STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

CBC JOINT VENTURE,
Plaintiff,

v.

Case No. 15-149783-CZ
Hon. James M. Alexander

THE CITY OF THE VILLAGE OF CLARKSTON,
Defendant.

_____/

ORDER RE: MOTION FOR SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. The facts of this case are largely not in dispute. Plaintiff owns real property located at 59 S. Main Street in Defendant The City of the Village of Clarkston.

Although the Property is currently zoned RM (multiple-family residential) and operates as an apartment home, over the years, it has also been zoned for and used as: (1) a doctor's office, (2) a house and apartment, (3) a bar/restaurant, and (4) a fruit and vegetable market.

In February 2015, Plaintiff filed an application for re-zoning to obtain VC (Village Commercial) zoning. Plaintiff's intent is to operate the Property as a bar and restaurant. In March 2015, the City Planning Commission recommended that the request for re-zoning be granted.

Defendant's planning consultant, Richard Carlisle, then reviewed Plaintiff's application and issued a report dated March 9, 2015. In this report, Mr. Carlisle indicated that he was "inclined to recommend that commercial zoning is appropriate," but he "would be more comfortable knowing the

request has been more narrowly refined." The same day, the City Council sent Plaintiff's request back to the Planning Commission for discussion of conditional re-zoning to a restaurant/bar (rather than generally commercial) use.

On June 11, 2015, Plaintiff then filed an amended Application for re-zoning the Property to VC, specifically limiting the use to restaurant/bar. On June 30, 2015, Mr. Carlisle again recommended approval for "commercial use of the property" – indicating the same was "both compatible and consistent with the stated intent of the Ordinance," and doing so would bring "consistent zoning in this location." But Mr. Carlisle also indicated that the new use "must be conducive to the historic nature of the property."

After providing Plaintiff with notice and an opportunity to be heard, on August 10, 2015, the City Council voted to deny Plaintiff's re-zoning request.

In October 2015, Plaintiff then filed the present Complaint on claims that: (Counts I-III) Defendant violated Plaintiff's equal protection and due process rights, (Counts IV and V) Defendant's actions amounted to a taking under the United States and Michigan Constitutions, and (Count VI) Defendant's actions constituted to a deprivation of rights under 42 USC § 1983.

Generally, Plaintiff claims that Defendant had no legitimate reason to deny its re-zoning request – particularly when faced with nearly identical requests from others, Defendant historically granted the same. Plaintiff further claims that Defendant consistently granted similar re-zoning requests made by Kirk Catallo, the son of City Councilmember Sharon Catallo – including operating a bar/restaurant and an industrial kitchen directly across the street from Plaintiff's property.[1] In other words, Plaintiff claims that it is being treated differently for no legitimate reason.

1 It is worth noting that the parties dispute whether Ms. Catallo "improperly influenced the Planning Commission and City Council to deny Plaintiff's requested re-zoning."

Defendant, on the other hand, claims that Plaintiff's re-zoning request was appropriately denied for the following reasons (internal citations and emphasis removed):

(1) Plaintiff's request is not consistent with the Clarkston Master Plan, which includes preserving the historic character of the City. Both Plaintiff's Property and the five homes to the south are all historic structures within the Historic District and were constructed as private residences over 100 years ago. A zoning change to VC-commercial would jeopardize the historic nature of the structure if Plaintiff's proposed restaurant were to fail.

(2) The current multifamily designation of Plaintiff's Property contributes to the spirit of the downtown area. As laid out in the Master Plan, "[m]ultiple family housing in the village center will contribute to the Main Street pedestrian activity and will add to the vitality of the downtown village core."

(3) The present zoning classification provides a good transition between historic homes to the south and VC-commercial properties to the north.

(4) Plaintiff's Property has been zoned for multifamily use since 1986 at Plaintiff's request. Residential property owners abutting Plaintiff's Property have relied on this zoning designation for thirty years. A sudden change would disturb the character of the area and the expectations of residents.

(5) Rezoning on the sole basis that Plaintiff's Property abuts or is across from commercially-zoned property is insufficient to grant rezoning. If this were the case, rezoning on that account alone would make it impossible for the City to deny rezoning requests from other similarly situated residential homes. This would create a "domino effect" and would in turn jeopardize the historic nature of the area.

Both sides now move for summary disposition under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999).[2]

As stated, Plaintiff's Complaint is based, in large part, on equal protection and due process

2 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. Maiden, 461 Mich at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. Id. at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. Id. at 120.

claims. Both the United States and Michigan Constitutions provide that no person shall be denied equal protection of the laws. US Const, Am XIV; Mich Const 1963, art 1, § 2. "When an ordinance is challenged on the basis of equal protection guarantees, the ordinance is presumed constitutional, and the challenging party has the burden to show that the established classification is not rationally related to a legitimate state interest." Houdek v Centerville Tp, 276 Mich App 568, 585; 741 NW2d 587 (2007)

Both the United States and Michigan Constitutions also guarantee due process to landowners. US Const, Am XIV; Mich Const 1963, art 1, § 17. Substantive due process requires that "a zoning ordinance must be reasonable in its operation, that whether it is so is the test of its legality, and that in the decision of such an issue each case must be determined on its own facts." Plum Hollow Golf & Country Club v Southfield Tp, 341 Mich 84, 87; 67 NW2d 122 (1954).

It is also well-settled that "procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard **by an impartial decision maker** at a meaningful time and in a meaningful manner." Mettler Walloon, LLC v Melrose Tp, 281 Mich App 184, 213-214; 761 NW2d 293 (2008) (emphasis added).

Finally, a 42 USC §1983 claim can be brought in either State or Federal Court. Martinez v State of Cal, 444 US 277, 283 n 7; 100 S Ct 553; 62 L Ed 2d 481 (1980). "A § 1983 claim must present two elements: (1) that there was the deprivation of a right secured by the Constitution and (2) that the deprivation was caused by a person acting under color of state law." Wittstock v Mark A Van Sile, Inc, 330 F3d 899, 902 (CA 6 2003).

Generally, when challenging the application or validity of an ordinance, our Supreme Court

has held:

> The important principles require that for an ordinance to be successfully challenged plaintiffs prove:
>
> > "(F)irst, that there is no reasonable governmental interest being advanced by the present zoning classification itself . . . or
> > "(S)econdly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question."
> > Kirk v Tyrone Tp, 398 Mich 429, 439; 247 NW2d 848 (1976); quoting Kropf v City of Sterling Heights, 391 Mich 139, 158; 215 NW2d 179 (1974).

The Kirk Court continued that there were "four rules for applying these principles" as outlined in Kropf. Id. These principles are:

1. The ordinance comes to us clothed with every presumption of validity.

2. (I)t 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 . . . . It must appear that the clause attacked is an arbitrary fiat, a whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its reasonableness.

3. Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.

4. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases.

Kirk, 398 Mich at 439–40 (internal citations and quotations omitted).

In other words, "'(a) zoning ordinance will be presumed valid, with the burden on the party attacking it to show it to be an arbitrary and unreasonable restriction upon the owner's use of his property.'" Kirk, 398 Mich at 440; quoting Nickola v Grand Blanc Twp, 394 Mich 589, 600; 232 NW2d 604 (1975).

Plaintiff first claims that it is entitled to summary disposition because the major part of the property in the immediate vicinity is zoned and used for commercial purposes, and as a result, "the imposition of residential restrictions on similarly situated property is unreasonable and invalid," citing Schaefer v City of E Detroit, 360 Mich 536; 104 NW2d 390 (1960) and Rogers v City of Allen Park, 186 Mich App 33; 463 NW2d 431 (1990).

A major reason Defendant articulates for denying Plaintiff's re-zoning request is based on the need for RM zoning to "buffer" or offer a "transition between non-residential districts and the lower density One-Family Residential District" under Article VII of its Zoning Ordinance.

But Plaintiff points out (and Defendant does not dispute) that several similar properties are zoned commercial without regard to proximity residential zoning. For example, Plaintiff points to its neighboring property, 55 S. Main; 54 S. Main; and 14 N. Main Street (amongst others), which are all zoned commercial and directly adjacent to residential-zoned properties. Further, Plaintiff argues that "[a]ll of the commercial properties on Main St from Waldon to 14 N Main St are adjacent to residential properties, with no 'buffer.'"

In other words, it is undisputed that Defendant routinely does not impose the "buffer" or "transition" residential restrictions on similarly situated property, and therefore, Defendant's decision to do so with Plaintiff's Property is "unreasonable and invalid" as considered by Schaefer and Rogers. Simply, Defendant's refusal to reclassify Plaintiff's Property is not consistent with general land use patterns in the area.

Next, Plaintiff argues that its proposed use is suitable for the area and is consistent with the planning recommendations. As stated, both the City Planning Commission (initially) and Defendant's planning consultant, Richard Carlisle (twice), recommended granting Plaintiff's re-

zoning request because, as Mr. Carlisle opined, doing so: (1) "would not be incompatible with the zoning and use of other properties in the immediate area," (2) "[f]or consistency, it would seem that this property should receive the same designation as the three properties to the north, and property on the opposite side of Main Street," and (3) "[g]iven the objectives of the District and the mixture of uses it promotes, commercial use of the property is both compatible and consistent with the stated intent of the Ordinance."

Further, it is undisputed that the Property at issue has been zoned and used for commercial purposes in the past (totaling some 50 years). It is also undisputed that the Property was actually used as a bar/restaurant for many years. Plaintiff's intended use and plans also includes preserving the historic character of the building on the property with minimal exterior changes – a stated objective in Defendant's Master Plan.

For the foregoing reasons, the Court finds that Plaintiff's proposed use of the Property is suitable for (and consistent with) the City's stated objectives in the subject area.

For all of the foregoing reasons, despite the fact that the Ordinance is presumed valid, the Court finds that the Defendant's denial of Plaintiff's VC re-zoning request was **arbitrary as applied to Plaintiff**. Specifically, the Court finds that, based on the undisputed evidence before it, Defendant has singled out Plaintiff's Property to apply different standards as applied elsewhere in the area. Defendant's decision to do so is arbitrary and capricious and not based on any legitimate rational reason.

As a result, Plaintiff's motion for summary disposition is GRANTED to the extent herein provided. Defendant is ordered to approve Plaintiff's re-zoning request and is enjoined from preventing Plaintiff from opening a restaurant/bar on the Property as proposed in Plaintiff's

Amended Application for re-zoning.[3]

Defendant's motion for summary disposition is also GRANTED, but **only** with respect to Plaintiff's Counts IV and V based on an illegal taking. Plaintiff has failed to establish that any taking has occurred, and said claims are DISMISSED.[4]

This Order is a Final Order that resolves the last pending claims and closes the case.

IT IS SO ORDERED.

January 4, 2017
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

3 Provided, however, that this Opinion in no way should be construed as requiring the City to approve any request for a liquor license – which is not an issue presently before the Court.

4 Specifically, Plaintiff has failed to establish that it has been "deprived of 'all economically beneficial or productive use of [his or her] land" as provided in Dorman v Twp of Clinton, 269 Mich App 638, 646; 714 NW2d 350 (2006). It appears undisputed that Plaintiff operates the property as a fully occupied apartment house and realizes some income from the same.

Further, Plaintiff cannot establish its entitlement to relief based on a "diminishing use" test under Penn Central Transportation Co v New York City, 438 US 104; 98 S Ct 2646, 57 L Ed 2d 631 (1978) because its alleged diminished-use claim is wholly based on speculation.