[Cite as *White Oak Property Dev., L.L.C. v. Washington Twp.*, 2012-Ohio-425.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

WHITE OAK PROPERTY DEVELOPMENT, LLC,	:	
	:	CASE NO. CA2011-05-011
Plaintiff-Appellant,	:	O P I N I O N
	:	2/6/2012
- vs -	:	
	:	
WASHINGTON TOWNSHIP, OHIO,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CV2009-0796

Michael P. McNamee and Gregory B. O'Connor, 2625 Commons Boulevard, Beavercreek, Ohio 45431, for plaintiff-appellant

Robert J. Surdyk, One Prestige Plaza, Suite 700, Miamisburg, Ohio 45342, for defendant-appellee

DINKELACKER, J.

{¶ 1} Plaintiff-appellant, White Oak Property Development, L.L.C., appeals a decision of the Brown County Court of Common Pleas that denied its motion for summary judgment and granted summary judgment to defendant-appellee, Washington Township. We affirm the lower court's decision.

{¶ 2} The pertinent facts are as follows. White Oak owns a 60-acre parcel of property located in Washington Township, Brown County, Ohio. In March 2007, White Oak submitted a development plan to the Washington Township Zoning Committee that proposed to develop 300 multi-family condominium units on the property. According to the proposal, White Oak would construct four to five condominium units per acre.

{¶ 3} On May 7, 2007, the zoning committee denied White Oak's proposal. The committee explained that the proposed amount of condominiums per acre violated a provision in the Washington Township Zoning Resolution called "Intensity of Use," stating:

> SECTION 5. INTENSITY OF USE
> LOT SIZE[:]
> * * *
> Every lot districted as Residential shall have a minimum of three (3) acres if the dwelling is connected to an on-site sewage disposal system, or a minimum of one (1) acre if the dwelling is connected to a public sanitary sewer system.

{¶ 4} On July 17, 2009, White Oak sued the Township, seeking declaratory relief on the basis that the zoning resolution and the accompanying zoning map were statutorily invalid under R.C. 519.02. White Oak claimed the zoning resolution was unenforceable because it did not zone in accordance with a comprehensive plan. White Oak also argued the Intensity of Use provision did not promote public health and safety, as required by R.C. 519.02.

{¶ 5} The parties filed cross-motions of summary judgment. On May 6, 2011, the trial court granted the Township's motion upon finding that the zoning resolution and map met the statutory requirements.

{¶ 6} White Oak timely appeals, raising two assignments of error for review. Because the assignments of error are interrelated, we will address them together.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED IN GRANTING WASHINGTON TOWNSHIP'S MOTION FOR SUMMARY JUDGMENT.

{¶ 9} Assignment of Error No. 2:

{¶ 10} THE TRIAL COURT ERRED IN OVERRULING WHITE OAK'S MOTION FOR SUMMARY JUDGMENT.

{¶ 11} On appeal, White Oak contends the trial court erroneously granted summary judgment to the Township because the following disputed issues of material fact remain: (1) whether a comprehensive zoning plan exists; (2) whether the zoning resolution and map zone in accordance with a comprehensive plan; and (3) whether the Intensity of Use provision promotes public health and safety, as required by R.C. 519.02(A).

{¶ 12} This court's review of a trial court's ruling on a summary judgment motion is de novo, which means that we review the judgment independently and without deference to the trial court's determination. *Liegel v. Bainum*, 12th Dist. No. CA2011-06-049, 2011-Ohio-6022, ¶ 9.

{¶ 13} Under Civ.R. 56, summary judgment is appropriate when:

> (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Id.* at ¶ 10; *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998).

{¶ 14} The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings. *Id*. *See also* Civ.R. 56(E). A disputed fact is "material" if it affects the outcome of the litigation, and it is "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Morris v. Fields Family Ents., Inc.*, 12th Dist. No. CA2010-10-102, 2011-Ohio-

3433, ¶ 9.

{¶ 15} We first address White Oak's argument that a genuine triable issue exists as to whether the Township adopted a "comprehensive plan" under R.C. 519.02, which states, in pertinent part:

> (A) Except as otherwise provided in this section, in the interest of the public health and safety, the board of township trustees may regulate by resolution, in accordance with a comprehensive plan, the location, height, bulk, number of stories, and size of buildings * * * percentages of lot areas that may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population * * * and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township.

{¶ 16} In *Rumpke Waste, Inc. v. Henderson*, 591 F.Supp. 521 (S.D.Ohio 1984), the Federal District Court for the Southern District of Ohio stated that "comprehensive plan" is a "flexible term," but that it "must be sufficiently detailed that a potential purchaser might ascertain in advance to what use property might be put." *Id.* at 534. With respect to sufficient detail, the plan must "define with certainty the location, boundaries and areas of the * * * districts," and a failure to do so renders the plan invalid. *Village of Westlake v. Elrick*, 52 Ohio Law Abs. 538, 83 N.E.2d 646 (8th Dist.1948). The *Rumpke* court also found that "rural" zoning plans may be less detailed than plans for metropolitan areas with more complicated layouts. *Rumpke* at 534, citing *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114 (1926). The court summarized that a rural comprehensive plan is one that "reflects current uses and allows for change as additional needs develop, and that bears a substantial relationship to the public health, safety or welfare[.]" *Rumpke* at 534.

{¶ 17} The zoning resolution adopted by the Washington Township Zoning Committee divides the unincorporated territory of the township into four districts: agricultural (A), residential (R), commercial (B1-B9), and industrial (I). While the majority of the township

is zoned as agricultural, White Oak's property is zoned as residential.

{¶ 18} Article V, Subsection 2(A) of the zoning resolution provides that residential districts may be used specifically for:

> 1. One (1) Single Family Dwelling subject to lot size requirements, dwelling size requirements, and all other requirements as set forth herein.
> 2. Home occupations.
> 3. Storage and/or salvage of no more than two (2) vehicles that re [sic] disabled, outside of an enclosed building, and visible from the road or from adjacent residential dwellings. Farm Machinery is excluded.
> 4. Accessory buildings and uses customarily incident to any of the above permitted uses.

{¶ 19} Subsection 2(B) prohibits any use not specifically permitted in Subsection 2(A).

{¶ 20} As previously discussed, the Intensity of Use provision places further restrictions on residential districts, stating:

{¶ 21} "Every lot districted as Residential shall have a minimum of three (3) acres if the dwelling is connected to an on-site sewage disposal system, or a minimum of one (1) acre if the dwelling is connected to a public sanitary sewer system."

{¶ 22} As an initial matter, we note there is sufficient undisputed evidence to establish that the unincorporated territory of Washington Township is a "rural" area. In fact, White Oak's witness, Alan Schwab, testified the township was "basically a rural area," with only 2,400 residents. Thus, while *Rumpke* was based chiefly on constitutional, rather than statutory grounds, the general principles outlined therein are a useful guide to determining whether the Washington Township Zoning Resolution and Map constitute a comprehensive plan under R.C. 519.02. *Compare Central Motors Corp. v. Pepper Pike*, 63 Ohio App.2d 34, 65 (8th Dist.1979) ("although a comprehensive plan is usually separate and distinct from a zoning ordinance, it is possible for an ordinance in and of itself to be a comprehensive plan, absent a specific requirement in the enabling legislation").

{¶ 23} Upon review, we find the resolution and map are, in fact, a comprehensive plan, suited to the area's rural nature.

{¶ 24} First, the 26-page resolution clearly reflects the current, primarily agricultural, use of the land, and even goes so far as to permit the use of "*any* land for agricultural purposes[.]" (Emphasis added.) Article IV, Section 1. That said, the resolution also allows for change as the township's needs develop. *See Rumpke*, 591 F.Supp. at 534. Specifically, the resolution seeks to use rural zoning as a "tool to put into effect plans for future development." Article I, Section 4. Moreover, it specifically acknowledges the need for continuing flexibility, stating, "[a] zoning resolution is a work in progress * * * the resolution provides a means to appeal differences in interpretation, to grant variances, and to amend itself (so that it can adjust to the changing needs of the township)." Article I, Section 5. Thus, the resolution is neither rigid nor unchangeable; instead, it "allows for change" and can be amended or supplemented in the sound discretion of the zoning committee. *Id. See also Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328, fn. 18 (1975) ("[a] comprehensive plan does not contemplate or require a 'master-plan' which [r]igidly provides for or attempts to answer in minute detail every possible question regarding land utilization or restriction").

{¶ 25} The zoning resolution also covers many subjects, including, but not limited to, land use, housing, and various environmental precautions. With regard to land use, it divides the township into four districts or zones, namely, agricultural, residential, commercial, and industrial, and clearly designates the permitted uses for each district. Additionally, the zoning map, incorporated into the resolution by reference, marks the location and boundaries of each district using a color-coded legend. Specifically, residential districts are outlined in red, commercial districts are outlined in green, and agricultural districts are indicated by white. Thus, in examining the zoning map, a potential purchaser could identify the location and boundaries of each district by color, and could then refer to the resolution to ascertain the

permissible use(s) of a particular property. *Rumpke*, 591 F.Supp. at 534; *Elrick*, 83 N.E.2d at 647; *Cassell v. Lexington Twp. Bd. of Zoning Appeals*, 163 Ohio St. 340, 345 (1955).

{¶ 26} As for public health concerns, the Intensity of Use provision sets lot size restrictions for homes according to sewer access. If the lot is connected to a public sewer system, a landowner may build one home per acre; however, if an on-site sewage system is used, the landowner must reserve three acres per home. By limiting the permissible amount of homes per acre, the Intensity of Use provision also limits population density, as only a certain number of residents would live in each home.

{¶ 27} In granting summary judgment to the Township, the trial court cited *Ketchel v. Bainbridge Twp.*, 52 Ohio St.3d 239 (1990), in finding that a land use restriction used to control population density "necessarily bears a substantial relationship to the health and safety of Township residents." Based upon this principle, the trial court upheld the Intensity of Use provision on health and safety grounds.

{¶ 28} As an initial matter, White Oak argues the trial court failed to apply the second step in the *Ketchel* analysis, namely, whether the "*particular* density restriction at issue * * * advances a health and safety concern." (Emphasis added.) White Oak argues that under *Ketchel*, the Intensity of Use restriction does not promote a legitimate public health or safety concern, where an "on-site sewage system * * * [would] easily serve the entire [proposed] development." However, White Oak's strict reliance on *Ketchel* is misplaced. Rather than determining the validity of the density restriction under R.C. 519.02, *Ketchel* determined whether the particular restriction was constitutional, which involves an entirely different analysis. Thus, while *Ketchel* may be an effective analytical guidepost, we are not bound to follow its analysis, where White Oak only challenges the Township's land use restriction on

statutory grounds.[1]

{¶ 29} Apart from the *Ketchel* analysis, White Oak also attempts to equate the Intensity of Use provision to the zoning resolution in *Fischer Dev. Co. v. Union Twp.*, 12th Dist. No. CA99-10-100, 2000 WL 525815 (May 1, 2000). In *Fischer*, the Union Township Board of Trustees adopted a resolution seeking to increase the minimum lot size for single-family dwellings. This court enjoined the trustees from applying the resolution, where there was evidence that it "may have been enacted for the purpose of maintaining property values, and therefore, in all likelihood for the purpose of the public welfare which is not one of the enumerated powers of [R.C. 519.02]." *Id.* at *4. However, this conclusion was based specifically upon the zoning director's indisputably damaging testimony that "probably the most important function [that] [raising the minimum square footage] serves is preservation of property values." *Id*.

{¶ 30} Here, there is no evidence in the record to support a similar conclusion. Unlike the specific testimony in *Fischer*, White Oak's witnesses only testified that the Intensity of Use provision restricted residential development "far in excess [of] any reasonably supportable claim of protecting public health and safety." However, such testimony is hardly substantial evidence of a motive to preserve property values. *Morris*, 2011-Ohio-3433 at ¶ 9. *Compare Long v. Bd. of Twp. Trustees, Liberty Twp.*, 5th Dist. No. 95CA-E-06-037 (May 24, 1996) (zoning resolution limiting land uses in "scenic" areas promoted property values, rather than health and safety). We decline to read more into this testimony, where it is White Oak's responsibility to find facts in the record to support its claims, not this court's. Stated

1. Nor are we bound to follow the trial court's reasoning where, as discussed below, its ultimate conclusion that the Intensity of Use provision promotes health and safety was not erroneous. Thus, even if we were to theoretically accept White Oak's argument that the trial court applied flawed reasoning under *Ketchel*, any such error would not be prejudicial. *See, e.g., French v. New Paris*, 12th Dist. No. CA2010-05-008, 2011-Ohio-1309, ¶ 42 ("we are required to affirm a trial court's judgment that achieves the right result for the wrong reason, because such an error is not considered prejudicial").

differently, "[i]t is not the function of this court to construct a foundation for [an appellant's] claims[.]" *Glenmoore Builders, Inc. v. Smith Family Trust*, 9th Dist. No. 24299, 2009-Ohio-3174, ¶ 53.

{¶ 31} Moreover, it is generally for the zoning committee, not the court, to decide which land uses are likely to promote public health and safety. The committee members may base their decisions, at least partly, on their common sense, experience, and "their general knowledge of the world." *Rumpke*, 591 F.Supp at 532. Here, common sense dictates that a mismanaged or overused sewer system might have adverse effects on the health and safety of the township. By limiting the number of homes per acre, the Intensity of Use provision most certainly reduces the likelihood of overuse by the masses.

{¶ 32} Because White Oak has not submitted any credible evidence that the Intensity of Use provision was enacted for a different, *improper*, purpose, we decline to substitute our judgment for that of the zoning committee. *See, e.g., Ketchel*, 52 Ohio St.3d at 246; *G. S. T. v. City of Avon Lake*, 59 Ohio App.2d 84, 87 (9th Dist.1978) (zoning is a "function of local administrative and legislative authority and is not a function of the judicial branch of government").

{¶ 33} Having reviewed the evidence, it appears the Township created a comprehensive rural zoning plan that reflects current and future land uses, contains clearly defined districts, and promotes public health and safety.

{¶ 34} However, despite this evidence, White Oak argues the zoning resolution and map are not a comprehensive plan because they lack several "crucial characteristics," including an analysis of the township's social, economic, and physical characteristics, as well as the living standards, transportation needs, topography, and growth projections. White Oak also argues the Township failed to apply such factors in defining its development goals and creating property restrictions. White Oak cites *Rumpke* and *Phantom Fireworks v.*

Congress Twp. Bd. of Zoning Appeals, 124 Ohio St.3d 1, 2009-Ohio-5863, for the apparent proposition that a township must, under all circumstances, provide a detailed foundation for its zoning plan that is based on these factors before it can be deemed "comprehensive" under R.C. 519.02. We disagree with this argument.

{¶ 35} First, the language of R.C. 519.02 does not require a township to gather statistics or explicitly provide a foundation for its zoning plan. Moreover, the Ohio Supreme Court's decision in *Phantom* was limited to the precise issue before the court, namely, whether a countywide zoning plan encompassed a smaller township within its purview. While the court also found the plan was comprehensive under R.C. 519.02, it did not indicate that a regional study was an indispensable basis for its conclusion.

{¶ 36} As for *Rumpke*, we reiterate that the district court's chief conclusions were based on constitutional, rather than statutory, analysis. Further, while the court mentioned that a zoning commission must "make use of such information and counsel as is available," the court did not find there was a firm requirement to articulate this information in the zoning plan. *See* R.C. 519.05.

{¶ 37} Thus, we reject White Oak's argument as it relates to the foundational requirements of a comprehensive plan under R.C. 519.02.

{¶ 38} We next address White Oak's contention that the zoning map leaves a "vast majority" of the township "unzoned" [sic], where many areas are not outlined in a specific color or otherwise marked. White Oak argues the map is therefore ambiguous and does not zone in accordance with a comprehensive plan, which requires clear, consistent land use classifications throughout the township. This argument lacks merit.

{¶ 39} As previously discussed, the color-coded map legend indicates agricultural districts are outlined in white, whereas residential districts are outlined in red, and commercial districts are outlined in green. Because the map is also white, it is clear the zoning

committee intended to classify the white, or according to White Oak, "unmarked," sections on the map as agricultural. The map's meaning is even clearer when viewed in conjunction with the zoning resolution, which states: "[n]othing contained in this Resolution shall prohibit the use of any land for agricultural purposes[,]" and "[a]griculture should be the *principal* use of the land[.]" (Emphasis added.) Article IV, Section 1; Article V, Section 1.

{¶ 40} Moreover, despite White Oak's argument to the contrary, the mere fact that the map does not depict an industrial district does not mean these sections are "unzoned," where White Oak has not shown a need for an industrial district existed at the time the resolution and map were adopted. *See, e.g., Rumpke*, 591 F.Supp. at 534 (failure to designate industrial district was immaterial without proof that one was needed when resolution was adopted).

{¶ 41} Under these circumstances, we find the map does not leave the "vast majority" of the township "unzoned." Instead, it is clear the map classifies the white sections as agricultural, particularly where the plan indicates this should be the "principal use of the land[.]" *See Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 228, 1994-Ohio-432. As a result, we find the map clearly identifies district boundaries and prom0otes the uniform classification of land so as to preserve its principal use. Thus, the map, when read in conjunction with the resolution, zones in accordance with the overall plan.

{¶ 42} We next address White Oak's contention that even if the map designates all "unmarked" properties as agricultural, this results in unlawful spot zoning, i.e., the sporadic grant of zoning variances and changes. In support of this argument, White Oak cites *Clegg v. Bd. of Zoning Appeals of Newton Twp.*, 11th Dist. No. 3668, 1987 WL 10755 (May 1, 1987), and *Bd. of Twp. Trustees Ridgefield Twp. v. Ott*, 6th Dist. No. H-93-16, 1994 WL 17542 (Jan. 21, 1994).

{¶ 43} In *Clegg*, the Newton Township Trustees adopted a zoning resolution that

provided for two districts, "R1" and "R2," yet the resolution and map failed to classify an area in the township to which the R2 classification applied. The Eleventh District Court of Appeals found the resolution promoted spot zoning because there was no guarantee that land qualified for "R2" usages would be classified as such, which "open[ed] the door to * * * arbitrary and unreasonable administration[.]" *Id.* at *4.

{¶ 44} Similarly, in *Ott*, the Ridgefield Township Zoning Resolution created five zoning classifications, but classified all land in the township as agricultural, "unless otherwise classified on the Official Zoning Map." *Ott*, 1994 WL 17542 at *2. The zoning map also classified the entire township as agricultural, save for nine individual businesses zoned as "Business/Commercial." The Sixth District Court of Appeals found "[a]n ordinance that purportedly provides for five different districts but actually consists of only one district promotes spot zoning because there is no assurance that similarly situated land areas will be equally treated." *Id.* at *4. The court further noted that the ambiguity in the ordinance left "'the administration thereof solely within the whim or caprice of the officials charged with its enforcement.'" *Id.*, quoting *Cassell*, 163 Ohio St. at 345. *See also Clegg* at *4.

{¶ 45} *Clegg* and *Ott* are readily distinguishable from the case at bar. Here, as previously discussed at length, the zoning map designates areas throughout the township to which residential, commercial, and agricultural classifications apply. *See, e.g., Cassell* at 345. Thus, we fail to see how the Washington Township Zoning Committee could arbitrarily classify the land at its whim. Nor can we see how the committee could treat similarly situated lands unequally, where the zoning resolution specifically states its intent to "reserve adequate and desirable sites for industrial and commercial users." Article I, Section 3. From this language, it is clear the zoning committee recognized the need to reserve similarly situated land for a particular purpose. Thus, because there is no danger that the Township may arbitrarily implement its zoning plan, we reject White Oak's argument as it relates to spot

zoning.

{¶ 46} In sum, the evidence reveals that together, the Washington Township Zoning Resolution and Map: (1) reflect current land uses; (2) allow for change; (3) promote public health and safety; (4) uniformly classify similar areas; (5) clearly define district locations and boundaries; and (6) identify the use(s) to which each property may be put. *See Rumpke*, 591 F.Supp. at 534; *Elrick*, 83 N.E.2d at 647. Under these circumstances, we find the zoning resolution and map not only set forth a comprehensive rural zoning plan, but also apply the plan in a manner consistent with its goals. Summary judgment to the Township was appropriate and the trial court did not err in that regard.

{¶ 47} Accordingly, White Oak's assignments of error are overruled.

{¶ 48} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.

Dinkelacker, J., of the First Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A) (3), Article IV of the Ohio Constitution.