STATE OF MICHIGAN

COURT OF APPEALS

DRAPROP CORP,

Plaintiff-Appellant,

v

CITY OF ANN ARBOR,

Defendant-Appellee,

and

CITY OF ANN ARBOR CITY COUNCIL and THE HISTORIC PROPERTY DISTRICT STUDY COMMITTEE,

Defendants.

UNPUBLISHED
March 13, 1998

No. 198235
Washtenaw Circuit Court
LC No. 95-004794-CZ

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ

PER CURIAM.

Plaintiff Draprop Corp appeals as of right from the trial court's September 1996 order and opinion granting defendant City of Ann Arbor's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff's complaint challenged defendant's decision to designate plaintiff's two residential rental properties as historically or architecturally significant properties. We reverse and remand for further proceedings.

Plaintiff owns two residential apartment buildings in Ann Arbor: the Planada Apartments, at 1127 East Ann Street, and the Anberay Apartments, at 616 East University Avenue. The Planada Apartments were constructed in 1929, and the Anberay Apartments were constructed in 1923.

Defendant adopted an Historic Preservation Ordinance, enacted pursuant to the Local Historic Districts Act (LHDA), MCL 399.201 *et seq.;* MSA 5.3407(1) *et seq.* In March 1990, defendant

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

created an individual historic properties district study committee to research and propose properties in Ann Arbor for designation as historically or architecturally significant sites. The committee initially considered 300 potential sites, including plaintiff's two apartment buildings. Although the list was later reduced to 73 sites, plaintiff's properties remained on the list. In August 1994, the committee held an informational meeting regarding the proposed historic designation for the 73 targeted properties. These properties would become part of defendant's historic register upon the city council's adoption of an ordinance proposing the same. Ann Arbor Ordinances, § 8:408(8). The city planning commission also held a formal public hearing regarding the properties in September 1994, and the city council held several public hearings in October 1994 where the historic designation issue was discussed. Plaintiff, through counsel, objected at each stage of the proceedings to the committee's inclusion of its properties in the historic preservation process. Although the city council had at one point decided to separately consider plaintiff's properties from the others on the list, defendant's city council passed an ordinance in November 1994 that incorporated all 73 originally-proposed properties within defendant's register of historic places.

Plaintiff filed his complaint in June 1995 against defendant, its city council, and the Ann Arbor Historic Property District Study Committee alleging violations of procedural due process, substantive due process, and equal protection guarantees as well as unlawful taking without just compensation. The trial court dismissed plaintiff's action against the city council and the committee with prejudice for lack of timely filing service of process per MCR 2.102(E)(2).

Pursuant to defendant's motion for summary disposition under MCR 2.116(C)(4), (8), and (10), the trial court also entered its lengthy opinion and order granting defendant's motion for summary disposition under MCR 2.16(C)(10). As a starting point, the court recognized that the ordinance is "clothed with every presumption of validity, and it is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property," citing to *Hecht v Niles Twp*, 173 Mich App 453; 434 NW2d 156 (1988). The trial court found no genuine issue of material fact regarding plaintiff's substantive or procedural due process allegations because the LHDA, which enabled defendant to enact its historical preservation ordinance, constituted legislation rationally related to legitimate state land use concerns, i.e., the preservation of significant architectural buildings. The court also found that the ordinance provided both the right to notice and a meaningful time and manner of being heard with respect to the designation of historical sites. Moreover, the ordinance did not arbitrarily or capriciously limit land uses. Rather, only work that would "alter, move or demolish the building . . . in a manner that affects its exterior appearance visible from a public right of way . . ." requires the approval of defendant's historic preservation commission.

The court also found that, in the context of historic preservation ordinances, the mere fact that the ordinance fails to provide economic compensation to affected property owners did not establish a taking. In the court's estimation, "Draprop has not been denied the economically viable use of [its] land as they have not been prevented from the best use of the land," citing *Hecht, supra*. Absent any physical invasion of the property, the court refused to find that the historical designation applied to plaintiff's properties constituted a taking.

Finally, the court found no equal protection violation based on the need to obtain an owner's permission before designating a property as a "landmark" but not when designating property as an "individual historic site." Nevertheless, the court found that the ordinance bore a reasonable relation to the permissible legislative objective of preserving historic structures, thereby satisfying the rational basis test.

On appeal, plaintiff only challenges the trial court's rulings regarding the grant of summary disposition before the close of discovery, the grant of summary disposition regarding the designation of plaintiff's property as historic, plaintiff's substantive due process challenges, and whether the ordinance constitutes an unlawful taking. For the reasons stated below, we reverse the trial court's grant of summary disposition.

I

As its first issue on appeal, plaintiff asserts that it had insufficient time to conduct discovery before the trial court granted defendant's motion for summary disposition pursuant to MC 2.116(C)(10) and that expert testimony and other evidence not yet collected would support its assertion that genuine issues of material fact existed with respect to whether plaintiff's properties were architecturally and historically significant. While we disagree with the rationale that plaintiff provides, we believe that the trial court erred in granting summary disposition with respect to the designation issue.

We review de novo the grant of summary disposition pursuant to MCR 2.116(C)(10) and will affirm where, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Fitch v State Farm Fire and Casualty Co*, 211 Mich App 468, 470-471; 536 NW2d 273 (1995). We must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the nonmoving party and grant the benefit of any reasonable doubt to the opposing party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The court may not make factual findings or weigh credibility in deciding a motion for summary disposition. *Skinner, supra*; *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). Thus, this Court examines the facts in a light most favorable to plaintiff. *Radtke, supra; Manning v Hazel Park*, 202 Mich App 685, 689-690; 509 NW2d 874 (1993).

II

A brief synopsis of the statutory and regulatory enactments relevant to this case is necessary. In 1970, the Legislature passed the LHDA, MCL 399.201 *et seq.;* MSA 5.3407(1) *et seq*., the enabling act that permits defendant to enact its own historic preservation ordinance.[1] Under § 2 of the LHDA,

> Historic preservation is declared to be a public purpose and the legislative body of a local unit may by ordinance regulate the construction, addition, alteration, repair,

moving, excavation, and demolition of resources in historic districts within the limits of the local unit. The purpose of the ordinance shall be to do 1 or more of the following:

(a) Safeguard the heritage of the local unit by preserving 1 or more historic districts in the local unit that reflect elements of the unit's history, architecture, archeology, engineering, or culture.

(b) Stabilize and improve property values in each district and the surrounding areas.

(c) Foster civic beauty.

(d) Strengthen the local economy.

(e) Promote the use of historic districts for the education, pleasure, and welfare of the citizens of the local unit and of the state. [MCL 399.202; MSA 5.3407(2); emphasis added.]

Section 1a(i) of the LHDA, MCL 399.201a(i); MSA 5.3407(1a)(i), defines an "historic district" as "an area, or group of areas not necessarily having contiguous boundaries, that contains 1 resource or a group of resources that are related by history, architecture, archeology, engineering, or culture." Section 1a(r), MCL 399.201a(r); MSA 5.3407(1a)(r), defines a "resource" as "1 or more publicly or privately owned historic or nonhistoric buildings, structures, sites, objects, features, or open spaces located within a historic district" (emphasis added).[2]

Defendant's historic preservation ordinance, Ann Arbor Ordinances, Ch. 103, §§ 8:405-8:417, adopts in large part the language of the LHDA but also expands upon the definitions in the LHDA. Notably, § 8:405(1) of the Ann Arbor Ordinances adds some additional language to § 2(a) of the LHDA, in pertinent part:

The purpose of this chapter is to:

(1) Safeguard the heritage of the city by preserving historic districts *as well as the individual buildings, structures, sites and objects within the districts in the city* which reflect elements of the city's cultural, social, economic, political or architectural history. [Emphasis added.]

Unlike the LHDA, the ordinance mentions "individual" buildings within an historic district and defines "individual historic property" as "[a]n individual building, structure, site or object which has historical significance and which has been designated as a part of an historic district by ordinance of the city council pursuant to MCL 399.201 *et seq.*" Ann Arbor Ordinances, § 8:406(9) (emphasis added).

III

Although neither of the parties spends any significant time discussing either the LHDA or defendant's ordinance, we believe that a closer analysis of both leads us to the inescapable conclusion

that summary disposition was inappropriate because genuine issues of material fact exist as to whether plaintiff's properties are within an historic district.[3] Under the LHDA, the Legislature permits local units, such as defendant, to establish historical districts in order to achieve the goals of historic preservation. Nothing in the LHDA enables defendant to pass an ordinance permitting it to select individual, isolated homes or buildings randomly located throughout the city limits that have historical significance. Rather, both the LHDA and defendant's ordinance require that historic preservation occur through the formation and amendment of historic *districts*—not individual historic buildings.

We also note that under MCL 324.2140(b); MSA 13A.2140(b), the Legislature has provided that when a property or site is listed as a national historic landmark, on the national register of historic places, on the state register of historic sites, or is "recognized under a locally established *historic district*" pursuant to the LHDA, an historic preservation easement is created. That easement is "an interest in land that provides a limitation on the use of a structure or site" falling into one of the above-mentioned four categories and is enforceable against the owner of the property by the governmental entity holding the easement. MCL 324.2140(b); MSA 13A.2140(b); MCL 324.2142; MSA 13A.2142. Nowhere in this statute does the Legislature discuss individual historic properties located outside historic districts or require individual historic property owners to give historic preservation easements to the local unit that assigned the historic designation to that singular site. Accordingly, we believe that this related statute supports our conclusion that the LHDA only permits the establishment of local historic districts.

Moreover, even though § 8:406(9) of defendant's historic preservation ordinance defines individual historic property, we find no evidence on the limited record before us establishing that plaintiff's properties satisfy both parts of that definition, i.e., (1) an individual building, structure, site or object that has historical significance, and (2) that has been *designated as a part of an historic district* pursuant to the LHDA.[4]

Accordingly, we believe that genuine issues of material fact exist regarding whether plaintiff's properties are located within historic districts. Upon resolving this factual question, the trial court must also then determine whether defendant, through its Commission, has operated within the ambit of the LHDA and its own historic preservation ordinance in designating plaintiff's properties as historically significant. We therefore reverse the trial court's order granting summary disposition in favor of defendant and remand for further fact finding and proceedings consistent with this opinion. Because the trial court's resolution of whether defendant operated within the confines of the LHDA and defendant's own historic preservation ordinance is outcome determinative, we need not reach the merits of plaintiff's constitutional challenges. Needless to say, should the court find that defendant cannot so designate plaintiff's properties, the constitutional challenges are irrelevant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan

[1] As our Supreme Court observed in *Bivens v Grand Rapids*, 443 Mich 391, 397; 505 NW2d 239 (1993):

> Municipal corporations have no inherent power. They are created by the state and derive their authority from the state. An ordinance enacted by the governing body of a home rule city is valid only if it is consistent with the powers conferred by the state in its constitution and statutes, and if it falls within the scope of authority delegated by the electorate in the city's charter. [Emphasis added.]

We presume that Ann Arbor is a home rule city, pursuant to MCL 117.1 *et seq.;* MSA 5.2081(1) *et seq.*

[2] Although this specific question is not now before us, at this point we can anticipate the argument that simply redesignating these individual properties as historic districts would comply with the letter of the law. It may, but we believe it likely conflicts with the spirit of the legislation and would require a piecemeal reading of the legislation. Reading the legislation in its entirety, we believe the legislators' intent is more likely that an historic district, i.e., an area or group of areas, cannot consist of one individual building.

[3] The only evidence we can find in the limited record below regarding the location of plaintiff's properties with respect to historic districts is contained in the affidavit of Gary Cooper, an architect who has renovated two of plaintiff's other properties located within the Old Fourth Ward Historic District. According to Cooper, the Planada Apartments are not located within an historic district. Further, we found a map of defendant city with dots showing the location of the 73 designated properties. Both of plaintiff's properties were relatively close to the University of Michigan campus and were not adjacent to any of the other proposed historic structures. Accordingly, we find that the limited record before us reveals disputed issues of material fact.

[4] In light of the arguments raised in this case, the Legislature may find it prudent to revisit and clarify the LHDA.