Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-003148 08/16/2022

HONORABLE SCOTT BLANEY

CLERK OF THE COURT
P. McKinley
Deputy

AMERICA M YOUNG

WILLIAM MORRIS FISCHBACH III

v.

CITY OF PHOENIX, THE

ANDREW ABRAHAM

DARYL D MANHART
DAVID BARLOW
JUDGE BLANEY

UNDER ADVISEMENT RULING

The Court has reviewed and considered Plaintiff's *Motion for Partial Summary Judgment*, Defendant's *Opposition to Plaintiff's Motion for Partial Summary Judgment*, Plaintiff's *Reply In Support of Her Motion for Partial Summary Judgment*, Plaintiff's *Separate Statement of Fact*, Defendant's *Opposition to Plaintiff's Separate Statement of Facts Re Plaintiff's Motion for Partial Summary Judgment*, Plaintiff's *Supplemental Statement of Fact,* and the arguments received at the August 2, 2022 oral argument.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Rule 56(a), *Arizona Rules of Civil Procedure*; *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990); *Hourani v. Benson Hosp.*, 211 Ariz. 427, 432, 122 P.3d 6, 11 (App. 2005). Relevant to the issues currently before the Court, a party moving for summary judgment on the other party's affirmative defenses is not required to present the Court with evidence negating the affirmative defenses. It is the proponent of the affirmative defenses that has the burden of proof as to its affirmative defenses. *National Bank of Arizona v. Thruston*, 218 Ariz. 112, 119, 180 P.3d 977, 984 (App. 2008) (as amended Jan. 23, 2008).

THE COURT FINDS AS FOLLOWS:

Plaintiff was the owner of certain real property located in Phoenix, on which was located a residential structure that was approximately 90-100 years old. In April of 2019, Plaintiff applied for a demolition permit that would allow demolition of the structure on the property. The City denied the permit application and, in December of 2019, the Phoenix City Council approved Ordinance G-6648, which changed the zoning classification of Plaintiff's property from R1-10-NCASPD (Single-Family Residence District, North Central Avenue Special Planning District) to R1-10 HP NCASPD (Single-Family Residence District, Historic Preservation, North Central Avenue Special Planning District). The Ordinance only applied to Plaintiff's property, as a "single property HP district."

The Ordinance had the effect of precluding Plaintiff from demolishing the older structure on her property, thereby allegedly making the property less desirable to prospective developers and causing a diminution in fair market value for the property. Approximately one month later Plaintiff submitted a second application for a demolition permit, but that application was also denied. Plaintiff then submitted multiple demands to the City for just compensation pursuant to A.R.S. § 12-1134(A). There is some disagreement regarding whether the first two demands were premature, but at least the third demand – submitted in June of 2020 – was not premature. Despite the demands, the Ordinance and its restrictions continued to apply to Plaintiff's property more than 90 days after she made her final demand.

Plaintiff brought the current action for just compensation pursuant to A.R.S. § 12-1134. The City initially asserted five affirmative defenses: (1) No diminution in value; (2) Ordinance not in effect when demand letter sent so claim not properly brought yet; (3) No damage because did not exhaust administrative remedy re demolition permit(s); (4) No damage because historic designation is temporary and demolition permit may be obtained upon expiration of a year; and (5) Ordinance G-6648 imposes no direct regulation on land. Rather, it is a preservation of an existing building. The property can be divided, sold, or transfer, so long as the building remains.

Plaintiff's Motion seeks summary judgment as to the City's second, third, fourth and fifth affirmative defenses. Plaintiff's Motion does not challenge the City's first affirmative defense – no diminution in value. In its Opposition, the City admitted that the Court (Hon. Margaret Mahoney) already dismissed its second affirmative defense. The City also withdrew its third and fifth affirmative defenses, leaving only its fourth defense at issue in the current Motion.

IT IS THEREFORE ORDERED granting summary judgment for Plaintiff as to Defendant's second, third and fifth affirmative defenses.

Defendant also modified its fourth affirmative defense during the course of the briefing on Plaintiff's *Motion* and during oral argument, arguing that instead of an independent affirmative defense, evidence that Plaintiff failed to seek another demolition permit was relevant to the damage issue, stating:

> The City's position is that requesting or failing to request the permit is relevant to what, if any, diminution in value may have occurred. *** [T]he availability of the demolition permit after one year is a factor relevant to whether, or how much, there is any diminution in value because no demolition permit was available in the interim. Plaintiff's failure to seek the permit, or to condition her sale of the property on availability of the permit, is relevant to the damage issue that the City is entitled to present at trial.

Defendant's Opposition at pp. 7:5-6; 7:25-8:1. For the following reasons, the Court rejects Defendant's argument.

The Court begins by noting that "one of the basic responsibilities of government is to protect private property interests." *Bailey v. Meyers*, 206 Ariz. 224, 227, 76 P3d 898, 901 (App. 2003). Here, the relevant statutes provide a remedy to property owners such as Plaintiff when the owner's "existing rights to use, divide, sell or possess private real property are reduced by the enactment … of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property…." A.R.S. § 12-1134(A). In such cases, the property owner is entitled to "just compensation" from the political subdivision that enacted the land use law. *Id*. Just compensation is the amount of money that is "equal to the reduction in fair market value of the property resulting from the enactment of the land use law." A.R.S. § 12-1136(2).

Importantly, the law is clear that the amount of just compensation to which a property owner is entitled is determined as of the specific date on which the land use law was enacted. *Id*. Just compensation is not determined based upon what the property could be worth on some future date, as Defendant seems to argue. It is certainly not determined based upon the property's anticipated fair market value on some future date after the property owner has been forced to wait a full year, with the value of her property subject to unpredictable market forces, such as interest rates, and after the property owner has been forced to reapply for another demolition permit.

Moreover, just as the law is clear that a property owner's just compensation is determined as of a specific date – the date of enactment – the law is also clear that a political subdivision

may not place additional requirements on the property owner's entitlement to just compensation. A.R.S. § 12-1134(D) leaves no room for interpretation on this issue:

> The owner shall not be required to first submit a land use application to remove, modify, vary or otherwise alter the application of the land use law to the owner's property as a prerequisite to demanding or receiving just compensation pursuant to this section.

Again, Defendant argues that whether Plaintiff reapplied for a demolition permit after waiting a full year is relevant to the amount of her just compensation. More specifically, Defendant appears to argue that Plaintiff's damages should be reduced at trial because, had she waited a full year and then reapplied for a demolition permit, her property would likely have had minimal reduction in fair market value because it is a near certainty that the demolition permit would have been approved at that time. The Court has already addressed one flaw in this argument: the operative date for determining just compensation is the date of enactment of the land use law, not one year later. But this argument also improperly places an additional requirement on Plaintiff's receipt of just compensation in direct violation of § 12-1134(D). The Court can find little difference between requiring a property owner to "first submit a land use application …" before she can receive just compensation – which directly violates the plain language of the statute – and as Defendant argues here, reducing the amount of the property owner's just compensation because she did not "submit a land use application…." *Id*. Just as the property owner could not be required on the front end to submit a land use application to remove the application of the land use law before receiving just compensation, the property owner cannot be penalized on the back end for having not submitted such an application.

THE COURT THEREFORE FINDS that evidence regarding whether Plaintiff requested or failed to request the permit is not relevant to the issues in this case. *See* A.R.S. §§ 12-1134(D), 12-1136(2); *see also* Rule 402, Ariz.R.Evid. (evidence is relevant if it tends to make a fact more or less probable and the fact is of consequence in determining the action). Further, to the extent that there is any probative value to whether Plaintiff requested or failed to request the permit, that minimal probative value is outweighed by a danger of confusing the issues and misleading the jury because the jury may incorrectly assume that Plaintiff's damages can be reduced based upon her failure to reapply for the permit. *See* Rule 403, Ariz.R.Evid.

THE COURT FURTHER FINDS there are no genuine issues of material fact as to the issues addressed herein and Plaintiff is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED granting summary judgment for Plaintiff as to Defendant's fourth affirmative defense. Defendant may not present evidence at trial regarding

whether Plaintiff requested or failed to request the permit, or that a permit might have been available if Plaintiff had waited one year to reapply.