COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1024

SUSAN J. NIMCHICK & others[1]

vs.

CITY COUNCIL OF CHICOPEE & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs appeal from a summary judgment in the Housing Court upholding the validity of a zoning bylaw amendment. The judge found that the plaintiffs failed to put forth sufficient facts to demonstrate that the amendment was based on legally untenable grounds, or was otherwise arbitrary or capricious. We affirm.

Background. The summary judgment record reveals the following facts. Westover Building Supply, Inc. (Westover), is a construction supply company that conducts its business at 37 Telegraph Avenue in Chicopee. The three contiguous lots next to Westover comprise the approximately one-acre parcel at issue

[1] Bernadine E. Klin, Michael A. Klin, Donna J. Mekal, and Jill C. Nimchick.

[2] Adelard E. Jodoin, Margaret Jodoin, and Marcus Thayer.

(locus).[3] The locus and Westover share a block with a metal works shop, and are directly across the street from a church, which sits on the corner of a block comprised of lots zoned exclusively business A.

Adelard E. Jodoin filed a zone change application with the city council of Chicopee requesting the locus be changed from residential A to business A, for the purpose of expanding Westover. After recommendations of approval by the planning board and the zoning committee, the city council approved the zone change by a vote of eleven to two. The plaintiffs commenced an appeal from the city council's decision pursuant to the Zoning Act, G. L. c. 40A, § 17, seeking to annul the decision. The judge granted the defendants' motion for summary judgment, dismissing the case.[4] This appeal followed.

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[3] The original zone change application mistakenly listed four lots as comprising that locus, but was later corrected.

[4] The judge, in a margin notation, concluded "that the Plaintiffs have failed to assert facts that, even view[ed] in a light most favorable to them -- sufficiently support their claims that the defendant city based its decision to make a zone change on either legally untenable grounds or that the city's decision was arbitrary or capricious." The plaintiffs aver that this decision lacked findings of fact and rulings of law as required by G. L. c. 40A, § 17. This argument has no merit. See Albahari v. Zoning Bd. of Appeals of Brewster, 76 Mass. App. Ct. 245, 248 (2010) ("although the judge who reviews a zoning board decision pursuant to G. L. c. 40A, § 17, typically finds the facts de novo, . . . a judge who decides the case on motions for summary judgment engages in no fact finding at all").

Discussion. We review the judge's decision on a motion for summary judgment de novo. See Albahari v. Zoning Bd. of Appeals of Brewster, 76 Mass. App. Ct. 245, 248 (2010). "Summary judgment is appropriate where there is no genuine issue of material fact and, where viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." O'Sullivan v. Shaw, 431 Mass. 201, 203 (2000). See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). When the moving party does not bear the burden of proof at trial, the party may succeed by demonstrating that the opposing party "has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).[5]

On appeal, the plaintiffs claim that the zone change constitutes impermissible spot zoning, is based upon legally untenable grounds, and is unreasonable, whimsical, capricious, or arbitrary.[6]

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[5] We note that at oral argument the defendants withdrew their claim that the plaintiffs lack standing.

[6] The plaintiffs further assert that the city council members acted with ill will, bad faith, or malice to violate the timing requirements of G. L. c. 40A, § 5, or the plaintiffs' procedural and substantive due process rights. Contrary to the plaintiffs' assertions, the record does not demonstrate that they advanced these claims in their complaint or in their opposition to summary judgment materials. We therefore do not consider them. See Bruno v. Board of Appeals of Wrentham, 62 Mass. App. Ct.

1. Spot zoning. Spot zoning occurs where there is a "singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot." Marblehead v. Rosenthal, 316 Mass. 124, 126 (1944), quoting Whittemore v. Building Inspector of Falmouth, 313 Mass. 248, 249 (1943). Such zoning violates G. L. c. 40A, § 4, which requires zoning ordinances and bylaws to promote uniformity within the districts they create. See Rando v. North Attleborough, 44 Mass. App. Ct. 603, 606 (1998).

As is the case here, one claiming that a zoning amendment, a legislative act, amounts to spot zoning faces a heavy burden. See Van Renselaar v. Springfield, 58 Mass. App. Ct. 104, 108 (2003) ("[e]very presumption is to be made in favor of the amendment and its validity"). To prevail on a spot zoning claim, "the challenger must prove by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare." Johnson v. Edgartown, 425 Mass. 117, 121 (1997).

527, 531-532 (2004). It follows that the plaintiffs' claim that they are entitled to attorney's fees as a result of the city council members' ill will also fails.

After a thorough review of the summary judgment record, we agree with the judge that the plaintiffs, as a matter of law, cannot meet their formidable burden. Although, the plaintiffs' claim that the locus is situated in a ninety percent residential neighborhood, as support for their contention that the locus was improperly singled out to become a business district, the summary judgment record is clear that the locus sits at the border of a decidedly mixed-use district. See Martin v. Rockland, 1 Mass. App. Ct. 167, 169 (1973) (where "locus is at a borderline between a business and industry district and a residential district[,] . . . it could be properly zoned in either" district). Furthermore, the fact that the zoning amendment may benefit primarily Westover does not render it invalid. See Raymond v. Building Inspector of Brimfield, 3 Mass. App. Ct. 38, 42 n.4 (1975).

We must consider whether the record shows that the zone change "bears a rational relation to any permissible public object which the legislative body may plausibly be said to have been pursuing" (quotation and citation omitted). W. R. Grace & Co.-Conn. v. City Council of Cambridge, 56 Mass. App. Ct. 559, 566 (2002). The record before us contains ample evidence that the city council considered reports and opinions from local officials and citizens in reasoning that the zone change would conform to the adjacent properties and be in the best interest

of Chicopee. The city council members noted that the change would permit the previously vacant lot to be used for a productive purpose, and result in greater tax revenue generation. Moreover, in addition to ensuring that Westover, a valued local employer, would remain in Chicopee, several city council members stated that the garage Westover planned to build on the locus would alleviate many of the noise and pollution concerns voiced by the abutters. This reasoning "reflect[s] a reasonable or permissible basis for the legislative enactment," Shell Oil Co. v. Revere, 383 Mass. 682, 689 n.13 (1981), and the veracity of the rationales "was a matter for the legislative determination of the town meeting, the members of which could exercise judgment in the light of their special knowledge of conditions in the town," Pierce v. Wellesley, 336 Mass. 517, 522 (1957). See, e.g., Peters v. Westfield, 353 Mass. 635, 639 (1968) (creating buffer strip between two existing zoning districts); Raymond, 3 Mass. App. Ct. at 41 (preserving company's presence in town).

2. Legally untenable grounds. The plaintiffs' contention that the zone change was based on legally untenable grounds is likewise without merit. Besides the spot zoning claim, the plaintiffs have set forth no cognizable argument that in granting the zone change the city council exceeded its authority or relied upon legally untenable grounds. See Zora v. State

Ethics Comm'n, 415 Mass. 640, 642 n.3 (1993) ("bald assertions of error, lacking legal argument and authority," do not rise to level of appellate argument); Donovan v. Gardner, 50 Mass. App. Ct. 595, 602 (2000) (conclusory statements in brief do not rise to level of appellate argument).

3. Unreasonable, whimsical, capricious, or arbitrary. The plaintiffs have also come up short of demonstrating that the zone change is unreasonable, whimsical, capricious, or arbitrary. See Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 74 (2003) (describing this highly deferential inquiry as question whether "any rational board" could have reached same conclusion). As described above, the record contains ample evidence that the city council's decision and reasoning thereof were well within the parameters of the Zoning Act.[7]

Judgment affirmed.

By the Court (Lemire, Singh & Wendlandt, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: November 25, 2019.

[7] We deny the plaintiffs' request for appellate attorney's fees.

[8] The panelists are listed in order of seniority.