

STATE OF MICHIGAN
COURT OF APPEALS

NOLAN BROTHERS OF TEXAS, INC.,

Plaintiff-Appellant,

v

CITY OF ROYAL OAK,

Defendant-Appellee.

UNPUBLISHED

August 3, 1999

No. 208054

Oakland Circuit Court

LC No. 94-476709 CZ

Before: Doctoroff, P.J., and Markman and J.B. Sullivan*, JJ.

PER CURIAM.

In this zoning dispute, plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).¹ We affirm.

Plaintiff alleges that the trial court erred in granting summary disposition in favor of defendant where genuine issues of material fact existed with respect to whether defendant's zoning of plaintiff's property was arbitrary and capricious and deprived plaintiff of all use of the property. We disagree. We review de novo a trial court's decision regarding a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 210 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* at 338. The court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.* The party opposing the motion has the burden of showing that a genuine issue of material fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences will be drawn in favor of the nonmovant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). The court must determine whether a record could be developed that would leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

To successfully challenge a zoning ordinance, plaintiffs must prove 1) that there is no reasonable governmental interest being advanced by the present zoning classification, or 2) that the ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

legitimate land use from the area. *Kirk v Tyrone Twp*, 398 Mich 429, 439; 247 NW2d 848 (1976). Zoning is valid if it is rationally related to the community's health, safety, welfare and prosperity and if the zoning remains a reasonable exercise of police power and is not used arbitrarily. *Frericks v Highland Twp*, 228 Mich App 575, 607-608; 579 NW2d 441 (1998). The body setting forth the zoning regulation is entitled to discretion and its decision will not be easily upset. *Kirk, supra* at 441. Zoning ordinances, like legislation, are presumed to be constitutional. *Id.* at 439.

Here, plaintiff first asserts that summary disposition of its due process claim was improper because genuine issues of material fact existed with respect to whether the rezoning of the land at issue from light industrial to multiple family residential (MFR) was arbitrary and capricious. However, after reviewing the documentary evidence submitted by the parties, we conclude that the trial court properly determined that, based on the undisputed facts, the zoning classification was not arbitrary and capricious.

A due process challenge to a zoning classification may be based on the argument that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question. *Kropf v City of Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974). Here, however, the undisputed facts indicate that the rezoning was reasonable. The rezoning was done in accordance with defendant's amended master plan, which called for increased residential properties. A zoning classification that advances a city's master plan is evidence of reasonableness. *Troy Campus v City of Troy*, 132 Mich App 441, 457; 349 NW2d 177 (1984). Although plaintiff argues that defendant's master plan was invalid because defendant failed to conduct comprehensive surveys to substantiate the need for increased residential property, plaintiff has not presented evidence to support such an argument. The affidavit of Steve Lehoczky merely stated in a conclusory fashion that defendant's master plan was not properly compiled, without any factual allegations supporting that statement. Furthermore, Phillip McKenna's report apparently was based on the belief that the plan was thirty years old, and did not comment on the validity of the 1991 amendment of the plan.

Further support for the reasonableness of the rezoning was shown in the minutes from the Planning Commission's meetings, which include discussions regarding the need for increased residential property as opposed to industrial development. These meetings were open to the public and the Planning Commission received comments from the public as to the desirability of the new designation. Other reasons for the rezoning included "the enhancement and preservation of neighborhood property values, the enhancement of the local economic base, and the enhancement of the local tax base." Defendant had an obvious interest in providing additional housing for its growing community and rezoned the property in conjunction with its effort to de-emphasize the industrial aspects of the city and meet the need for housing. Plaintiff has failed to show that defendant did not act for such purposes or that the purposes were not legitimate. *Kropf, supra* at 161. Thus, plaintiff has not demonstrated a genuine fact issue with respect to whether the rezoning was arbitrary and capricious.

Plaintiff makes much of the fact that defendant, rather than purchasing the property, simply opted to rezone it so that defendant could retain control of its development. Plaintiff sees this as underhanded. However, the Zoning Enabling Act allows cities to control development without purchasing the land so

long as that control does not deprive the owner of the use of the property. MCL 125.581; MSA 5.2931; *Troy Campus, supra*, 132 Mich App 451.

Plaintiff next argues that the trial court erred in granting summary disposition of its claim that the MFR zoning classification amounted to a taking of the property without just compensation because genuine issues of material fact existed with respect to whether the property was economically viable with an MFR zoning classification.

Although “an ordinance may advance the public welfare, it is invalid [if] it amounts to a condemnation of property for a public purpose without compensation.” *Troy Campus, supra*, at 451. A zoning ordinance that has the effect of precluding the use of the property for any purpose to which it was reasonably adapted constitutes a taking of property without just compensation in violation of the state and federal constitutions. *Id.* However, a plaintiff must show more than the fact that the property would be more lucrative if given a different designation. *Bell River Ass’n v China Twp*, 223 Mich App 124, 133; 565 NW2d 695 (1997). “Mere diminution in value does not amount to taking.” *Id.*

Here, plaintiff argues that it has been deprived of the use of the property because the property cannot feasibly be developed with an MFR designation. Plaintiff points to the increased traffic volume, noise levels from the expressway and the active railroad, the high-powered power lines, and the cost of contamination clean-up. Thus, plaintiff alleges that, because the property cannot be developed with an MFR designation, he was denied the use of the property for any purpose for which it was adapted. However, defendant presented evidence that a similar parcel across the railroad tracks from the property in dispute had successfully developed a condominium association. In addition, plaintiff has been offered \$750,000 for the property in dispute so that it may be developed in accordance with its MFR designation. Plaintiff maintains that the court should not have considered the similar developed parcel or the offer to purchase because neither of these factors were in existence at the time the property in issue was rezoned. While it is true that the reasonableness of zoning is measured by the conditions present at the time of the zoning, “we cannot believe that this Court is required to close its eyes to developments or improvements within the municipality which are imminent or a factual certainty.” *Kropf v City of Sterling Heights*, 41 Mich App 21, 26; 199 NW2d 567 (1972), rev’d on other grounds 391 Mich 139 (1974). Thus, plaintiff has not demonstrated a genuine fact issue with respect to whether the zoning classification constituted a taking of the property without just compensation.

Plaintiff further argues that the trial court erred in applying the “best use” test to the property in dispute. Property need not be zoned in order to obtain the best or most lucrative use so long as it can feasibly be used as zoned. *American Bakery v City of Warren*, 55 Mich App 245, 248; 222 NW2d 200 (1974). However, a review of the record clearly reveals that the trial court did not apply the “best use” test. Rather, the court concluded that there was a mere difference of opinion as to how the property could be developed. Validity of a zoning ordinance should be upheld if the question is debatable. *Zaagman, Inc v City of Kentwood*, 61 Mich App 693, 705; 233 NW2d 146 (1975).

Finally, plaintiff argues that summary disposition was premature where discovery had not come to a close. Summary disposition is premature if discovery is incomplete. *Mackey v Dep’t of*

Corrections, 205 Mich App 330, 333; 517 NW2d 303 (1994). However, summary disposition is appropriate if there is no chance that any further discovery would result in support of the nonmoving party. *Id.* This case began in 1994. Trial was set to begin only two months from the date that the trial court granted summary disposition. Plaintiff has failed to demonstrate that further discovery would have supported its position. Therefore, summary disposition was not premature.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Stephen J. Markman

/s/ Joseph B. Sullivan

¹ The order granting summary disposition does not indicate under which subrule of MCR 2.116(C) summary disposition was granted. However, because the trial court clearly considered the documentary evidence submitted by the parties, we will presume that summary disposition was granted pursuant to MCR 2.116(C)(10).