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IN THE
COURT OF APPEALS OF INDIANA

CESARE, LLC and
KEVIN MENSENDIEK,

Appellants-Plaintiffs,

vs.

CITY OF BEDFORD,
BEDFORD CITY COUNSEL, and
BEDFORD CITY PLAN COMMISSION,

Appellees-Defendants.

No. 47A01-0606-CV-262

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable William E. Vance, Special Judge
Cause No. 47C01-0501-PL-54

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants-Plaintiffs Cesare, LLC and Kevin Mensendiek (collectively, "Cesare") appeal a grant of summary judgment in favor of Appellees-Defendants City of Bedford, Bedford City Council ("the City Council") and Bedford City Plan Commission ("the Plan Commission") (collectively, "the City") upon Cesare's Complaint for Declaratory Judgment and Damages subsequent to the denial of an application for rezoning. We affirm.

Issue

Cesare presents a single issue for review: whether the trial court erroneously granted summary judgment to the City and denied summary judgment to Cesare.

Facts and Procedural History

Cesare owns real estate located in Bedford, Indiana, commonly known as 1604, 1606, 1608, 1610 and 1616 16th Street and 1607 P Street. The real estate is zoned residential, pursuant to the 1984 Revised Comprehensive Land Use Plan, Zoning Ordinance and Zoning Map ("the Comprehensive Plan").

On May 18, 2004, Cesare filed an Application for Rezoning with the Plan Commission, for the purpose of operating an Advance Auto Parts Store, a commercial entity. A preliminary hearing on the application was held before the Plan Commission on May 24, 2004. A public hearing on the Application was held before the Plan Commission on June 28, 2004. The Plan Commission recommended the denial of the rezoning application. On December 14, 2004, a public hearing was held before the City Council, which is the legislative body with the authority to adopt a zoning ordinance in the City of Bedford. On that same date, the City Council unanimously voted to deny the application.

On January 13, 2005, Cesare filed a "Verified Petition for Writ of Certiorari and Declaratory Judgment." (App. 1.) On August 5, 2005, the trial court dismissed the Petition for Writ of Certiorari. On December 8, 2005, the trial court granted Cesare leave to file an amended complaint, and, on January 9, 2006, Cesare filed an "Amended Complaint for Declaratory Judgment and Damages." (App. 7.) Therein, Cesare alleged that the City Council failed to pay reasonable regard to the statutory criteria for rezoning set forth in Indiana Code Section 36-7-4-603 and that the Comprehensive Plan was void for failure to publish proper notice of a public hearing as required by Indiana Code Section 36-7-4-507. Cesare sought damages of an unspecified amount.

On March 15, 2006, the City filed a motion for summary judgment, brief, and designation of materials. On April 14, 2006, Cesare filed a response, designation of materials, and a cross-motion for summary judgment in its favor upon an allegation of a taking without just compensation. The trial court conducted a hearing on the motions on May 1, 2006. On May 18, 2006, the trial court entered an order granting summary judgment in favor of the City, the City Council and the Plan Commission, and implicitly denying Cesare's motion for summary judgment. On May 31, 2006, the trial court directed the entry of final judgment. Cesare now appeals.

Discussion and Decision

A. Standard of Review

Pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Our standard of review is the same as that of the trial court when reviewing a grant of summary judgment. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). We consider only those facts that the parties designated to the trial court. Id. The Court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Id. A trial court's order on summary judgment is cloaked with a presumption of validity; the party appealing from a grant of summary judgment must bear the burden of persuading this Court that the decision was erroneous. Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), trans. denied. We may affirm the grant of summary judgment upon any basis argued by the parties and supported by the record. Payton v. Hadley, 819 N.E.2d 432, 437 (Ind. Ct. App. 2004).

Here, the parties filed cross-motions for summary judgment. The fact that cross-motions are filed does not alter our standard of review. KPMG, Peak Marwick, LLP v. Carmel Fin. Corp., Inc., 784 N.E.2d 1057, 1060 (Ind. Ct. App. 2003). Instead, each motion is considered separately to determine whether the moving party is entitled to judgment as a matter of law. Madrid v. Bloomington Auto Co., 782 N.E.2d 386, 391 (Ind. Ct. App. 2003). Finally, questions of law are reviewed de novo. Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000).

Rezoning is a legislative process, and the procedure for review of legislative action is

to bring a suit for declaratory judgment. Board of Comm'rs of County of Vanderburgh v. Three I Properties, 787 N.E.2d 967, 976 (Ind. Ct. App. 2003). By this process, a party may seek review of the action to determine constitutionality, procedural soundness or whether it was an arbitrary, capricious or unreasonable action. Id. Because the action is "legislative" as opposed to "judicial" in nature, the reviewing court is much more limited in its scope of review. Id.

Generally, whether to rezone a particular piece of property is a matter left to the sound discretion of the local legislative body. Id. We will not intervene in the local legislative process as long as it is supported by some rational basis. Id. The courts may reverse a board or commission's decision regarding rezoning only if it is arbitrary or capricious; that is, the board or commission has taken willful and unreasonable action without consideration and in disregard of the facts or circumstances of the case. Id.

B. Analysis

On appeal, Cesare contends that the City was not entitled to summary judgment because (1) the Comprehensive Plan is void and (2) the Plan Commission and City Council failed to consider appropriate statutory factors and thus issued an arbitrary and capricious denial. Cesare further contends that it is entitled to summary judgment upon its claim for damages because the denial of its application constitutes a "taking without just compensation." Appellant's Br. at 19. We address each of these contentions in turn.

Voidness of Comprehensive Plan. Pursuant to Indiana Code Sections 36-7-4-201, 202, Indiana municipalities may establish an advisory plan commission to make recommendations to the legislative body of the municipality about the physical development

of the community. Borsuk v. Town of St. John, 820 N.E.2d 118, 121 (Ind. 2005). Plan commissions create comprehensive plans to promote efficiency and economy in the land use development process. Id. A comprehensive plan is a general, long-term blueprint used as a "guiding and predictive force" in the physical development of a community, and it plays a central role in zoning inasmuch as it rationally allocates land use with due consideration given to the community as a whole. Borsuk, 820 N.E.2d at 121.

Cesare claims that the City could not demonstrate its entitlement to summary judgment because the Comprehensive Plan adopted in 1984 is void ab initio for failure to properly publish notice of a public hearing. In 1984, Indiana Code Section 36-7-4-507 provided:

> Before the adoption of a comprehensive plan, the plan commission must give notice and hold a public hearing on:
> (1) the comprehensive plan; and
> (2) in the case of an advisory plan commission, a proposed ordinance for its enforcement.
> The commission must publish a notice of the time and place of hearing in accordance with IC 5-3-1.

Indiana Code Section 5-3-1-2(b) provided:

> If the event is a public hearing or meeting, notice shall be published one (1) time, at least ten (10) days before the date of the hearing or meeting.

The designated materials indicate that the following notice appeared in the Time-Mail newspaper for the City of Bedford, Indiana on April 12, 1984:

> Notice is hereby given that the Bedford City Plan Commission of the City of Bedford, Indiana will hold a Public Hearing April 23, 1984 at 7:00 p.m. in the City Hall on the proposed revised Zoning Map and Zoning Ordinances which are now on display at the Plan Commission office in City Hall. This meeting will be open for Public Participation.

(Appellant's App. 30.) Cesare contends that the omission of the words "comprehensive plan" is a fatal deficiency of the notice. However, his position is untenable because Indiana Code Section 36-7-4-507 did not mandate the use of particular words or phrases to describe the meeting agenda. In order to comply with the statutory requisites, the plan commission was to advise of time and place, and publish once at least ten days before the hearing. The notice at issue complied with these statutory requirements. The Comprehensive Plan is not void ab initio for failure to publish proper notice.[1]

Criteria to be considered upon rezoning request. Indiana Code Section 36-7-4-603 provides:

> In preparing and considering proposals under the 600 series, the plan commission and the legislative body shall pay reasonable regard to:
>
> (1) the comprehensive plan;
> (2) current conditions and the character of current structures and uses in each district;
> (3) the most desirable use for which the land in each district is adapted;
> (4) the conservation of property values throughout the jurisdiction; and
> (5) responsible development and growth.

Cesare argues that the Plan Commission and City Council ignored all the statutory factors and consequently, the decision was arbitrary and capricious.

The City Council was not required to make findings of fact to support the exercise of its legislative discretion. Board of Comm'rs of County of Vanderburgh, 787 N.E.2d at 977. The court may not inquire into the motives of the members of a local legislative body when

[1] We observe that the adoption of the Comprehensive Plan in 1984 did not change the zoning classification of the property at issue. It was residential property prior to 1984, and remains residential. Thus, had the trial court declared the 1984 ordinances void, as requested by Cesare, the declaration would not entitle Cesare to summary judgment in its favor.

they act in their legislative capacity. Id. Indeed, if there is any rational basis for a zoning decision from the objective facts, the actual motive for the decision becomes immaterial. Id. (citing Town of Schererville v. Vavrus, 180 Ind. App. 500, 389 N.E.2d 346, 352 (1979)). As such, in considering the Complaint for Declaratory Judgment regarding whether the legislative determination of the City Council was arbitrary and capricious and without a rational basis, the trial court was limited to reviewing its compliance with the statutory procedure for amending zoning ordinances, and limited to reviewing the evidence before it during its consideration. See id. Then, if the trial court found any rational basis supporting the determination, the law required the trial court to affirm that determination. Id.

Here, the record indicates the Plan Commission and the City Council did pay reasonable regard to the statutory factors. The minutes of their respective meetings reflect that they were concerned with evidence of the existing traffic congestion, the residential character of the neighborhood, including the presence of children and attendant safety concerns, the appearance of the adjacent buildings and the neighborhood noise levels. These concerns provide a rational basis for the legislative decision against rezoning the subject area.

Taking of Property without Just Compensation. Finally, Cesare contends that the denial of its rezoning request was an unconstitutional taking. The test for the "taking" of property was set forth in Taylor-Chalmers, Inc. v. Bd. of Comm'rs, 474 N.E.2d 531, 532 (Ind. Ct. App. 1985), reh'g denied:

> Some physical part of the real estate must be taken from the owner or lessor, or some substantial right attached to the use of the real estate taken before any basis for compensable damage may be obtained by an owner of real estate in an eminent domain proceeding. It must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public.

Subsequently, this Court observed in Rodman v. City of Wabash, "[o]riginally, the concept of taking may have contemplated only actual appropriation, but it is clear today that non-acquisitive governmental action may amount to a taking in the constitutional sense." 497 N.E.2d 234, 241-42 (Ind. Ct. App. 1986), trans. denied. Thus, governmental regulatory activity may amount to an unconstitutional taking even where no physical interference has occurred. DPF, Inc. v. Board of Comm'rs for Vanderburgh County, 622 N.E.2d 1332, 1334-35 (Ind. Ct. App. 1993), trans. denied. Diminution in property value caused by a regulation, standing alone, cannot establish a taking; however, a land-use regulation that denies all economically viable uses of land may constitute a taking. Borsuk, 820 N.E.2d at 123.

Inverse condemnation is the process provided by statute that allows individuals to be compensated for the loss of property interests taken for public purposes without use of the eminent domain process. Old Romney Dev. Co. v. Tippecanoe County, 817 N.E.2d 1282, 1285 (Ind. Ct. App. 2004). It serves to provide a remedy for a taking of property that would otherwise violate Article I, Section 21 of the Indiana Constitution, which provides, in relevant part: "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Id.

Indiana Code Section 32-24-1-16 provides the statutory remedy for inverse condemnation:

> A person having an interest in property that has been or may be acquired for a public use without the procedures of this [Eminent Domain] article or any prior law followed is entitled to have the person's damages assessed under this article substantially in the manner provided in this article.

There are two stages in an action for inverse condemnation. Old Romney, 817 N.E.2d at 1286. The first stage involves determining whether a taking of property has occurred. Id. The landowner must show that he or she has an interest in land that has been taken for a public use without having been appropriated under eminent domain laws. Id. If the trial court finds that a taking has occurred, the matter proceeds to the second stage where the court appoints appraisers and assesses damages. Id. An action for inverse condemnation is premature until such time as the landowner can establish that his property has been deprived of all economically beneficial or productive use. Mendenhall v. City of Indianapolis, 717 N.E.2d 1218, 1227-28 (Ind. Ct. App. 1999), trans. denied.

Here, Cesare did not designate materials to establish that it was deprived of all economically viable uses of its land, constituting a taking. Thus, with respect to an inverse condemnation claim, Cesare did not demonstrate the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. Cesare was properly denied summary judgment.

Conclusion

In light of the foregoing, Cesare has not demonstrated its entitlement to summary judgment nor has it established that the trial court erred by granting summary judgment to the City.

Affirmed.

RILEY, J., and MAY, J., concur.