2018 IL App (2d) 170970-U
No. 2-17-0970
Order filed June 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PETE OCCHIPINTI, as sole beneficiary of Land Trust No. 12128 dated 9/12/2001,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellant,	)	
v.	)	No. 17-MR-8
CITY OF DE KALB,	)	Honorable William Brady,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's challenge to 2013 amendment to zoning ordinance was moot where plaintiff's challenge was purely procedural, concerning the manner in which that amendment was enacted, and defendant properly enacted amendment in 2017 imposing same restriction on plaintiff's property as 2013 amendment.

¶ 2 I. INTRODUCTION

¶ 3 Plaintiff, Pete Occhipinti, as sole beneficiary of Land Trust No. 12128, dated September 12, 2001, appeals the judgment of the circuit court of De Kalb County entering judgment in favor of defendant, the City of De Kalb. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Plaintiff was the beneficiary of a trust that owned two parcels of land zoned Light Commercial (LC) within defendant's city limits. Plaintiff desired to develop these parcels—formerly a theater—consistent with defendant's zoning ordinance as it existed prior to 2013. In 2013, defendant amended section 5.07 of its Unified Development Ordinance (UDO) (eff. February 4, 1993; amended June 24, 2013). Prior to the amendment, properties zoned LC were permitted to have residential dwellings on the second floor. After the amendment, such residential dwellings became special uses, which requires an owner to obtain a special-use permit to develop such dwellings. This was an amendment to the text of the ordinance—making it a "text amendment" rather than a "map amendment."

¶ 6 In February 2015, plaintiff filed a lawsuit (case no. 15-MR-30) seeking the same relief sought in this case (essentially, invalidation of the 2013 amendment as it pertained to him). That case was dismissed, without prejudice, for plaintiff's failure to exhaust administrative remedies. Plaintiff had not applied for or been denied a special-use permit. Plaintiff subsequently filed a petition for a special-use permit. Defendant contends that it suffered from numerous defects and was not a *bona fide* attempt to secure a permit. Given our conclusion that this case is moot, we need not consider this issue further.

¶ 7 On January 6, 2017, plaintiff initiated the instant case seeking a declaratory judgment invalidating the 2013 amendment as it pertained to plaintiff's two parcels. Plaintiff alleged that he was entitled to actual, individual notice of the meeting of the city council on June 24, 2013, at which the amendment was adopted. He noted that defendant simply provided notice by publication. He further alleged that the failure to provide him with such notice was a violation of his entitlement to procedural due process. Plaintiff contended he had a property interest in being

free to develop his property without going through the procedures to obtain a special-use permit. Plaintiff asks that the amendment be declared "void as to [his premises]."

¶ 8 In the meantime, defendant, though maintaining that the 2013 amendment was properly enacted, promulgated a second amendment. This amendment was a "map" amendment, extending LC—as LC was defined in 2017 as opposed to 2012 prior to the 2013 amendment—zoning to plaintiff's parcel. On March 27, 2017, defendant conducted a public hearing on this amendment. It published notice of this hearing, and it also mailed notice to the land trust of which plaintiff is a beneficiary and sent a courtesy copy to plaintiff. Plaintiff acknowledges in his reply brief that he appeared at the hearing and was allowed to present testimony. Like the 2013 amendment, the 2017 amendment made a second-floor dwelling over a commercial space a special use.

¶ 9 Defendant filed an initial combined motion to dismiss and for summary judgment setting forth a number of issues. Subsequently, defendant filed a second such motion. It explicitly incorporated the first motion by reference, and it advanced another theory as to why defendant should prevail. It asserted that because it gave plaintiff all the process he was due in connection with the 2017 amendment, his claim that he did not receive adequate notice regarding the enactment of the 2013 amendment was moot. The trial court stated that plaintiff could have pursued denial of its special-use permit on administrative review and that it was not the appropriate forum to litigate the issue of whether plaintiff received adequate notice as it pertained to the 2013 amendment. Accordingly, it dismissed plaintiff's complaint. This appeal followed.

¶ 10 III. ANALYSIS

¶ 11 Because this cause comes to us following the dismissal of plaintiff's complaint, review is *de novo*. See *In re James W.*, 2014 IL 114483, ¶ 18; *Consolidated Freightways Corp. of Delaware v. Human Rights Comm'n*, 305 Ill. App. 3d 934, 938 (1999). Thus, we are free to disregard the trial court's reasoning and substitute our own. *People v. Davis*, 403 Ill. App. 3d 461, 464 (2010). Furthermore, we review the propriety of the result ordered by the trial court rather than its reasoning. *In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 392 (2002).

¶ 12 Here, defendant contends—and we agree—that this case is moot. A case is moot where it does not present an actual controversy because the issues that it involved have ceased to exist. *Forest Preserve District of Kane County v. City of Aurora*, 151 Ill. 2d 90, 94 (1992). Mootness presents a question of law, also subject to *de novo* review. *In re Alfred H.H.*, 233 Ill. 2d 345, 350 (2009).

¶ 13 Plaintiff's complaint challenges the process by which the 2013 amendment was enacted. Specifically, citing *Passalino v. City of Zion*, 237 Ill. 2d 118 (2009), and *Mullane v. Central Hannover Bank & Trust Co.*, 339 U.S. 306 (1950), plaintiff contends that he was entitled to individualized notice of defendant's intention to enact the 2013 amendment. However, in 2017, defendant enacted a zoning change that affected plaintiff's property in precisely the same manner as the 2013 amendment. Generally, an intervening amendment to a legislative enactment moots a challenge to the enactment's validity. *Johnson v. Edgar*, 176 Ill. 2d 499, 511 (1997). Hence, here, even if plaintiff were successful in invalidating the 2013 amendment, the 2017 amendment would remain in effect. In other words, no matter what the outcome of this case, plaintiff's property would remain subject to the requirement that a special-use permit be obtained in order to have residential dwellings on its second floor. Thus, plaintiff's challenge to the 2013 amendment is moot. See *Bartow v. Costigan*, 2014 IL 115152, ¶ 35 (holding procedural due

process challenge to statutory scheme moot where subsequent amendment cured alleged procedural deficiencies).

¶ 14 Plaintiff attempts to avoid this result by recasting his claim as a facial challenge. However, in his complaint, plaintiff asks that the 2013 amendment be declared "void as to Plaintiff's Subject Premises." Indeed, plaintiff's arguments concern the specific facts of his situation, particularly whether he received adequate notice, which is the hallmark of an as-applied challenge. See *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 53 ("However, [the plaintiff] also refers to the facts of her particular situation, which is only relevant in an as-applied challenge."). In his reply brief, defendant argues, "In simplest terms, an unconstitutionally passed law would be void not merely to Plaintiff but to every LC owner in the city." However, plaintiff makes no attempt to explain how the failure to provide him with adequate notice could make the 2013 ordinance void generally. Given the factual nature of plaintiff's claim, we will treat it as an as-applied challenge. Moreover, even if plaintiff succeeded in invalidating the 2013 amendment, it would not affect the validity of the 2017 amendment.

¶ 15 Plaintiff questions the efficacy of the notice concerning the 2017 amendment. He complains that the notice stated that his property was being zoned from LC to LC (of course, the salient change was from LC as it existed before the 2013 amendment to how it existed after that time). How a defect in notice concerning the 2017 amendment would affect plaintiff's challenge to the 2013 amendment in terms of mootness (or otherwise for that matter) is unclear. Plaintiff is not challenging the passage of the 2017 amendment, to which the notice plaintiff here complains of might be relevant. As such, this argument is not on point.

¶ 16 Plaintiff contends that his challenge is not moot because "the 2017 map amendment *includes* the 2013 substantive amendment to the ordinance that imposes an onerous burden on Plaintiff where none existed previously." In essence, plaintiff contends (without citation to any authority to substantiate this theory) that the 2017 amendment somehow draws its validity from the 2013 amendment. While the 2013 amendment does contain a definition of an LC district consistent with the one used in the 2017 amendment, plaintiff's challenge is to the manner in which the 2013 amendment was enacted, not to its substance. Plaintiff does not explain why defendant could not include that definition in a new amendment and enact it properly in a subsequent amendment. See *People v. Crutchfield*, 2015 IL App (5th) 120371, ¶ 64.

¶ 17 Plaintiff attempts to augment this point by asking, "what would have been the effect on Plaintiff's rights to develop the Property had the 2017 amendment not been passed?" He answers by contending that there would have been no effect, as the 2013 amendment was already in place. However, the proper question is what would be the effect if plaintiff is successful in invalidating the 2013 amendment. The answer here is properly "nothing," as the 2017 amendment would remain in effect. Plaintiff fails to appreciate that defendant could enact two ordinances imposing the special-use requirement on his property (put differently, there is no such thing as legislative mootness).

¶ 18 Before closing, we note one additional problem with which plaintiff does not come to terms. While plaintiff complains of the "onerous burden" imposed on him if he is required to obtain a special-use permit to develop his property, he cites nothing to establish that avoiding the necessity of going through such a process creates a protectable interest for due process purposes. Indeed, the authority we have located indicates otherwise. Essentially, plaintiff claims a right to proceed with developing his property consistent with defendant's zoning law as it existed prior to

2013. It has been held that a party has no constitutionally protected interest in the continuance of such procedures. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (" 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."). Thus, it is questionable whether plaintiff even has an interest sufficient to support a due process claim.

¶ 19 IV. CONCLUSION

¶ 20 In light of the foregoing, we hold that the 2017 amendment moots plaintiff's challenge to the 2013 amendment. Plaintiff contends he was denied due process in 2013; however, he was afforded that process in 2017. Hence, the 2017 amendment validly imposes the special-use requirement upon his property. Accordingly, we affirm the judgment of the trial court.

¶ 21 Affirmed.