UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
Case No. 2:18-cv-13330

v.

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

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DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

A. Plaintiffs' Complaint Does Not Invoke Facial Challenges to Milford's Ordinances.

Plaintiffs implicitly acknowledge that they failed to obtain a final administrative decision prior to filing suit. Instead, Plaintiffs argue that they need not exhaust administrative remedies because they have facially challenged Milford Ordinances Sec. 32-583 and 32-574. **(Dkt. 22, Pg. ID 623)**. This argument fails because it is clear from a reading of Plaintiffs' Complaint that only "as applied" challenges are pled. Plaintiffs' obligation to exhaust administrative remedies and obtain a final administrative decision is therefore unexcused.

In *Bruley v. City of Birmingham*, 259 Mich. App. 619, 626; 675 N.W.2d 910, 915 (2003), the Court, quoting *Paragon Properties Co. v. City of Novi*, 452 Mich. 568, 576; 550 N.W.2d 772, 775 (1996), recognized the distinction between a facial and an "as applied" challenge to a municipal ordinance. The Court noted:

> A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. An "as applied" challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution. *Id*.

The *Bruley* Court went on to conclude that because the plaintiff's complaint alleged "that the ordinance is unconstitutional because it is arbitrary and capricious inasmuch as it fails to advance any reasonable governmental interest [and] [b]ecause this claim does not take issue with any aspect of the execution or enforcement of the ordinance, it is a challenge of the ordinance on its face." *Id*.

Accordingly, as a facial challenge, there was no need to exhaust administrative remedies. *Id*.

In the present case, however, Plaintiffs have exclusively pled "as applied" challenges requiring them to obtain a final administrative decision remedies *prior to* filing suit. The Complaint challenges Defendants' imposition of preconditions to the construction of a residential driveway. Nowhere in the Complaint do Plaintiffs state that they are challenging the validity of any ordinance on its face. In fact, Plaintiffs' Complaint does not even mention Milford Ordinances Sec. 32-583 or 32-574. See *Miller v. Food Concepts Int'l, LP*, No. 2:13-CV-0124, 2014 WL 202053, at *3 (S.D. Ohio Jan. 17, 2014) ("A complaint must give defendants fair notice of the claims a plaintiff makes against them and the grounds on which those claims rest"). Plaintiffs did not plead any facial challenge and they are now raising multiple claims that are not part of the Complaint in an attempt to avoid dismissal. This Court should not be persuaded by such an attempt.

In fact, even the two "facial challenges" argued in Plaintiffs' Response to Defendants' Motion for Summary Judgement are, in actuality, veiled "as applied" challenges. Plaintiffs first claim is that Sec. 32-574 does not authorize Milford to require Plaintiffs to obtain topographical surveys, drainage calculations, or volume

calculations.[1] **(Dkt. 22, Pg. ID 624)**. This is clearly an "as applied" because it claims that Sec. 32-574 was impermissibly ***applied to the Plaintiffs***. See *Bradley, supra*. Plaintiffs' second argument is that Milford Ordinances Sec. 32-583 and 32-574 are unconstitutionally vague on their face. (**Dkt. 22, Pg. ID 628).** However, the Sixth Circuit has recognized that when a challenged ordinance does not invoke the First Amendment or impose criminal penalties, void-for-vagueness challenges are to be analyzed as an "as applied challenge." See *Bell Maer Harbor v Charter Twp. Of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999) ("[V]agueness claims not involving First Amendment freedoms [or criminal sanctions] must be examined in light of the facts of the particular case at hand and not as to the statute's facial validity."). The present case does not involve the First Amendment or criminal penalties; therefore the challenged ordinances must be evaluated "as applied". As an "as applied" challenge, Plaintiffs were required to obtain a final administrative decision *prior to* filing suit. See *Paragon Properties Co., supra*.

B. Milford Ordinances Sec. 32-583 And 32-574 Are Not Unconstitutionally Vague.

As previously discussed, Plaintiffs have not made any facial challenges to Milford Ordinances Sec. 32-583 and 32-574 and they were therefore required to

[1] Plaintiffs only argue that Sec. 32-574 does not authorize these imposed requirements. However, they ignore Sec. 32-583 which clearly enables the Township to act as they did. Sec. 32-583 provides that "[i]t shall be unlawful for any person to use land for filling with materials of any kind ***without approval of the township board and subject to requirements as may be appropriate***." **(Dkt. 16-4, Pg. ID 513)**. Plaintiffs' builder, via sworn affidavit, admitted that such fill material was being used on site thus enabling the Township to impose requirements it deems appropriate to protect the health, safety and welfare of the community. **(Dkt. 22-9, Pg. ID 670, ¶10)**.

exhaust administrative remedies. However, even assuming *arguendo* that such a claim is permitted to proceed, it must still fail. In *Bonner v. City of Brighton*, 495 Mich. 209, 223; 848 N.W.2d 380 (2014), the Court recognized that "[a] party challenging the facial constitutionality of an ordinance faces an extremely rigorous standard." "To prevail, plaintiffs must establish that ***no set of circumstances exists*** under which the ordinance would be valid and the fact that the ordinance might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid." *Id.* [emphasis added] [internal quotations and citations omitted]. In *Township of Plymouth v. Hancock*, 236 Mich. App. 197; 600 N.W.2d 380 (1999), a case relied upon by Plaintiffs, the Court rejected a void-for-vagueness challenge to a municipal ordinance. There, the Court recognized that "[a]n ordinance is presumed to be constitutional and will be so construed unless the party challenging the statute clearly establishes its unconstitutionality." *Id*. at 199. Accordingly, "courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent." *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 259 Mich. App. 315, 341-342; 675 N.W.2d 271 (2003) [quotations omitted].

In *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, *supra*, the court recognized three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague:

> A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated. *Id*. at 342 [quotations omitted].

Here, Plaintiffs have failed to set forth any facts establishing that the ordinances at issue are unconstitutionally vague. Importantly, Plaintiffs also failed to allege in their Complaint their belief that these ordinances are vague. See 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2723 (3d ed. Supp.2005) ("A non-moving party plaintiff may not raise a new legal claim for the first time in response to the opposing party's summary judgment motion."). Only now do Plaintiffs claim that Sec. 32-583 is impermissibly vague because "Milford may construe the ordinance to require Milford Board approval each time a speck of dirt or single stone is brought onto a piece of property."[2] **(Dkt. 22, Pg. ID 629)**. Such a reading of the ordinance is absurd and, as the *Shepherd Montessori* Court pointed out, "it is critical for courts to remember that, when considering whether an ordinance is void for vagueness, [courts] do not set aside common sense, nor is the township board required to define every concept in minute detail." *Shepherd Montessori*, *supra* at 343 [quotations omitted]. Here, the challenged ordinance was enacted to enable the Township to impose reasonable requirements upon builders to ensure that only

[2] Plaintiffs completely ignore Sec. 32-574 in their void-for-vagueness argument.

non-hazardous filling material is used and to further ensure that filling activities do not cause standing water issues (the precise issue in this case). The ordinance provides notice of the conduct it regulates and it does not give the Township unfettered discretion in determining if it has been violated.

C. An Alleged "Inadequacy Of Relief" Does Not Permit Plaintiffs To File Suit Before Exhausting Administrative Remedies.

Plaintiffs next argue that they need not exhaust administrative remedies because the Township's final decision regarding the driveway would have provided an inadequate remedy. **(Dkt. 22, Pg. ID 631)**. However, Plaintiffs fail to address how any such remedy would be inadequate. The Township was prepared to allow Plaintiffs to construct their driveway subject to a few preconditions that the Township's building consultant indicated do "not require a great deal of labor nor should it be expensive to accomplish." **(Dkt. 16-9, Pg. ID 544)**. Unfortunately, Plaintiffs instead chose to file suit *prior to* Defendants having made any final decision with respect to their property.

To justify their premature conduct, Plaintiffs now claim that time was of the essence because standing water blocked ingress and egress for visitors. **(Dkt. 22, Pg. ID 632)**. However, Plaintiffs ignore the fact that they have been residing on the property pursuant to a temporary occupancy permit granted by the Township. **(Dkt. 16-11, Pg. ID 549)**. Photographs taken as recently as December 2018 evidence Plaintiffs residing in their home without issue. **(Dkt. 16-12, Pg. ID 551-**

559). Contrary to Plaintiffs' assertions, administrative remedies were not inadequate and do not justify the filing of their lawsuit prior to affording Defendants any meaningful opportunity to address their complaints.

D. Plaintiffs Abandoned Their Due Process And Takings Claims.

Plaintiffs do not address Defendants' argument that the due process claims are barred because they may not rely on a generalized notion of due process when a more particularized constitutional takings claim exists. **(Dkt. 16, Pg. ID 497)**. Additionally, Plaintiffs' Response fails to set forth *any* analysis to rebut Defendants' position that Plaintiffs cannot establish a regulatory taking. **(Dkt. 16, Pg. ID 490)**. Accordingly, these claims must be deemed abandoned and should not be considered by this Court. *Brown v. VHS of Michigan, Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013) ("This Court's jurisprudence on abandonment of claims is clear: a plaintiff is deemed to have abandoned a claim when a plaintiff fails to address it in response to a motion for summary judgment.")

Respectfully submitted,

BY:/s/ *Michael J. Bonvolanta*

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Dated: February 6, 2019

PROOF OF SERVICE

Jemmis F. Lawrence states that on February 6, 2019, on behalf of Defendants she served the attached *Defendants' Reply in Support of Motion for Summary Judgment* and *Proof of Service* upon counsel of record via e-filing with the ECF Filing system to their e-mail addresses of record.

/s/ *Jemmis F. Lawrence*
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