STATE OF MICHIGAN

COURT OF APPEALS

DENNIS L. CUSON, KEVIN C. HEINIG, MICHAEL J. BARRON, and JAY FISHER,

Plaintiffs-Appellants,

v

TALLMADGE CHARTER TOWNSHIP and LAND ACQUISITION, LLC.,

Defendants-Appellees,

and

PANDA TALLMADGE POWER, L.P.,

Intervening Defendant-Appellee.

UNPUBLISHED
May 15, 2003

No. 234157
Ottawa Circuit Court
LC No. 00-038811-CZ

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order and opinion of the circuit court granting defendants' motions for summary disposition.[1] We affirm.

I

In count II of their complaint, plaintiffs seek to vacate a consent judgment entered in a previous case, *Land Acquisition, LLC v Tallmadge Charter Twp* (Ottawa Circuit Court file No. 99-32939-CZ). In this collateral attack,[2] plaintiffs claim that the judgment entered by the Ottawa Circuit Court in settlement of File No. 99-32939-CZ violates the township rural zoning act (TRZA), MCL 125.271 *et seq.*, and public policy. In count I of their amended complaint,

[1] Defendant township's motion was granted on the basis of both MCR 2.116(C)(8) and (10). Defendants Land Acquisition's and Panda's motions in regard to count II were granted pursuant to MCR 2.116(C)(8).

[2] "Collateral attacks encompass those challenges raised other than by initial appeal of the [judgment] in question." *People v Ingram,* 439 Mich 288, 291 n1; 484 NW2d 241 (1992).

plaintiffs allege defendant Tallmadge Charter Township (township) violated Michigan's Open Meetings Act (OMA), MCL 15.261, when it approved the proposed consent judgment.

The relevant facts not in dispute are summarized in the well-reasoned written opinion by the Honorable Calvin L. Bosman:

> Defendant [Land] owns property located in the township (the Land parcel). Part of the Land parcel is zoned "RP" (rural preserve) and part is zoned "C-2" (general commercial). The township's master plan indicates that, in the future, the Land parcel should be used for industrial purposes. Defendant Panda also owns property located in the township (Panda parcel #1). Panda parcel #1 is zoned "RP" (rural preservation). The township's master plan indicates that, in the future, Panda parcel #1 should be used for rural preservation.
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> Land wished to build a 750-unit multi-family residential housing development on the Land parcel. However, multi-family residential housing is not permitted on property zoned RP or C-2. Land requested that the township rezone the parcel. The Township denied Land's request.
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> Panda wished to build a power plant on Panda parcel #1. Power plants are not permitted on property zoned RP, so Panda asked that the Township rezone Panda parcel #1. Panda's application met with resistance from some of the citizens of the Township, who felt that power plants should be located on property designated for industrial use rather than on property designated for rural preservation. The Township denied Panda's request for rezoning.
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> Dissatisfied with the Township's denial of its request for rezoning, Land filed a lawsuit against the Township accusing the Township of exclusionary zoning . . . . After a year and a half of litigation, Land and the Township decided to settle the case. The parties drafted terms of a proposed consent judgment. The proposed consent judgment provided that Land would sell part of the Land parcel to Panda (Panda parcel #2) and that Panda would build a power plant on Panda parcel #2. However, Panda parcel #2 is zoned RP and power plants are not permitted on property zoned RP. Therefore, in the proposed consent judgment, the Township agreed it would treat Panda parcel #2 *as if* it were zoned "I-1" (industrial). Power plants are permitted on property zoned I-1. For its part, Panda agreed to abide by all the regulations that apply to property zoned I-1 and that it would comply with all applicable state and federal laws and regulations. In addition, over time, Panda agreed to pay the Township more than $5,000,000.00.
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> The proposed consent judgment required the approval of the Tallmadge Township Board of Supervisors (Board). Four members of the Board constitute a quorum. Prior to voting on the proposed consent judgment, Board members gathered together informally in private homes in sub-quorum groups of two or three to review and discuss the terms of the proposed consent judgment.
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> On October 25, 2000, the Board held a special meeting to vote on the proposed consent judgment. At the meeting, the Township Supervisor informed

the members of the public who were present at the meeting that the meeting was not a public meeting and that no one would be permitted to comment on the terms of the proposed consent judgment until after the Board had voted to approve or reject it. At the meeting, the Board enacted resolutions approving the proposed consent judgment. Following the vote, the Board permitted members of the public who were present to comment on the terms of the consent judgment. The next day, the consent judgment was presented to Judge Post. Judge Post signed the consent judgment in the absence of the undersigned judge, who was on vacation at the time.

On February 13, 2001, the Board held a second meeting to discuss the consent judgment. At this meeting, the Board permitted public comment on the consent judgment prior to voting on the matter. After entertaining comments on the terms of the consent judgment from the members of the public who were present at the meeting, the Board voted to re-enact the resolutions approving the consent judgment that the Board had previously enacted on October 25, 2000.

On February 14, 2001, the Board presented the re-enacted consent judgment to the undersigned judge, and he signed it.

Plaintiffs, who are residential property owners that live near Panda parcel #2, oppose the construction of the power plant and bring this action to vacate the consent judgment.

In count I, plaintiffs allege that by meeting informally in sub-quorum groups of two or three at private residences to review and discuss the terms of the consent judgment, the Board ran afoul of the OMA. Plaintiffs make two claims in count I. First, plaintiffs claim that the informal sub-quorum gatherings constitute a violation of the OMA. Second, plaintiffs claim that the Board's refusal to permit public comment at the October 26, 2000, meeting prior to voting on the resolutions approving the consent judgment is also a violation of the OMA.

Nevertheless, on February 19, 2001, the parties entered into the following stipulation and order:

". . . the parties . . . hereby agree and stipulate that Plaintiffs . . . dismiss with prejudice that portion of the relief requested under Count I . . . which seeks to invalidate the decision . . . by the . . . Board . . to approve the . . . Consent Judgment . . . without prejudice to Plaintiffs' other claims for relief under the Open Meetings Act . . . ."

* * *

Count II alleges that the consent judgment violates the TRZA.

II

This Court reviews de novo the grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Further,

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). [*Id.* at 119-120.]

A motion brought under MCR 2.116(C)(10) tests the factual support of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In doing so,

> a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). [*Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).]

III

First, in regard to the OMA violation alleged in count I, in view of the parties' partial stipulation for dismissal,[3] the only relief remaining at issue is the request for injunctive relief to prohibit *future* violations of the act by defendant township. In addressing defendant township's motion for summary disposition, the lower court ruled that the equitable relief requested for potential future violations is "too speculative and hypothetical to be justiciable." We agree.

In general, the equitable relief of injunction is an extraordinary remedy that should be granted only

> "if a plaintiff has a right but is without an effective remedy at law he may resort to equity for the enforcement of such right." Injunctive relief is an extraordinary remedy that is granted only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury. *In re Martin*, 200 Mich App 703, 723; 504 NW2d 917 (1993). [*ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 400;

[3] In an effort to cure the claimed OMA violation, defendant township convened a second meeting at which the proposed consent judgment was reapproved. The partial stipulation for dismissal was apparently in response to the second meeting.

516 NW2d 498 (1994), quoting *Kefgen v Coates*, 365 Mich 56, 63; 111 NW2d 813 (1961).

See also *Wexford Co Prosecutor v Pranger*, 83 Mich App 197, 205; 268 NW2d 344 (1978).

After applying the above standards, we agree with the trial judge that plaintiffs have failed to sustain their burden of establishing sufficient facts for the issuance of the extraordinary remedy of injunction. *Id.* The possibility for additional violations of the OMA by defendant township is purely hypothetical and speculative.

In addition, we note that under the standing requirements adopted by our Supreme Court in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), plaintiffs do not have standing in regard to the issuance of an injunction for future acts. In order for plaintiffs to have standing, they must have suffered an injury in fact, and an invasion of a legally protected interest, which is concrete, particularized, and actual or imminent, not conjectural or hypothetical. *Id.* Here, plaintiffs have not established standing for the issuance of an injunction for potential future violations.

IV

Plaintiffs' main issue on appeal is their collateral attack claiming that the consent judgment entered in the previous action violated the statutory procedures in the township rural zoning act, MCL 125.271, *et seq.* and the public policy of the state of Michigan. We disagree.

Recently in *Green Oak Twp v Munzel*, 255 Mich App 235; ___ NW2d ___ (2003), this Court rejected a similar argument that a consent judgment entered in settlement of a zoning lawsuit constitutes de facto rezoning in violation of the TRZA. In Green Oak Township, the township was sued by a developer when it refused to grant a use variance for a proposed mobile home park. After the case was settled with the entry of a judgment, a property owner near the proposed mobile home park filed a subsequent action claiming that the consent judgment, which allowed the mobile home park to proceed, was a de facto amendment of the township's zoning ordinance in violation of the TRZA. We rejected the defendant's argument and held:

> [T]he consent judgment was neither the promulgation of a zoning ordinance nor an amendment of a zoning ordinance as contemplated by MCL 125.282. Therefore, a determination that MCL 125.282 is applicable to a consent judgment would be contrary to the plain language of the statute. [*Id.* at 241.]

In ruling that the consent judgment was not an amendment to the zoning ordinance, we stated:

> We suggest that the effect of the consent judgment is more akin to a use variance, which our Supreme Court has determined is allowable. *Mitchell v Grewal*, 338 Mich 81, 87; 61 NW2d 3 (1953). Specifically, a zoning board has the authority to allow a use in a zoning district that would not otherwise be allowed under an ordinance. *Paragon Properties Co v Novi*, 452 Mich 568, 575; 550 NW2d 772 (1996); 25 Mich Civ Jur, zoning § 36, pp 669-670 (2001).

> Essentially, when a variance is granted, the ordinance — and zoning pursuant to the ordinance — is left unchanged. However, a particularized exception to the provision of the ordinance is permitted. Mich Civ Jur, zoning § 37, pp 670-673 (2001); *Mitchell, supra* at 88. Accordingly, a variance is distinct from an ordinance or an amendment of an ordinance as contemplated by the TRZA. [*Id.* at 242-243.]

Finally, in *Green Oak Twp* we rejected similar public policy arguments and suggested that plaintiffs' remedies were political in nature against their township board members or through the timely intervention in prior proceedings:

> Amici curiae argue that our holding today will encourage townships to routinely use consent judgments to effect zoning changes by circumventing the enactment procedure and the citizen's right to referendum. We do not agree. A consent judgment by its nature is a settlement reached by two opposing parties to a court proceeding. To reach a consent judgment allowing a zoning change, the township would have to file suit against or be sued by a developer. That is, the township's position would necessarily be opposing that of the developer. Putting aside the fact that the citizens could intervene at this point in the proceedings, it strikes us as uncertain and illogical that a township would engage in the fiction of advocating against a zoning change initially only to successfully procure a settlement with the opposing party allowing the zoning change.
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> The proper remedies in this case were: (1) citizen intervention in the trial court proceedings below, which was done too late here and therefore denied, see *Vestevich v West Bloomfield Twp,* 245 Mich App 759, 762; 630 NW2d 646 (2001) (property owners could intervene to challenge a township's continued enforcement of a zoning ordinance where the township had entered into a consent judgment allowing development, suggesting that township's representation of property owners was inadequate), citing MCR 2.209; and (2) recalling the offending township officials, see MCL 168.960(1). Further, the township could have reserved the right to appeal the consent judgment, but chose not to. See *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 278, n 4; 597 NW2d 235 (1999) (appeal of right is available from a consent judgment where reserved); 7 Martin, Dean & Webster, Michigan Court Rules Practice, Rule 7.203, p 139 (an appeal by right is generally lost on agreeing to a consent judgment; leave to appeal may be requested). *We believe that it is within the township's discretionary authority to settle a legal matter or appeal an adverse judicial decision.* [*Id.* at 242 ns 6 and 7 (emphasis added).]

In the present case, plaintiffs' reliance on dicta contained in *Vestevich v West Bloomfield Twp, supra*, and *Sloban v Shelby Twp,* 67 Mich App 371*;* 241 NW2d 211 (1976), is misplaced and unpersuasive. Both cases are factually distinguishable from the facts of the instant case. Most importantly, the intervenors in *Vestevich*, injected the issue of the validity of the consent judgment into the original action in which the consent judgment was designed to settle. In contrast, this Court is presented in the instant case with a *collateral attack* to the validity of a prior judgment entered in a different action. "Collateral attacks, as opposed to direct appeals, require consideration of the interests of finality and of administrative consequences." *People v*

Ingram, 439 Mich 288, 291; 484 NW2d 241 (1992). For these reasons, collateral attacks on prior judgments are disfavored. *Id.*; *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993).

Plaintiffs' argument that a consent judgment entered by the circuit court should be treated differently from a litigated judgment is not the law of this jurisdiction. As we held in *Trendell v Solomon*, 178 Mich App 365; 443 NW2d 509 (1989), a consent judgment is a judicial act that possesses the same force and character as a judgment rendered following a contested trial. See also *System Federation No. 91 Railway Employees' Dep't v Wright*, 364 US 642, 651; 81 S Ct 368; 5 L Ed 2d 349 (1961), and *Siebring v Charles W Hansen & Afsco, Inc*, 346 F2d 474, 477 (CA 8, 1965). Plaintiffs' arguments to the contrary are without merit. *Madison v Detroit*, 182 Mich App 696, 701; 452 NW2d 883 (1990).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski