

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MPCB DEVELOPMENT, LLC, and MPC  
INVESTORS, LLC,

UNPUBLISHED  
November 17, 2009

Plaintiffs-Appellants,

v

No. 287485  
Oakland Circuit Court  
LC No. 06-079480-CZ

CHARTER TOWNSHIP OF OAKLAND,

Defendant-Appellee.

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Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

In this contract/zoning case, plaintiffs appeal as of right from the trial court's grant of summary disposition to defendant. We affirm.

I. Summary of Facts and Proceedings

In 2004, plaintiff MPC Investors, LLC (MPC) purchased by land contract property in Oakland County consisting of 708 acres (the Property). Plaintiff MPCB Development, LLC (MPCB) sought to develop the Property on behalf of MPC into a residential/commercial community to be known as Harvest Corners.

On June 10, 2005, MPCB submitted a rezoning petition to have the Property rezoned "from MRD LRD VLRD to R-M-1, B-1, PUD."<sup>1</sup> On December 6, 2005, a public hearing was held regarding a Planned Residential Rezoning Overlay (PRRO) application for Harvest Corners. At the hearing, the Township's attorney "explained that the PRRO is a method and means of conditional zoning which relates to rezoning requests [and] indicated that the PRRO is a means of providing assurance that the rezonings, if approved, would be tied to the PUD plan that was presented by the applicant." Dominic Mocerri, as representative for MPCB, "indicated that by submitting the PRRO application, they are trying to clarify the intent of the project and tie the rezoning to the PUD." A public hearing was then held on the PRRO.

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<sup>1</sup> Medium Residential District; Low Residential District; Very Low Residential District; Residential Multiple District; Local Business District; and Planned Unit Development.

On May 3, 2006, Kelly Poniers, a representative of Mocerri Companies, sent an email giving an update on the progress of Harvest Corners, stating, in pertinent part:

In order for the overall PUD plan to be accepted, the underlying zoning needed to be amended to allow for the attached housing within the 4-corner area (RM zoning) & to allow for the neighborhood retail (B-1 zoning).

At the planning commission meeting of April 27, [t]he planning commission did recommend approval to the township board to allow for the RM, but recommended denying the B-1 zoning. Thus, because they were not recommending approval of the necessary underlying zoning, the motion that passed was to recommend denying the Harvest Corners PUC to the Township Board. [Emphasis in original.]

It is unclear from the record what occurred over the next three months, but on August 22, 2006, the Township adopted Ordinances Nos. 16-2006-A(1), A(2), and A(3). Ordinance A(1) rezoned 37.7 acres of the Property from MRD to R-M/PRRO.<sup>2</sup> Ordinance A(2) rezoned 1.95 acres of the Property from MRD to B-1/PRRO. Ordinance A(3) then rezoned the Property in its entirety “from VLRD, MRD, R-M/PRRO and B-1/PRRO to PUD.”

On August 28, 2006, MPCB and the Township entered into a PRRO Agreement. The PRRO Agreement referenced MPCB’s R-M/PRRO and B-1/PRRO rezoning requests and indicated that the rezonings had been approved with the adoption of Ordinances A(1) and A(2). The PRRO Agreement was to take effect “on the effective date of the Township’s grant of the Rezonings.”

On September 6, 2006, Mocerri sent a letter to the Township regarding a public hearing meeting scheduled for September 8. Mocerri had become aware that the PUD request was not scheduled for consideration at that meeting. He indicated that “[t]he intent was not to carve out the RM and B-1 acreage for separate approvals. Rather their zoning was part of a unified open space plan for the entire 708 acres” and requested the public hearing be rescheduled to be held “at one meeting which will address our entire application” including the 708 acres to PUD and the rezoning to RM and B-1. It was understood “that all three requests are interdependent and that simultaneous review and action is appropriate.”

On September 12, 2006, MPCB and the Township entered into a development agreement (the PUD Agreement). The PUD Agreement, recital B, referenced both the R-M/PRRO and B-1/PRRO rezoning requests and the PRRO Agreement. Development of the Property was required to be in accordance with, among other things, “the Ordinance Granting Harvest Corners Planned Unit Development adopted and published by the Township,” the PRRO Agreement, and “all applicable Township Ordinances.”

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<sup>2</sup> Meaning that the new zoning was not just R-M, but was subject to the PRRO.

As for its effective date, recital J of the PUD Agreement provided:

For the purpose of confirming the rights and obligations in connection with the improvements and other obligations to be undertaken in connection with the development of the Harvest Corners Planned Unit Development on the Property, the parties have entered into this Development Agreement to take effect on the later of (i) the execution of this Agreement by MPCB and the Township, or (ii) the effective date of the Township's ordinance granting rezoning of the Property to Harvest Corners Planned Unit Development, or (iii) on the effective date of the other rezonings described in Recital B, above.

However, the final paragraph of the agreement before the signatures states, "THIS AGREEMENT . . . shall take effect on the effective date of the Township's amended Ordinance Granting the Harvest Corners Planned Unit Development rezoning."

The three Ordinances were published on August 31, 2006. Each of them was subject to the provision that if a notice of intent was filed within seven days of publication, the Ordinance would become effective 31 days from the date of publication unless an adequate petition was filed within 30 days of publication, which would require the Ordinance to be submitted to voter approval, and its effective date would become the date of voter approval. If no notice of intent was filed, the Ordinances would become effective on October 2, 2006. Notices of intent and petitions were filed as to Ordinances A(1) and A(2) so that they became subject to voter referendum. Ordinance A(3) was unchallenged.

At some point, MPCB presented its final development plan to the Township for approval. On December 11, 2006, the Township Supervisor sent a letter to counsel for MPCB stating that that the Township had declined to process the submitted materials based on the outstanding voter referendum:

It is true that the PUD was approved, and that the referendum petition was not filed expressly challenging it. However, the necessary underpinning for the PUD included the two rezonings that have been challenged by referendum. Thus, if the referendum votes to nullify the business and/or multiple family zoning, this would appear to undermine the validity of the PUD, which was presented as an "all or nothing" proposal.

Accordingly, we do not see how the Township could approve a final development plan for any aspect of the PUD. And, as a result, processing your materials at this time would appear to be premature and [a] potentially unnecessary use of Township resources.

Plaintiffs filed suit two days later, on December 13, 2006, requesting a declaration that the Property is zoned PUD and could be developed pursuant to the PUD Agreement, Ordinance A(3), and the PUD provisions of the Zoning Ordinance and requiring that the Township process plaintiffs applications. Three Township residents who filed the notices of intent against Ordinances A(1) and A(2) moved to intervene. They noted that a special election on those ordinances had been scheduled for February 27, 2007 and alleged that they had relied on the

representations that the project was all or nothing and that the rezonings were all interdependent.<sup>3</sup>

On January 17, 2007, plaintiff moved for partial summary disposition, arguing that there was no issue of material fact as to whether Ordinance A(3) rezoned the Property to PUD, the Property could be developed pursuant to the PUD Agreement, and that its application to the Township be processed.

On February 27, 2007, Ordinances A(1) and A(2) were defeated in the voter referendum and, thus, never became effective. Defendant and the amici argued that because of the interrelated nature of the defeated ordinances to Ordinance A(3) which purported to zone the Property to PUD (the PUD Ordinance), the PUD Ordinance never became effective, such that plaintiffs were not entitled to summary disposition. The trial court concluded that there was a genuine issue of material fact as to whether the three ordinances were interrelated and denied plaintiffs' motion.

In January 2008, the Township moved for summary disposition arguing, among other things, that there was no genuine issue of material fact that the PUD Agreement never became effective because the defeated ordinances never went into effect. The trial court held a hearing on defendant's motion on August 13, 2008. At the end of the hearing, the trial court orally granted the motion, agreeing with the Township that the PUD Agreement never became effective. The trial court subsequently entered a final order memorializing its decision. Plaintiffs now appeal.

## II. Summary Disposition

Plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition when it concluded that the PUD Agreement never became effective because the defeated ordinances never went into effect. Plaintiffs contend that the decision was based "solely upon a recital in the agreement that conflicted with an operative provision which clearly and unambiguously set forth the circumstances under which the agreement would become effective."

"We review de novo a trial court's determination regarding a motion for summary disposition." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). For a motion brought under MCR 2.116(C)(10), we review the pleadings, admissions, and other evidence in the light most favorable to the nonmoving party and, if there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 466-467. We also review de novo issues of contract interpretation. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

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<sup>3</sup> The trial court ultimately denied the motion to intervene without prejudice, but permitted the proposed intervening defendants to file an amicus brief on plaintiffs' pending motion for summary disposition.

Plaintiffs' primary question on appeal is whether the trial court properly concluded that the PUD Agreement never became effective. As noted above, the PUD Agreement has two different paragraphs related to its effective date. The first, recital J, provides:

For the purpose of confirming the rights and obligations in connection with the improvements and other obligations to be undertaken in connection with the development of the Harvest Corners Planned Unit Development on the Property, the parties have entered into this Development Agreement to take effect on the later of (i) the execution of this Agreement by MPCB and the Township, or (ii) the effective date of the Township's ordinance granting rezoning of the Property to Harvest Corners Planned Unit Development, or (iii) on the effective date of the other rezonings described in Recital B, above.

However, the final paragraph of the agreement provides that the PUD Agreement "shall take effect on the effective date of the Township's amended Ordinance Granting the Harvest Corners Planned Unit Development rezoning."

We agree with plaintiffs that these paragraphs appear to conflict. Under recital J, the PUD Agreement takes effect on the later of, September 12, 2006 (the date the PUD Agreement was executed), October 2, 2006 (the effective date of the PUD Ordinance), or never (the effective date of the defeated ordinances). Looking just at this paragraph, the trial court properly concluded that the PUD Agreement never took effect, as never is the latest of the three alternate dates. Under the final paragraph, however, the PUD Agreement would have become effective on October 2, 2006, when the PUD Ordinance became effective.<sup>4</sup>

Plaintiffs argue that this conflict either rendered the PUD Agreement ambiguous such that only a trier of fact could resolve the ambiguity, or that the final paragraph was the operative paragraph as a matter of law because obligatory paragraphs prevail over preamble or recital language. We decline to address these arguments, however, because we conclude that even if the PUD Agreement is operative, defendant was still entitled to summary disposition.

Recital I of the PUD Agreement states:

As part of the application process, MPCB . . . has offered and agreed to complete certain improvements, and to proceed with other undertakings set forth in this Development Agreement and the PUD Documents (as defined in Section 1 below), all of which MPCB and the Township agreed were necessary . . .

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<sup>4</sup> We have not decided that PUD Ordinance actually became effective on October 2, 2006. Rather, we are simply taking the facts in the light most favorable to plaintiffs.

Section 1 then provides:

The Property shall be developed *only in accordance with*: (i) this Development Agreement . . . ; (ii) the Concept Development Plan; (iii) the Ordinance Granting Harvest Corners Planned Unit Development adopted and published by the Township; (iv) the terms and conditions of the Township's approval of such ordinance and Concept Development Plan, if any, as contained in the official approved minutes of the meeting of the Board of Trustees of August 22, 2006; (v) all applicable Township Ordinances, except as otherwise states in Paragraph 20; (vi) the Ultimate Paved Road Density Agreement between MPCB and the Township, dated Sept. 12, 2006; and (vii) the PRRO Agreement between MPCB and the Township, dated Aug. 28, 2006 (all of the foregoing documents, plans and ordinances are together referred to in this Agreement collectively as the "PUD Documents"). Furthermore, *all development of the Property shall be subject to and in accordance with all applicable Township ordinances* and any Township approvals of Final Development Plans for the various phases or subphases of the Harvest Corners PUD and, unless expressly stated otherwise in this Agreement, shall also be subject to all other approvals and permits required under applicable Township ordinances and State laws, and shall be subject to all other approvals and permits required under applicable ordinances for the respective PUD components and phases. [Emphasis added.]

Thus, the PUD Agreement requires that the Property be developed only in a manner consistent with the PUD Agreement, the PRRO Agreement, and all applicable Township ordinances. However, because the PRRO Agreement only took effect "on the effective date of the Township's grant of the Rezoning," and the rezonings never took effect because they were defeated by the voters, it appears that the PRRO Agreement never took effect. Therefore, the Property must be developed in accordance with the PUD Agreement and all applicable Township ordinances.

The PUD Ordinance rezoned the Property "from VLRD (Very Low Residential District), MRD (Medium Residential District), R-M/PRRO (Residential Multiple District with Planned Residential Rezoning Overlay), and B-1/PRRO (Local Business District with Planned Residential Rezoning Overlay) to PUD (Planned Unit Development)." Because of the defeated ordinances, none of the Property was ever zoned R-M/PRRO and B-1/PRRO. Rather, that land never ceased to be zoned MRD. However, because the PUD Ordinance specifically rezoned MRD land to PUD, and the defeated ordinances resulted in those portions of the Property remaining MRD, it appears that plaintiffs are correct that all of the Property is currently zoned PUD.

However, even with the conclusion that the Property is zoned PUD, plaintiffs still cannot prevail. Zoning ordinance 22.01.00.11 provides that the intent of PUD zoning is, "To achieve land use development substantially consistent with the Township's Comprehensive Development Plan *and the underlying zoning applicable to the property prior to the grant of a planned unit development amendment . . . .* (emphasis added)." Zoning ordinance 22.04.00.02 relates to "Permitted Uses Within a PUD" and provides, in relevant part, "Type of use, number of residential dwelling units, and acreage in the overall PUD shall not exceed type of use and acreage permitted within the underlying zone or zones in which the PUD is proposed." Thus, the

types of use permitted on the Property after it was zoned PUD must be consistent with the zoning on the Property prior to the PUD rezoning. Plaintiffs' proposed development contains certain uses that are only allowed within B-1 and R-M districts. Plaintiffs admitted as much in their May 3, 2006 update email, when Poniers states "the underlying zoning needed to be amended to allow for the attached housing within the 4-corner area (RM zoning) & to allow for the neighborhood retail (B-1 zoning)." Without the underlying B-1/PRRO and R-M/PRRO zoning, certain aspects of plaintiffs' proposed development are inconsistent with the underlying zoning and, therefore, plaintiffs' proposal is not in compliance with all Township ordinances, as required by the PUD Agreement.

Plaintiffs attempt to argue that the limiting language in the fifth item enumerated as part of the PUD Documents, "all applicable Township Ordinances, except as otherwise stated in Paragraph 20," means that these ordinances do not apply. We disagree. Paragraph 20 provides, in relevant part:

In the event there is an inconsistency or conflict between the PUD Documents and applicable future Township ordinances or future amendments to existing Township ordinances, the PUD Documents shall apply. In the event there is an inconsistency or conflict among the various PUD Documents or between the PUD Documents and existing Township ordinances (excluding future Township ordinances and future ordinance amendments), the more restrictive standard shall apply.

First, zoning ordinances 22.01.00.11 and 22.04.00.02 were existing ordinances, not future ordinances or amendments, such that the first sentence does not apply. Second, we do not read these two ordinances as inconsistent or conflicting with the PUD Documents. But, even assuming that they do, the PUD Agreement states that "the more restrictive standard shall apply." Here, the more restrictive standard is that of the zoning ordinances, which require uses in a PUD to be consistent with the underlying zoning. Accordingly, we find the application of paragraph 20 does not change the result.

Plaintiffs complaint relies on the provision that "[a]pproval of the Final Development Plans will not be unreasonably withheld or unreasonably delayed if the Final Development Plans are materially consistent with the Concept Development Plan and otherwise in compliance with the PUD Documents." However, because of the defeated ordinances, nothing that plaintiffs submit can comply with all of the requirements. If what plaintiffs submit utilizes the R-M/PRRO and B-1/PRRO zonings, then the submission does not comply with the applicable Township ordinances. If the submission does not utilize the R-M/PRRO and B-1/PRRO zonings, then it is no longer materially consistent with the Concept Development Plan. Because the PUD Agreement requires that the submission meet both requirements, under the terms of the PUD Agreement, the Township is permitted to withhold or delay approval, even unreasonably.

Therefore, defendant was entitled to summary disposition. Because the trial court reached the right result in granting summary disposition to defendant, albeit for a different reason, we affirm. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

Affirmed.

/s/ Douglas B. Shapiro  
/s/ Kathleen Jansen  
/s/ Jane M. Beckering