IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60196
(Summary Calendar)

AVERYELL A. KESSLER, ET AL.,

Plaintiffs-Appellants,

versus

CITY OF JACKSON, MISSISSIPPI,
ET AL.,

Defendants,

CITY OF JACKSON, MISSISSIPPI,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-3:92-424)

(December 23, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Plaintiffs-Appellants Averyell A. Kessler, Paula A. St. Clair and Frances T. Avery (collectively, Appellants), appeal the

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court's grant of summary judgment in favor of Defendant-Appellee, the City of Jackson, Mississippi (the city), dismissing Appellants' claims which arose from a zoning dispute. Specifically, the district court dismissed Appellants' Takings Clause claim for lack of ripeness, and dismissed their Due Process and Equal Protection claims summarily without explanation. For the reasons set forth below, we affirm.

I

FACTS AND PROCEEDINGS

Appellants own real property located in the city. The property is zoned single family residential (SFR). Because of its proximity to the Pearl River, a large portion of the property is subject to flood-based restrictions, as determined by the U. S. Corps of Engineers, and to minimum elevation requirements for land located within the Pearl River Floodway, as expressed by the city's Flood Plane Management Ordinance.

The city's Future Land Use Plan Committee (the Committee) presented its long range plan for the city's development. The plan initially recommended that Appellants' property be re-zoned from SFR to a mixture of uses, including both commercial and medium, high, and low density residential. The mayor is alleged to have threatened to veto the plan unless the existing zoning pattern was maintained. The Planning Director recommended that the plan be amended to reflect no change in the current zoning; he had reconsidered the feasibility of developing the property as currently zoned after additional information was acquired and in

light of improving market conditions. The city adopted the plan, as amended.

Thereafter, Appellants applied to re-zone a portion of their property to permit a mixture of uses consistent with the Committee's original recommendation. They contended at the zoning hearing that, among other things, the development costs of the property as currently zoned would not be economically feasible. The Planning Board denied the application, and the City Council affirmed that decision.

Appellants filed suit in federal district court, complaining that the city's amendment to and adoption of the Future Land Use Plan, and its denial of their re-zoning application, constituted a taking without just compensation, thereby violating Appellants' Equal Protection and Due Process rights. The district court granted the city's motion for summary judgment and dismissed all of Appellants' claims. The court determined that Appellants' Takings Clause claim was not yet ripe because they had failed to seek compensation first from the state. And, even though the district court made a statement to the effect that Appellants made no showing that age or sex warranted the application of a different standard of review, the court did not express or even imply the reasons for its dismissal of Appellants' Equal Protection and Due Process claims.

II

ANALYSIS

A. Standard of Review

We review a grant of summary judgment de novo and in doing so apply the same standard applied by the district court. Evans v. City of Marlin, Tex., 986 F.2d 104, 107 (5th Cir. 1993). A grant of summary judgment is appropriate if there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The parties do not dispute the facts; therefore, only questions of law remain.

B . Ripeness

Appellants contend that they were not required to seek compensation first from the state because such efforts would have been futile. They argue that no Mississippi court would substitute its judgment for that of the city's zoning authorities in this instance because the decision was "fairly debatable." As no court would reverse the city's zoning decision, Appellants reason, their pursuit of compensation from the state would be futile.

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U. S. Const. amend. V., quoted in Samaad v. City of Dallas, 940 F.2d 925, 933 (5th Cir. 1991). "A takings claim is not ripe until the claimant has unsuccessfully sought compensation from the state." Samaad, 940 F.2d at 933. There is no such requirement, however, when the state would undoubtedly deny a

claimant compensation if he were to pursue the obviously futile act of seeking it. Id. at 934. Appellants have failed to show that Mississippi law would provide them no remedy. They erroneously focus on whether a Mississippi state court would reverse the city's zoning decision. The proper question is whether the state provides an adequate procedure for seeking just compensation. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985). Under Mississippi law, a property owner may bring an inverse condemnation action to obtain just compensation for governmental takings. Miss. Const. art. 3, § 17. Moreover, the Mississippi Supreme Court has indicated that a refusal to re-zone property may constitute a taking when the property owners are left without any economic use of the property. Thrash v. Mayor and Comm'rs of City of Jackson, 498 So. 2d 801, 806 & n.6 (Miss. 1986). In Thrash, the property in question had no reasonably valuable use unless the existing zoning classification was relaxed; and, unlike in the instant case, the city granted the requested re-zoning. The Mississippi Supreme Court, likening zoning to petty larceny through the exercise of the city's legitimate police power, explained that when the property would otherwise be valueless, a "[r]efusal to rezone might well effect grand larceny of the owners of the subject property." Thrash, 498 So. 2d at 806 & n.6.

Given these comments, it cannot be said that a Mississippi court might not conclude that the city's refusal to re-zone Appellants' property constitutes a taking, and award just

compensation if Appellants could establish that their property was valueless without re-zoning. Consequently, Appellants' Takings claim was not yet ripe, and the district court properly granted summary judgment, dismissing the claim.

C. Due Process and Equal Protection

Appellants argue that the district court erred when it summarily dismissed their Due Process and Equal Protection claims. They contend that these claims are independent of their Takings claim and, thus, should not have been dismissed.

Although the applicable standard of review is de novo, our ability to review is severely hampered, if not prevented, when the lower court fails to provide adequate findings of fact and conclusions of law. White v. Texas American Bank/Galleria, 958 F.2d 80, 82 (5th Cir. 1992). The district court here found that a higher standard of review did not apply, but did not provide reasons for its dismissal of these claims. Nevertheless, as the facts are not here in dispute and the record is sufficient, we can conduct, and therefore have conducted, an independent review so as to avoid further delay and waste of judicial resources.

Appellants essentially challenge two actions taken by the city: (1) the amendment and passage of the Future Land Use Plan which did not re-zone their property, and (2) the city's subsequent denial of Appellants' zoning application. Appellants argue that the city's actions implicate a fundamental rightSQtheir right to propertySQso that the city's actions should be strictly scrutinized. This argument is unmeritorious. A zoning decision

necessarily affects the property owner's interest in his property when the decision limits the potential uses of the property. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68, 101 S. Ct. 2176, 68 L.Ed.2d 67 (1981). Without more, however, this does not implicate a fundamental right which requires a higher level of scrutiny. See id.

When there is no fundamental right or suspect classification involved, the applicable standard of review for both Equal Protection and substantive Due Process claims is "rational basis." Jackson Court Condominiums v. City of New Orleans, 874 F.2d 1070, 1079 (5th Cir. 1989); Reid v. Rolling Fork Public Utility Dist., 854 F.2d 751, 753 (5th Cir. 1988) (citing City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-42, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985)). There admittedly are differences between the protections provided by the Equal Protection Clause and the Due Process Clause; but here those claims can be considered together for purposes of reviewing the rationality of the city's decision. See Brennan v. Stewart, 834 F.2d 1248, 1258 (5th Cir. 1988). The relevant inquiry is whether there is a rational basis for a state's exercise of its police power and the making of its zoning decisions. Jackson Court Condominiums, 874 F.2d at 1077. As we have explained, the "key to such an inquiry is whether the question is `at least debatable.'" Id.

Our independent review of the record demonstrates that neither the amendment and adoption of the Future Land Use Plan nor the denial of Appellants' zoning request was arbitrary, capricious or

unreasonable. The subject property was zoned SFR when it was brought into the city, and that zoning was left unchanged by the city's adoption of the amended plan. As the Committee's chairman explained, based on the reconsideration of improving market conditions, a determination was made that zoning change was not needed. Under these circumstances, the city's reluctance to change the zoning classification on its own initiative to permit commercial development cannot be regarded as arbitrary or capricious. The zoning regulations remained in force and Appellants retained their right to seek a zoning change.

Neither was the city's subsequent denial of Appellants' zoning application arbitrary. An applicant who seeks re-zoning in the city must establish that a public need exists for the re-zoning and that the surrounding area has changed to such an extent as to justify re-zoning. Saunders v. City of Jackson, 522 So. 2d 902, 906 (Miss. 1987).

Appellants concede that the city's finding of insufficient need was fairly debatable. They nevertheless contend that the city's failure to consider the economic impact of its zoning decision on Appellants' property was arbitrary, capricious and irrational. The economic use of the property, although relevant in addressing a Takings Clause claim, is not so crucial when considering a zoning decision that the failure to consider such use will render the decision-making process irrational. Zoning does not ensure the best or highest use of property. The criteria applied by the citySQneed and evidence of changeSQcomport with the

city's interest in stable, controlled growth and in the preservation of residential areas. Accordingly, as the city's actions were not arbitrary or capricious, Appellants' Equal Protection and substantive Due Process claims were properly dismissed.

Appellants also assert claims of procedural Due Process. These claims are without merit. We have long held that a zoning decision made by an elected body such as a city council is a legislative or quasi-legislative action, so that no procedural Due Process rights attach. Jackson Court Condominiums, 874 F.2d at 1074-75. Accordingly, these claims too were properly dismissed. AFFIRMED.