

STATE OF MICHIGAN
COURT OF APPEALS

TG DEVELOPMENT, LLC,

Plaintiff-Appellant,

v

CITY OF ROCHESTER HILLS,

Defendant-Appellee.

UNPUBLISHED

August 16, 2002

No. 232855

Oakland Circuit Court

LC No. 00-020928-CZ

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in this action in which plaintiff sought an injunction and money damages against defendant as a result of defendant's adoption of Traffic Control Order WT-24 ("TCO WT-24"). We affirm.

Plaintiff is the owner of a proposed single-family residential site condominium development to be known as "Shortridge Estates" in the city of Rochester Hills. The land consists of sites that require ingress and egress by Shortridge Road, which is a local residential road. Between November 1998 and June 1999, a Special Assessment District was established to pave the deteriorated gravel streets in the neighborhood where plaintiff's property is located. Preliminary work for the paving project commenced in May 1999, and upon completion of the preliminary work the street paving began.

Plaintiff's predecessor-in-interest¹ submitted a Final Site Condominium Plan to the city planning commission and the plan was approved on October 19, 1999. On November 1, 1999, the city engineer issued a land improvement permit for Shortridge Estates authorizing grading and earthwork to commence.

Inclement weather and the closure of local asphalt plants in November 1999 caused the paving contractor to suspend the paving project until the spring of 2000. At the time the paving project was suspended, two and one-half inches of the planned four-inch thickness of asphalt on the street was completed. Evidence was presented that truck traffic with normal loading on

¹ Plaintiff acquired the property on December 7, 1999.

incompletely paved asphalt streets, at that time of year, presented a significant and present risk and danger to the road pavement and threatened the integrity and viability of the road base. In addition, such heavy traffic could be expected to cause not only immediate damage but also latent damage to the streets that might not be detectable until much later. Because of these risks, the city traffic engineer ordered, by TCO WT-24, that reduced load restrictions go into effect on November 22, 1999. Signs notifying the public of the reduced load restrictions were installed on November 30, 1999, at all street entrances to the project area. The effect of TCO WT-24 was to implement seasonal load restrictions three months earlier than the restrictions would otherwise have been implemented.²

Plaintiff filed suit against defendant seeking relief in the form of an injunction and money damages as a result of the adoption of TCO WT-24.³ Essentially, plaintiff claimed that TCO WT-24 as applied to its property completely eliminated all means of ingress and egress because it could not use its trucks to bring heavy equipment to the site. Plaintiff also claimed that it did not receive notice of the reduced load restrictions, thereby depriving it of due process of law. The trial court granted summary disposition of the taking claim, finding that it was undisputed that ingress and egress routes remained, albeit with weight restrictions, and that plaintiff suffered an inconvenience, not an unconstitutional taking. The trial court also found that the undisputed evidence showed that public notice of the reduced load restrictions was provided and, therefore, granted summary disposition of the due process claim.

We review the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(10) de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing such a decision, we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A land-use regulation effectuates a taking where the regulation does not substantially further a legitimate governmental interest or where the regulation deprives the owner of economically viable use of the land. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 67; 592 NW2d 724 (1998). Here, plaintiff conceded at the hearing on the motion for summary disposition that it was "not questioning the [reasonableness of] the ordinance." Rather, plaintiff argued that a taking occurred because TCO WT-24 "completely barred access" to plaintiff's property because heavy trucks and machinery were prohibited from traversing Shortridge Road while the reduced load restrictions were in place. The inquiry, therefore, is whether TCO WT-24 denied plaintiff an economically viable use of its land.

Plaintiff carries the burden of proving that the value of its land has been destroyed by the regulation or that it is precluded from making use of the property. *Bevan v Brandon Twp*, 438

² Seasonal load restrictions went into effect throughout Oakland County on February 28, 2000.

³ The claim for an injunction and the claim seeking damages for inverse condemnation were dismissed by stipulation of the parties.

Mich 385, 403; 475 NW2d 37 (1991). Here, plaintiff argues that the seasonal reduced load restrictions rendered its development plans impossible. However, the undisputed evidence reveals that Shortridge Road remained open during all relevant time periods. Plaintiff's right of ingress and egress remained, with the only limitation being that plaintiff had to utilize vehicles subject to the weight restrictions while the reduced load restrictions were in effect. Plaintiff's claim that the ordinance "completely barred" its access to the property is not supported by the record. At most, plaintiff established only that it could not access the property using the vehicle of its choice during the time that the reduced road restrictions were in effect. Plaintiff therefore suffered an inconvenience that does not amount to a temporary taking of property. See, e.g., *Hough v State Hwy Comm'r*, 1 Mich App 554, 556; 137 NW2d 289 (1965) (mere inconvenience caused by the necessity to use a more indirect route to travel in certain directions is not a deprivation of access).⁴

Plaintiff also argues that summary disposition of its due process claim was improperly granted. We disagree. Evidence was presented that established public notice of the weight restrictions was provided through the placement of signs at the entrances to all streets entering the project area and that the signs were in place before plaintiff acquired the property. The affidavit of plaintiff's president attesting that he personally did not observe the signs is insufficient to create a factual dispute.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

⁴ Plaintiff's reliance on *Thom v State Hwy Comm'r*, 376 Mich 608; 138 NW2d 322 (1965) is misplaced as that case is factually distinguishable. In *Thom*, the grade of the highway in front of the Thom property was altered, resulting in a grade ten feet higher than the drive at the southern intersection and eight feet higher than the drive at its northern intersection. Undisputed evidence was presented that the change in the highway grade made the usual access to the plaintiff's property very difficult and caused a substantial diminution in the property's value. Unlike the present case, *Thom* involved more than an ordinary inconvenience. See, e.g., *Spiek v Transportation Dep't*, 456 Mich 331, 345 n 12; 572 NW2d 201 (1998).