

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF YPSILANTI,

Plaintiff-Counterdefendant-Appellee,

v

FIRST PRESBYTERIAN CHURCH,

Defendant-Counterplaintiff-Appellant,

and

JANE SCHMIEDEKE, formerly known as JANE
BIRD, YPSILANTI HERITAGE FOUNDATION,
YPSILANTI HISTORICAL COMMISSION, AND
FRIENDS OF THE TOWNER HOUSE
CHILDREN'S MUSEUM,

Counterdefendants-Appellees.

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from the order granting plaintiff and counterdefendants summary disposition and denying defendant's motion for summary disposition. We affirm.

I

The controversy in this case stems from defendant's 1972 purchase of property lying adjacent to the property where its building is located in Ypsilanti. The property in question is the site of the "Towner House," which was built in 1837 and represents the earliest example of post-log cabin living by settlers in the area. In April 1974, defendant decided to demolish the building. Counterdefendants, through a succession of leases with defendant, organized in an attempt to forestall defendant's decision because of the Towner House's historical and architectural value.

In 1978, six years after defendant's purchase of the adjacent property, the city council passed the Ypsilanti Historic District Ordinance, creating an historic district that encompassed the Towner House and establishing the Historic District Commission to oversee the district. One provision of the ordinance requires the owner of a protected structure to obtain a certificate from the commission before moving or demolishing the resource. Ypsilanti Ordinances art 2, ch 55, § 5.334(3). See MCL 399.205(5); MSA 5.3407(5)(5) (pre-1992 amendments). Defendant twice applied to the newly formed commission for such a permit, but the commission denied the permit both times. Defendant appealed the second decision to the State Historic Review Board, which affirmed the commission's decision.

Plaintiff brought suit in circuit court to enforce a finding by the commission that defendant committed "demolition by neglect," which is defined as "neglect in maintaining, repairing, or securing a resource that results in deterioration of an exterior feature of the resource or the loss of structural integrity of the resource." MCL 399.201a(g); MSA 5.3407(1a)(g). Defendant filed counter and third-party claims, raising several issues that included a review of the commission's denial of a permit to remove or demolish the Towner House. Because defendant's counterclaims were filed within sixty days after the board filed its decision, the lower court treated defendant's claims as a timely appeal pursuant to the Administrative Procedures Act, MCL 24.304; MSA 3.560(204). All parties filed motions for summary disposition, but the lower court granted only plaintiff's and counterdefendants' motions.

II

Defendant first argues that the lower court erred in denying its motion for summary disposition because enforcement of the ordinance against it violates one or more of its constitutional rights. We review constitutional questions of law de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). We also review the lower court's decision regarding the summary disposition motions de novo. *Ladd v Ford Consumer Finance Co, Inc*, 217 Mich App 119, 124; 550 NW2d 826 (1996).

A

Defendant argues that application of the ordinance against it substantially burdens its free exercise of religion as prohibited by the Religious Freedom Restoration Act (RFRA), 42 USC 2000bb *et seq.* Under the RFRA the government could not substantially burden the exercise of religion, even if the burden resulted from a rule of general applicability, unless the government showed that the law or regulation furthered a compelling interest and was the least restrictive means of furthering that end. 42 USC 2000bb-1. However, the Supreme Court recently nullified the RFRA, holding that Congress exceeded its power when it enacted the RFRA. *City of Boerne v Flores*, ___ US ___, 117 S Ct 2157; 138 L Ed 2d 624 (1997). Therefore, the framework in which to analyze the ordinance in this case is the minimal standard of review established in *Employment Division, Dep't of Human Resources of Oregon v Smith*, 494 US 872; 110 S Ct 1595; 108 L Ed 2d 876 (1990), and the reasoning of the majority opinion of the Supreme Court in *Flores, supra*, which was decided within the context of a historical landmark ordinance.

Under the *Smith* and *Flores* approach, buildings with religious uses are subject to generally applicable, otherwise valid land use regulations, even when the building owner attempts

to raise the claim of a first amendment infringement. See, e.g., *St Bartholomew's Church v City of New York*, 914 F2d 348, 353-356 (CA 2, 1990) (using the reasoning of *Smith* to validate the application of New York City's landmark ordinance and to prevent a church from constructing an addition to be used as an office building). Here, the ordinance applies to all building owners within the historic district without distinction. Thus, the ordinance is a facially neutral, generally applicable law requiring only minimal review to determine that prohibiting the exercise of religion is not the object of the ordinance but merely the incidental effect.

Assuming, *arguendo*, that the burdens alleged by defendant affect religiously motivated conduct, the burdens are still only incidental effects of the ordinance. For example, if allocating funds in defendant's budget for renovation of the Towner House would decrease the funds available for other areas of defendant's mission, this effect does not indicate that the ordinance singles out defendant for differential treatment. Likewise, the fact that renovation of the Towner House would presumably prohibit defendant from adding on-site parking and expanding its memorial garden or greenspace results in only incidental effects. Finally, defendant's reliance on provisions from its Book of Order to show that all church money must be used for religious purposes is insufficient to show that the object of the ordinance is prohibiting the exercise of religion where defendant could use the Towner House for religious purposes. Although defendant's control of its financial resources may be fundamental to its free exercise of religion, the ordinance in question here does not directly force defendant into refraining from spending money in certain areas, such as outreach to the community; rather, the effect on defendant's budget plan is not only uncertain but also incidental to enforcement of the ordinance. Thus, the ordinance in this case does not give the historic preservation commission authority over defendant's ecclesiastical decisions. In short, the ordinance is a law of general application which does not burden defendant any more than other citizens, let alone burden defendant because of its religious beliefs.

B

Next, defendant argues that enforcement of Ypsilanti's ordinance amounts to an unconstitutional regulatory taking. Defendant cites only the federal guarantee against unlawful takings, which is no more protective than the state guarantee. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 184 n 10; 521 NW2d 499 (1994). It states: "nor shall private property be taken for public use, without just compensation." US Const, Am V. The federal guarantee is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Electro-Tech v H F Campbell Co*, 433 Mich 57, 67 n 11; 445 NW2d 61 (1989).

The Supreme Court's most recent pronouncement on the topic is that property may only be taken when there exists an "essential nexus" between the taking and a legitimate state interest, and when there is "rough proportionality" between the manner of the taking and actual state interest involved. *Dolan v City of Tigard*, 512 US 374; 114 S Ct 2309, 2319; 129 L Ed 2d 304 (1994). Neither plaintiff nor defendant denies that the city has a legitimate interest in historical preservation. However, defendant argues that no essential nexus nor rough proportionality exists between historical preservation and the regulation in this case because defendant is solely required to bear the economic burden of a benefit conferred on the entire community.

Within the context of historical preservation, the Supreme Court rejected that precise argument. In *Penn Central Transportation Co v New York City*, 438 US 104, 138; 98 S Ct 2646; 57 L Ed 2d 631 (1978), the Court held that application of New York’s landmarks law to the terminal property did not constitute a “taking” of the property within the meaning of the Fifth Amendment. The Court stated:

Legislation designed to promote the general welfare commonly burdens some more than others. . . In any event, appellants’ repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal – all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole – which we are unwilling to do – we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. [*Id.* at 438 US 133-135 (footnotes omitted).]

Here too, the fact that the ordinance in this case affects defendant more severely than others does not itself result in “taking.” Historical preservation benefits all the citizenry both economically and by improving the overall quality of life in Ypsilanti.

III

Defendant next argues that the commission abused its discretion in denying defendant a permit to remove or demolish the Towner House. This Court reviews an administrative decision in the same limited manner as does the circuit court. *Barker Bros Construction v Bureau of Safety & Regulation*, 212 Mich App 132, 141; 536 NW2d 845 (1995). To reverse an agency’s decision as an abuse of discretion under MCL 24.306; MSA 3.506(206), a court must find a result so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or an exercise of passion or bias. *Kurzyniec Estate v Dep’t of Social Services*, 207 Mich App 531, 537; 526 NW2d 191 (1994). We do not find an abuse of discretion here.

Upon receiving defendant’s application for a permit to remove or demolish the Towner House, the Historic District Commission was required to grant the permit if defendant had shown that one or more of the following conditions prevailed:

- (1) The resource constitutes a hazard to the safety of the public or the occupants.
- (2) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community.
- (3) Retaining the resource will cause undue financial hardship to the owner.

(4) Retaining the resource is not in the interest of the majority of the community.
[Historic District Ordinance, art 2, ch 55, § 5.334(3). See MCL 399.205(5); MSA 5.3407(5)(5).]

The commission concluded that defendant had not shown any of the three relevant grounds (1, 3, or 4) and denied the permit. Its decision was affirmed by the State Historic Review Board.

The testimony and exhibits presented before the two agencies reveal that the decision to deny defendant a permit was supported by competent, material and substantial evidence on the whole record. First, there was video evidence that the Towner House was in disrepair, but there was also testimony that the house did not constitute a safety hazard and could be saved. Next, there were estimates about the costs of rehabilitation beginning at \$74,000 and evidence about the church's annual budget of approximately \$130,000, with thirty percent allocated to building repair. Last, there were letters and testimony from community residents and organizations in support of both parties. Based on this record, both agencies agreed that the permit to remove or demolish the Towner House should be denied. Even if this Court were to believe that it would have decided the case differently had it been in the place of the agency, the administrative decision in this case does not rise to the level of abuse required for reversal.

IV

Last, defendant argues that its indemnification claim survived the expired statute of limitations. The applicable standard of review under MCR 2.116(C)(7) requires this Court to accept all of the complainant's well-pleaded allegations as true and to construe them most favorably to the complainant. *Jones v State Farm Mutual Automobile Ins*, 202 Mich App 393, 396; 509 NW2d 829 (1993). Additionally, this Court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties. *Id.* at 396-397; MCR 2.116(G)(5). The motion should not be granted unless no factual development could provide a basis for recovery. *Jones, supra* at 397.

Defendant's breach of contract claim is based on its lease with the foundation that provided that the foundation would keep the premises in good repair in exchange for one year to find a new location for the Towner House. The lease between defendant and the foundation was entered into in 1974, renewed several times, then terminated in 1981. Defendant brought this counterclaim against the foundation on April 6, 1994. Because the statute of limitations governing an action to recover damages for breach of a contract is six years, MCL 600.5807(8); MSA 27A.5807(8), the foundation correctly argues that the statute of limitations expired in 1987 and that this action is barred. However, defendant argues that the indemnification provision contained in the parties' lease survived the termination in 1981 and therefore provides defendant a cause of action more than six years later. The sentence on which defendant relies is taken from the section in the lease on the tenant's covenants and stated the following: "Tenant further agrees to indemnify Landlord from any liability whatsoever arising from the continued existence of the structure on the land at 303 North Huron Street, Ypsilanti, Michigan."

An indemnity contract is construed in accordance with the rules for the construction of contracts in general. *Triple E Produce Corp v Mastronardi Produce Ltd*, 209 Mich App 165, 172; 530

NW2d 772 (1995). Indemnity contracts should be construed to effectuate the intent of the parties, which may be determined by considering the language of the contract, the situation of the parties, and the circumstances surrounding the making of the contract. *Id.* Also, an indemnity contract should be strictly construed against the party who drafts the contract and the party who was the indemnitee. *Id.* The sentence from the lease quoted above is ambiguous and does not reveal the intent of the parties about the duration of the indemnity provision. Moreover, the foundation is apparently no longer in existence. Finally, the circumstances surrounding the lease indicate that the parties considered the lease a determinate contract, which required annual renewals and which had as its primary objection the relocation of the Towner House. These factors suggest that it was the understanding of the parties that the indemnity provision was to be exercised, if at all, during the term of the lease. At most, the provision meant that any right to indemnification that defendant had arising from the lease was lost in 1987, when the six-year statute of limitations expired.

Affirmed.

/s/ Janet T. Neff