694 N.W.2d at 821. A developer must show that the expenses incurred were significant and unique to the proposed project and that the land could not be used profitably in another way. *Id*. And because the public

interest is implicated in such disputes, the governmental entity will only be estopped if it committed affirmative misconduct. *Ridgewood*, 294 N.W.2d at 292-93. If the above elements are established, the court weighs the equities of the situation. *Id*.

Here, appellants failed to show that the land cannot be used profitably in any other way or that respondent township acted wrongfully. In the prior section of this opinion, we noted that the Fillmore County CUP had not given final approval to the plat, that its preliminary approval was conditioned on town board approval, and that respondent township never did approve the subdivision. In our prior consideration of this litigation, we recognized that it was within the respondent's independent zoning authority to enact both the interim moratorium ordinance and the final zoning ordinance and to enforce the ordinance against appellants. *See Bucknell I*, 2008 WL 2579137, at *4-5.

Furthermore, appellants failed to show that they relied on respondent township's actions or representations to their detriment. *See Concept Props.*, 694 N.W.2d at 821. Although appellants argue that in October 2002, they purchased the land in reliance on representations by the county zoning administrator that they could subdivide the property, they were aware of township opposition to appellants' plan, and that respondent began discussing the adoption of a restrictive ordinance as early as November 2002. Respondent never misrepresented or changed its position regarding appellants' plan to develop a subdivision.

Appellants argue that respondent township committed wrongdoing by collecting or benefitting from real estate taxes paid by appellants, but fail to show that such benefit was wrongful or that it amounted to affirmative misconduct. Increased real estate taxes

were apparently triggered by a chain of events that begin with appellants filing their preliminary plat with the Fillmore County Recorder. Presumably, based on this action by appellants, the assessor increased the value of their property. This hardly constitutes a showing of wrongful conduct by respondent township that would support an estoppel claim.

In sum, we conclude that respondent township was not equitably estopped from enforcing the final zoning ordinance against appellants.

V.

Appellants raise a variety of other issues on appeal, challenging the validity of respondent township's final zoning ordinance because respondent township failed to meet certain statutory requirements in its adoption and claiming that the final zoning ordinance is arbitrary and capricious. Because appellants failed to raise these arguments at the district court, respondent township did not have the opportunity to respond on the record to these claims and we do not have the benefit of district court fact finding or analysis. Accordingly, we do not consider them. *See Thiele v. Stich*, 435 N.W.2d 580, 582 (Minn. 1988).

Affirmed.

Dated:

RANDALL, Judge (concurring specially)

I concur in the result but I write separately to point out that this case, and the problems it caused for appellants and respondent, are due to what is an "overly ambitious" restriction on development by Sumner Township, its "1 per 80."

Appellants Bruce E. Bucknell and Linda M. Bucknell purchased 46 acres of land in Sumner Township, Fillmore County. At the time of purchase, the land was being leased for agricultural use. The following month, appellants informed the Sumner Township Board of Supervisors (township) that they intended to develop a subdivision on the property. In October 2002, appellants applied to Fillmore County for a conditional use permit (CUP) to develop a twelve-lot subdivision on the property. After the county denied appellants' request for a setback variance needed to proceed with the development, appellants withdrew their CUP application. In November 2002, the township began to discuss the possibility of enacting their own zoning ordinance.

In January 2003, appellants applied to the county to develop an eight-lot subdivision on the property that was in compliance with the setback requirement. At a February 26, 2003 public hearing on the application, the Fillmore County Planning Commission voted to approve the CUP, and passed the resolution on to the county board of commissioners for final approval.

Before the county board acted on the recommendation, the township voted to implement an interim moratorium ordinance, prohibiting any residential building or development on parcels of land smaller than 80 acres, in order to allow the township to study its needs for a zoning ordinance pursuant to Minn. Stat. § 462.355, subd. 4 (2002).

With those facts in mind, I agree with the majority that the township's independent zoning ordinance, which was recognized by the county (the county's CUP issued to appellants pointed out there would be no final approval of a land-use permit without approval of the township board), was not in violation of any state statutes or a clear abuse of the discretion afforded local governments in zoning matters. But I strongly suggest they need to rethink their present "1 per 80," as that, to me, runs the risk of being declared arbitrary and capricious as a matter of law.

At oral argument, the township's attorney conceded that although he was familiar with ordinances requiring a minimum of 20 acres for subdividing, and maybe had heard of one requiring a minimum of 40 acres, he had no knowledge of anything in the state prohibiting residential building and development of parcels of land of less than 80 acres.

There is a movement in some parts of Minnesota and in other states to "preserve the countryside," the bucolic image of green pastures, Holsteins and Herefords grazing contently in the sun, and cottonwoods, oaks, and maples swaying in the spring breeze. Too often, the groups pushing for large minimum lot size are people who have enough money to buy their 5, 10, or 20 acres in the country, when that size is allowable, and then once they are grandfathered in, push for larger minimum development size. In some cases, development is opposed by local agricultural interests who do not want new neighbors complaining about odiferous smells and noxious odors, which come from certain animal husbandry businesses that involve large concentrations of animals raised for meat and milk.

Those who can get hurt by restrictive zoning ordinances, ironically, are the second, third, and fourth generations of farmers and ranchers who have tried to make a living off the land long before the trend of "moving to the country." Operating small- or medium-size farms in Minnesota, which have been disappearing at a steady rate the last four or five decades, is a tough way to make a living. In most any small-town coffee shop in Minnesota you can still get a laugh at the Saturday-morning coffee klatches by stating, "Since I quit farming, I really miss it; if I had a million dollars I would put it in the bank and farm until I was broke!"

Farmers know the truth of the old saying, "the farmer's last crop is his land." With increasing frequency, that might be the only "crop" a lifelong farmer has to pay off the mortgage and maybe help kids and grandkids with college. It is rare, almost unheard of, for anyone to pay top dollar today for farmland—for farming. Your best buyers tend to be those who want your land because it has some attractive building sites, and they hope to develop it and sell homes. Without those buyers in the pool of people bidding for the farmers' land, they will be forced to take far less.

To avoid "clutter in the country," the minimum requirements for a residential home in the country could be five or ten acres and stay within the ambit of what is arguably "reasonable." Twenty acres may be stretching it. I believe one home per 40 acres is stretching it. But the one home per 80 acres at issue in this case is clearly a stop-gap figure plucked out of the air by the township to keep the owners of a 46-acre parcel from developing it while they want to study the issue. I wonder what appellants would

have paid the seller of that 46 acres in Sumner Township, if anything, if the ordinance had been firmly in place while they were shopping for land.

As I said, I can concur in the result because I believe Sumner Township acted within the law, but I question whether they acted wisely for the future.