UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7016
Summary Calendar

AUSTIN RAINWATERS, ET AL.,

Plaintiffs-Appellants,

versus

JACKSON COUNTY BOARD OF SUPERVISORS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-S91-0285(R))

(November 1, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge:

Plaintiffs appeal a summary judgment rendered against them in a case arising out of a zoning dispute. The district court found that the plaintiffs had presented no genuine issues of material facts to support their constitutional claims brought under 42 U.S.C. § 1983. We affirm.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

In 1982 a real estate partnership consisting of eight partners, known as RLB, purchased approximately 1,500 acres of land in Jackson County, Mississippi. In 1989 RLB was dissolved and ownership of this land was transferred to four of the original partners, Mr. and Mrs. Rainwaters and Mr. and Mrs. Brown (hereinafter "Rainbro"). Except for Mr. and Mrs. Rainwaters, all of the RLB and the Rainbro partners were residents of the state of Mississippi. Mr. and Mrs. Rainwaters were residents of Alabama. Mr. Rainwaters apparently headed Rainbro's efforts to subdivide and develop the subject property.

Rainbro is aggrieved because Jackson County and its officials have frustrated their development efforts. The plaintiffs contend that the Jackson County Planning Commission imposed various lot and zoning restrictions on the proposed subdivision contrary to Jackson County regulations and ordinances and past practice. They claim that the Planning Commission unnecessarily forced them to obtain an archeological survey, to obtain approval for septic tank installations for each subdivided lot, and to dedicate and improve land abutting a public road. The plaintiffs are most upset by the county's refusal to allow them to place 17 mobile homes on 17 separate lots bordering the aforementioned public road.

Under Jackson County zoning ordinances, neither placement of individual mobile homes nor the establishment of a mobile home park was permitted on the subject property, which was zoned

agricultural-residential. The Jackson County Planning Commission, however, could issue a "use permit" under the ordinances allowing the placement of an individual mobile home on a lot if it found "that under the particular circumstances present such use is in harmony with the Principal Permitted Uses of the Zone." The plaintiffs claim that on at least seven occasions the Planning Commission granted other property owners use permits or "special exceptions" to place mobile home trailers on the public road in question despite the agricultural-residential zoning classification.

In the course of wrangling over these disputes, the plaintiffs allege that a county supervisor told Mr. Rainwaters at a public hearing on fire districting that he should "just go back to Alabama or Louisiana and file a lawsuit." Another supervisor allegedly told Mr. Rainwaters, "Let this be a lesson to anyone who thinks he can come into Jackson County and make a bunch of money and leave."

The county and its officials defend their actions as a proper exercise of discretion over county development. They assert that the county must promote the health, safety, convenience, and general welfare of its residents, and contend that local government entities examine developers' requests for zoning variances on a case-by-case basis in light of these objectives. Defendants further argue that the plaintiffs never protested the required improvements and dedication of land abutting the public road prior to the district court lawsuit, and that the archaeological surveys

and septic tank approvals were required by state and federal regulations. Most importantly, the defendants argue without contradiction that Jackson County has never granted permission for an individual or developer to place mobile homes on multiple lots. Under the county ordinances, placement of five or more mobile homes on a property lot constitutes a prohibited mobile home park. The defendants argue that the plaintiffs sought to circumvent this zoning prohibition by placing 17 mobile homes on the 17 subdivided lots.

The plaintiffs appealed the Planning Commission's decision to the County Board of Supervisors, which affirmed, and then appealed to the Circuit Court of Jackson County, Mississippi, which also affirmed the Planning Commission.[1] The plaintiffs did not appeal to the Mississippi Supreme Court. Rainbro then filed this lawsuit asserting various constitutional violations under 42 U.S.C. §§ 1983, 1985, and 1988: denial of equal protection, denial of due process, and taking of property without just compensation. After examining the affidavits and pleadings, the district court granted the defendants summary judgment.

DISCUSSION

Equal Protection and Due Process

We review summary judgment by the same legal standard applied by the district court in the first instance. Beck v. Somerset Technologies, Inc., 882 F.2d 993, 996 (5th Cir. 1989).

[1] For reasons unclear from the record, the Planning Commission, the Board of Supervisors, and the County Circuit Court apparently each heard aspects of this case twice.

Summary judgment is appropriate only if there are no genuine issues of material fact and movant is entitled to judgment as a matter of law. Fed. Rule Civ. Proc. § 56(c).

Zoning ordinances and proceedings for waivers or variances therefrom are legislative decisions subject only to rational basis review in most cases. Calhoun v. St. Bernard Parish, 937 F.2d 172, 174 (5th Cir. 1991) (citing Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986) (en banc)) cert. denied, Calhoun v. Odinet, 112 S. Ct. 939 (1992); Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070, 1079 (5th Cir. 1989). Unless a classification involves suspect classes or fundamental rights, judicial scrutiny under the Equal Protection Clause demands only a conceivable rational basis for challenged zoning decisions. Jackson Court Condominiums, 874 F.2d at 1079.

The plaintiffs allege that they were discriminated against at least partially because of Mr. Rainwater's residence outside of the state of Mississippi, but nonresidency and out-of-state citizenship have not been deemed suspect classifications for equal protection purposes. Nor can Rainbro reasonably argue that receiving a zoning variance or zoning classification is a fundamental right. Under a rational basis review, therefore, the defendants did not violate the Fourteenth Amendment or Section 1983 by imposing requirements on the plaintiffs' development activities or by denying them permission to depart from Jackson County's zoning ordinances. All of the county's actions were consistent

with guiding the orderly development of property in the area, surely a rational purpose.

The district court found that the two alleged discriminatory remarks directed at Mr. Rainwaters did not constitute a claim under section 1983. The judge found the first alleged statement, "just go back to Alabama," was clearly taken out of context from the fire protection discussion which prompted it. Under the circumstances he found the statement, if true, not discriminatory. We find nothing in the record to disturb this finding. He found the second statement, "let that be a lesson to anybody that thinks he is going to come into Jackson County and make a bunch of money and leave," if true, was an isolated instance of discriminatory action that could not withstand summary judgment under the circumstances. We agree that a single discriminatory remark directed at a nonresident, uttered in the course of a protracted zoning dispute, does not support a section 1983 claim absent other factors clearly evidencing discrimination.

The plaintiffs' equal protection claim is perhaps more properly considered under the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, which bars discrimination against citizens of other states where there is no substantial reason for discrimination beyond the mere fact that they are citizens of other states.[2] Toomer v. Witsell, 334 U.S. 385, 396, 68 S. Ct. 1156,

[2] This case does not involve a facial classification challenge but a charge of discrimination against out-of-state residents in application of local law. The Privileges and Immunities Clause is often invoked but seldom relied upon by judges in disputes involving the application of statutes and ordinances.

1162 (1948). The clause protects only basic and essential activities. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 387, 98 S. Ct. 1852, 1862 (1978). Pursuing a business on equal terms with state residents is clearly protected. Toomer, 334 U.S. at 396, 98 S. Ct. at 1162. Regardless whether we apply the Equal Protection Clause or the Privileges and Immunities Clause, however, it is clear that in this case the defendants had ample, rational grounds for their actions. Their decisions bore a substantial relationship to furthering the rational objectives of Jackson County's zoning ordinances and easily pass constitutional muster.

Plaintiffs' claims of due process denial are also without merit. Their case was heard by the Planning Commission, by the County Board of Supervisors, and by the Circuit Court of Jackson County--perhaps even twice by each. For this reason, we find no denial of procedural due process.

This Court has repeatedly demonstrated its reluctance to accord constitutional status to local zoning disputes. See e.g., Howard v. City of Garland, 917 F.2d 898 (5th Cir. 1990); Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989); County Line Joint Venture v. City of Grand Prairie, 839 F.2d 1142 (5th Cir.) cert. denied 488 U.S. 890, 109 S. Ct. 223 (1988); Davidson v. City of Clinton, 826 F.2d 1430 (5th Cir. 1987); Horizon Concepts, Inc. v. City of Balch Springs, 789 F.2d 1165 (5th Cir. 1986); Shelton v. City of College Station, 780 F.2d 475 (5th Cir.) cert. denied 477 U.S. 905, 106 S. Ct. 3276 (1986). We agree with the First Circuit case cited by the district judge below:

> There is an obvious danger to opening up local permitting decisions to detailed federal judicial scrutiny under equal protection rubric. If disgruntled permit applicants could create constitutional claims merely by alleging that they were treated differently from a similarly situated applicant, the correctness of virtually any state permit denial would become subject to litigation in federal court. Limiting such claims is essential to prevent federal courts from turning into zoning boards of appeals.

Medina, 964 F.2d at 44-45.

Constitutional Taking

A taking may be shown if a zoning ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. Jackson Court Condominiums, 874 F.2d at 1080. As discussed above, the defendants' actions certainly advanced a legitimate government interest. The only question remaining is whether the plaintiffs were deprived of the economically viable use of their land. The Fifth Amendment prohibition against taking without compensation does not guarantee the most profitable use of property. Jackson Court Condominiums, 874 F.2d at 1080. Instead, the analysis focuses on the uses permitted by the government regulations. Id.

In this case, the plaintiffs and their predecessor partnership purchased the subject property with knowledge, actual or constructive, that it was zoned agricultural-residential. This zoning classification did not permit mobile home placement unless special permission was obtained from the Jackson County Planning Commission. The denial of a variance from zoning regulations that predicated plaintiffs' purchase cannot reasonably be construed as

a "taking." On these grounds the district court properly granted summary judgment on the takings claim.

The district judge went further and ruled that the takings claim was not ripe because the plaintiffs had failed to seek compensation through available state channels. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95, 105 S. Ct. 3108, 3120-21 (1985). The district judge specifically found that the plaintiffs had not pursued the alleged takings argument all the way through the Mississippi state courts. We agree that a party may not successfully assert a state takings claim in federal court unless he has first pursued compensation under adequate state procedures, Samaad v. City of Dallas, 940 F.2d 925, 933 (5th Cir. 1991). In the instant case, the plaintiffs twice appeared before the Jackson County Circuit Court complaining of the treatment they had received. Although they did not appeal to the Mississippi Supreme Court, we believe their exhaustion of practically available state remedies was sufficient to permit a takings claim in federal court.

For these reasons, the district court's judgment is **AFFIRMED**.