2017 IL App (2d) 160849-U
No. 2-16-0849
Order filed July 24, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

960 AND 970 COUNTY LINE RD LLC,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 15-MR-1701
THE VILLAGE OF BENSENVILLE,	)	Honorable Paul M. Fullerton,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's complaint challenging defendant's refusal to grant a text amendment to its zoning code: in light of plaintiff's request for a text amendment, its challenge was a facial challenge, and plaintiff conceded that it did not state facts sufficient to sustain a facial challenge; to the extent that plaintiff alternatively raised an as-applied challenge, plaintiff likewise failed to support it with sufficient facts.

¶ 2 Plaintiff, 960 and 970 County Line Rd LLC, owns property at that address, which is within the boundaries of defendant, the Village of Bensenville. Plaintiff sought a text amendment to the Village's zoning code that would have allowed it to operate a construction contractor's office on its property. The Village denied the request. Plaintiff sued, seeking a

declaration that the village's refusal to approve the amendment was unconstitutional. The trial court dismissed the complaint, holding that plaintiff had failed to sustain a facial challenge to the ordinance. Plaintiff appeals, contending that the court's ruling effectively deprives it of a remedy. We affirm.

¶ 3 The following facts are taken from the complaint. The property is zoned I-1 Light Industrial. It contains a house and a garage. Both structures are vacant and the property is not presently being used. County Line Road is a heavily trafficked, four-lane highway. Property to the north, south, and east is zoned industrial, while property to the west is residential.

¶ 4 Plaintiff wanted to build a contractor's office on the property, but such a use was not permitted under the I-1 zoning. Accordingly, it applied for a text amendment to the zoning ordinance to permit contractors' and construction offices as a conditional use in the I-1 zoning district. The amendment would provide for no outside storage except pursuant to the existing ordinance, which limits outside storage to no more than 25% of the lot area. Plaintiff's development plan for the property included remodeling the existing house, demolishing the existing garage and building a bigger one to store plaintiff's equipment and vehicles, designating up to 25% of the lot for outside storage, installing landscaping and fencing, and creating a parking lot.

¶ 5 The Community Development Commission (Commission) held a public hearing on plaintiff's application. At the hearing, plaintiff presented evidence showing the appropriateness of allowing contractors' and construction offices as a conditional use in the I-1 district. Plaintiff also presented evidence that the I-1 district allowed conditional uses more intense than plaintiff's proposed use, including heliports, outdoor athletic facilities, and hospitals.

¶ 6 The Commission declined to endorse plaintiff's proposal. Following its own hearing, the Village Board voted to follow the Commission's recommendation and deny plaintiff's request for a text amendment.

¶ 7 Plaintiff then filed its complaint. Plaintiff alleged that a contractor's office was appropriate for the site. Further, application of the zoning ordinance to the property was arbitrary and capricious and deprived plaintiff of substantive due process. The Village moved to dismiss. See 735 ILCS 5/2-615 (West 2014). Citing *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296 (2008), the Village contended that, because plaintiff's proposed amendment would affect all property in the I-1 zone, plaintiff could not pursue an as-applied challenge to the constitutionality of the zoning ordinance, but had to pursue a facial challenge. The Village further argued that, short of its site-specific allegations, the complaint consisted solely of conclusions that did not satisfy plaintiff's burden to show that the ordinance was facially invalid.

¶ 8 The trial court agreed with the Village and dismissed the complaint. The court denied plaintiff's motion to reconsider, and plaintiff timely appeals.

¶ 9 Plaintiff contends that the trial court erred by holding that it had to mount a facial challenge to the zoning ordinance. Plaintiff reasons as follows. Separation-of-powers principles prohibit the trial court from ordering the Village to enact the text amendment, which is part of its legislative function. The only relief historically available to someone in plaintiff's position is that the restriction not be applied to the particular property at issue. Here, the trial court could order that the restriction not be applied to plaintiff's property. As this relief would affect only plaintiff's property, plaintiff's challenge is necessarily to the ordinance as applied and it need not, and indeed cannot, challenge the ordinance facially. To hold otherwise would essentially deny plaintiff any remedy.

¶ 10 A facial challenge to the constitutionality of a legislative enactment is the most difficult to mount successfully because an enactment is facially invalid only if no set of circumstances exists under which it would be valid. *Id.* at 305-06.

¶ 11 That the enactment might be unconstitutional under some circumstances does not establish its facial invalidity. *Id.* at 306. In contrast, an " 'as-applied' " challenge questions how the enactment was applied in the particular context in which the plaintiff proposed to act, and thus the plaintiff's particular circumstances become relevant. *Id.* If the plaintiff prevails on an as-applied claim, it may enjoin the objectionable enforcement of the enactment only against itself, while a successful facial attack voids the enactment in its entirety. *Id.*

¶ 12 In either case, municipal enactments enjoy a presumption of validity. *Chavda v. Wolak*, 188 Ill. 2d 394, 398 (1999); *Rockford Blacktop Construction Co. v. County of Boone*, 263 Ill. App. 3d 274, 278-79 (1994). This presumption is overcome when the party challenging the ordinance proves, by clear and convincing evidence, that the ordinance is unreasonable and arbitrary and bears no substantial relationship to the public health, safety, morals, or welfare. *Thornber v. Village of North Barrington*, 321 Ill. App. 3d 318, 324-25 (2001).

¶ 13 The primary relief plaintiff sought in its complaint was a declaration that the denial of its proposed text amendment was unconstitutional. What ultimately defines the nature of a challenge, *i.e.*, whether it is facial or as-applied, is the remedy requested by the party challenging the law. *People v. One 1998 GMC*, 2011 IL 110236, ¶ 95 (Karmeier, J., special concurrence). Thus, plaintiff's challenge was necessarily a facial one, as an amended ordinance would apply to every property in the I-1 zone. However, as plaintiff now concedes, its complaint did not state facts sufficient to mount a facial challenge.

¶ 14 On appeal, plaintiff asserts that it no longer seeks approval of the text amendment. Rather, it seeks only to have the proposed use applied to its property. It further argues that the site-specific allegations were relevant to this issue.

¶ 15 It is debatable whether plaintiff raised this issue in the trial court. As noted, the primary thrust of its complaint appears to be the denial of the text amendment. However, plaintiff's prayer for relief did seek, apparently in the alternative, to have the proposed use applied to its property, which could arguably be considered an as-applied remedy.

¶ 16 In any event, even considering the allegations specific to plaintiff's property, the complaint is still insufficient. A section 2-615 motion to dismiss admits all well-pleaded facts but not conclusions of law or factual conclusions unsupported by allegations of specific facts. If, after disregarding any legal and factual conclusions, the complaint does not allege sufficient facts to state a cause of action, the motion to dismiss should be granted. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 16 (1995). A plaintiff must allege "facts, not mere conclusions," in support of its allegations. *Napleton*, 229 Ill. 2d at 305. We review *de novo* the trial court's order granting a section 2-615 motion to dismiss. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 54 (2011).

¶ 17 "Of paramount importance" in a case such as this one is whether the present zoning of the property conforms to the existing uses of surrounding properties. *Suhadolnik v. City of Springfield*, 184 Ill. App. 3d 155, 175 (1989). Here, however, the complaint alleges that the present zoning of the property is *consistent* with the surrounding neighborhood. Plaintiff alleges in conclusional fashion that the denial of its application impairs the value of the property and prohibits it from being used for its "highest and best use." However, plaintiff pleads no specific facts to show how much the property's value has been diminished by the present zoning. Nor

does it explain why a contractor's office is a more suitable use for the property than any of the myriad of conditional uses permitted in the I-1 zone.

¶ 18 Thus, the complaint fails to allege specific facts to show that the present zoning is unconstitutional or, put another way, that it is arbitrary not to allow plaintiff to construct a contractor's office on its property. Thus, the trial court properly dismissed the complaint.

¶ 19 The judgment of the circuit court of Du Page County is affirmed.

¶ 20 Affirmed.