Exhibit I

Ealy v. City of Utica, No. 200125, 1998 WL 1988693 (Mich. Dec. 1, 1998)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Supreme Court of Michigan.

Pearl Ben EALY, Plaintiff-Appellant,
v.
CITY OF UTICA, Defendant-Appellee.

No. 200125.
|
Dec. 1, 1998.

Before: O'CONNELL, P.J., and GRIBBS and TALBOT, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right from the trial court's orders dismissing his complaint against defendant regarding the validity of a zoning ordinance regulating the parking of recreational vehicles on private property. We affirm.

Defendant's zoning ordinance became effective July 1, 1992. The instant controversy primarily concerns the following subsection:

> Residents of the City may keep not more than one (1) of their own trailer, boats, camper, motor home, and similar vehicles on their own property for an indefinite period of time, provided such vehicles are in operable condition and are not kept within twenty (20) feet of the closest edge of any neighboring road surface area. Such vehicles shall be subject to all other applicable provisions concerning accessory buildings set forth in Section 1405. [Utica Zoning Ordinance, § 1413.2.]

Soon after the ordinance went into effect, defendant notified plaintiff that he was in violation and that he had ten days to bring his property into compliance. Plaintiff declined to do so and was issued a misdemeanor citation a few weeks later.[1] Plaintiff responded with a civil action, challenging the constitutionality of the ordinance and alleging that it was not enacted pursuant to the requirements of the enabling legislation, the city and village zoning act, M.C.L. § 125.581 *et seq.;* MSA 5.2931 *et seq.* Defendant filed a motion for summary disposition, which the court granted on all questions of constitutionality. The court denied defendant's motion with respect to the issue of noncompliance with the enabling legislation; however, that claim was subsequently dismissed as well after plaintiff informed the court that he no longer wished to pursue the matter.

On appeal, plaintiff challenges on several grounds the trial court's order granting partial summary disposition to defendant. This Court reviews a trial court's decision on a motion for summary disposition de novo as a matter of law. *Miller v. Farm Bureau Mutual Ins Co,* 218 Mich.App 221, 233; 553 NW2d 371 (1996). Likewise, a lower court's ruling on the meaning and constitutionality of an ordinance calls for de novo review. *Ballman v. Borges,* 226 Mich.App 166, 168; 572 NW2d 47 (1998); *Jott, Inc v. Charter Twp of Clinton,* 224 Mich.App 513, 525; 569 NW2d 841 (1997).

I. Substantive Due Process

Plaintiff argues that the regulations at issue within defendant's ordinance are invalid because they were enacted primarily for aesthetic purposes in violation of case law, characterizing the provisions as unreasonable for purposes of due process analysis. We disagree.

The federal and state constitutions guarantee that the state's governmental units will not act against the citizenry without observing due process of law. US Const, Am XIV, § 1; Const 1963, art 1, § 17. "The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " *Zinermon v. Burch,* 494 U.S. 113, 125; 110 S Ct 975; 108 L.Ed.2d 100 (1990), quoting *Daniels v. Williams,* 474 U.S. 327, 331; 106 S Ct 662; 88 L.Ed.2d 662 (1986).

*2 A party challenging a zoning ordinance on substantive due process grounds must show that "there is no reasonable governmental interest being advanced by the present zoning classification itself, ... or ... that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question." *Kropf v. Sterling Heights,* 391 Mich. 139, 158; 215 NW2d 179 (1974).

This Court has recognized that aesthetics may not be the sole basis for a zoning ordinance. *Recreational Vehicle United Citizens Ass'n v Sterling Heights,* 165 Mich.App 130, 140; 418 NW2d 702 (1987). See also *Hitchman v. Twp of Oakland,* 329 Mich. 331, 339; 45 NW2d 306 (1951) (" 'Aesthetics may be an incident but cannot be the moving factor." '), quoting *Wolverine Sign Works v. Bloomfield Hills,* 279 Mich. 205, 208; 271 NW 823 (1937). However, where an ordinance is rationally related to other legitimate governmental interests, the ordinance is not invalid simply because aesthetic conditions for the community will be improved as a result of its enforcement. *Recreational Vehicle United Citizens Ass'n, supra.* In the instant case, the record indicates that defendant did not enact its zoning ordinance purely for aesthetic purposes, but did so pursuant to other legitimate municipal concerns as well.

The enabling statute authorizes municipalities to regulate the uses of land

> to meet the needs of the state's residents for ... places of residence, recreation, industry, trade, service, and ... to ensure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, ... and other public service and facility needs, and to promote public health, safety and welfare .... [MCL 125.581(1); MSA 5.2931(1).]

Comporting with the enabling statute, the preamble of defendant's zoning ordinance announces purposes including

> promoting and protecting the public health, safety, peace, comforts, convenience and general welfare of the inhabitants of the City of Utica by protecting and conserving the character and social and economic stability of the residential, commercial, industrial, and other use areas, by securing the most appropriate use of land; preventing over-crowding; and facilitating adequate and economical provision of transportation, water, sewers, schools, recreation, and other public requirements .... [Utica Zoning Ordinance pmbl.]

Defendant's City Planner and Building Inspector submitted affidavits stating that the purpose behind restrictions at issue is to address safety concerns arising from potentially dangerous traffic conditions on residential streets resulting from numerous recreational vehicles stored on private property. They indicated that the ordinance protects both pedestrians and motorists traveling on the road from obstructed vision and thus maintains a safer path for traveling. Further, the statement of intent set forth in the section of the ordinance concerning the parking of motor vehicles and storage of machinery and building materials informs our reading of the provision here at issue, those purposes including prevention of "the storage or accumulation of ... unsightly motor vehicles, machinery, or building materials that could be hazardous to the safety of children, encourage the propagation of rats or rodents, or detract from the orderly appearance of the City." Utica Zoning Ordinance, § 1412.1. Restrictions on the storage of recreational vehicles are clearly rationally related to the legitimate governmental concern for avoiding conditions dangerous to children or hospitable to pests.

*3 Defendant's acknowledged concern for promoting the aesthetic appearance of residential neighborhoods notwithstanding, we agree with the trial court that the restrictions at issue legitimately further the interests of public health and safety.

Further, plaintiff has failed to produce evidence to support his position that the ordinance effects an arbitrary and capricious exclusion of a legitimate land use. Plaintiff's property is zoned for residential use, and plaintiff has conceded that the ordinance does not interfere with his ability to use his property for its intended purpose. For these reasons, we conclude that plaintiff's substantive due process challenge is without merit.

II. Equal Protection

Plaintiff argues that the zoning ordinance unconstitutionally violated his right to equal protection of the law, on the ground that the ordinance treated individuals who owned certain recreational vehicles differently from individuals who did not. Plaintiff additionally argues that the ordinance was unequally enforced against him, citing similarly situated neighbors whose violations drew no official reproach. We disagree.

Both the federal and state constitutions guarantee individuals equal protection of the law. US Const, Am XIV, § 1; Const 1963, art 1, § 2. Equal protection doctrine mandates that similarly situated persons be treated alike; however, it does not require that persons under different circumstances be treated the same. *El Souri v. Dep't of Social Services,* 429 Mich. 203, 207; 414 NW2d 679 (1987); *Yaldo v. North Pointe Ins Co,* 217 Mich.App 617, 623; 552 NW2d 657 (1996), aff'd. 457 Mich. 341 (1998). When a legislative enactment is challenged as violative of equal protection, the applicable test of constitutionality depends on the nature of classification involved and the interest affected. *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation,* 425 Mich. 173, 190; 387 NW2d 821 (1986); *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd,* 215 Mich.App 69, 73; 544 NW2d 705 (1996). Municipal "ordinances are presumed [constitutionally] valid and the burden is on the person challenging the ordinance to rebut the presumption." *Detroit v. Qualls,* 434 Mich. 340, 364; 454 NW2d 374 (1990). In the instant case, because plaintiff does not allege that the challenged ordinance targets a suspect class or infringes on a fundamental right, the restrictions in question warrant no heightened judicial scrutiny for purposes of equal protection analysis, and the classifications resulting from the regulatory scheme should be upheld if they rationally relate to a legitimate governmental interest. *People v. McFall,* 224 Mich.App 403, 413; 569 NW2d 828 (1997), citing *Romer v. Evans,* 517 U.S. 620, [631]; 116 S Ct 1620, 1627; 134 L.Ed.2d 855 (1996).

As stated in Part I above, the disputed provisions of defendant's zoning ordinance rationally relate to legitimate governmental purposes. Accordingly, we conclude that the ordinance's differentiation between owners of certain recreational and motor vehicles does not run afoul of equal protection doctrine.

***4** We likewise reject defendant's claim of an equal protection violation on the ground that the ordinance was unequally enforced. Plaintiff predicates his argument on the assertion that he received a ticket while others engaging in similar conduct did not. However, "[t]here is no right under the Constitution to have the law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) that you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere ...." *Futernick v. Sumpter Twp,* 78 F3d 1051, 1056 (CA 6, 1996). Further, "the equal protection clause is concerned with acts of invidious discrimination among classes and not with mere acts of unequal enforcement which may be the result of erroneous or even arbitrary administration of facially-neutral ordinances." *Recreational Vehicle United Citizens Ass'n, supra* at 141. Because plaintiff's evidence and arguments suggest, at worst, only that he was the happenstantial object of an irregular initial enforcement effort, not that he was the victim of invidious discrimination in the matter, plaintiff's allegations do not add up to an equal protection violation.

III. Uncompensated Taking

Finally, plaintiff challenges the constitutionality of defendant's ordinance on the ground that it constitutes a taking of his property without just compensation. We disagree.

Our state constitution provides that government will not take private property except for public purposes and with just compensation to the owner. Const 1963, art 10, § 2. *Peterman v. DNR,* 446 Mich. 177, 184; 521 NW2d 499 (1994). The Fifth Amendment of the United

States Constitution includes a similar provision, and the Fourteenth Amendment operates to bring the Takings Clause of the Fifth Amendment to bear upon the states. *Id.* at 184 n 10. These constitutional guarantees are coextensive. *Id.* In this case, because defendant has not actually taken possession of any part of plaintiff's land, at issue is whether defendant effected a regulatory taking.

In general, zoning regulations are upheld where they promote the health, safety, and welfare of the community, even if the regulations adversely affect recognized property rights. *Bevan v. Brandon Twp,* 438 Mich. 385, 390; 475 NW2d 37 (1991). However, a land-use regulation effectuates a taking where the regulation does not substantially further a legitimate governmental interest, or where the regulation deprives the owner of economically viable use of the land. *K & K Construction, Inc v Dep't of Natural Resources,* 456 Mich. 570, 576; 575 NW2d 531 (1998). Because we concluded above that the disputed provisions of defendant's ordinance were enacted in furtherance of legitimate health and safety concerns, and rationally relate to those objectives, plaintiff's takings claim hinges on whether the regulations have deprived him of all economically viable use of his land.

***5** Plaintiff's argument that the ordinance had the effect of precluding use of his property for any purpose for which it was reasonably adapted strains at credulity. Plaintiff makes no effort to explain why the several square feet of ground space upon which his recreational vehicles stand are not suited to any of countless other residential uses. Further, even if we credited plaintiff's argument that the ordinance had rendered those fractions of his land unusable, we would nonetheless disagree with plaintiff's characterization of the effect of the ordinance as a regulatory taking.

For purposes of a takings analysis, Michigan courts view an owner's real property as indivisible. *Bevan, supra* at 394. " ' *"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.*" ' *Id.,* adding emphasis and quoting *Penn Central Transportation Co v New York City,* 438 U.S. 104, 130; 98 S Ct 2646; 57 L.Ed.2d 631 (1978). Instead, courts must focus on "the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole.*" *Bevan, supra* at 394, adding emphasis and quoting *Penn Central Transportation Co, supra* at 130-131. Therefore, even if we were to conclude that enforcement of the zoning ordinance rendered a small portion of plaintiff's land useless, the insignificant limitation placed on plaintiff is not sufficient to create a takings claim. Plaintiff has admitted that, despite the ordinance, he is able to reside in his home, cut his grass, and tend his garden. Clearly plaintiff is not deprived of using his property in ways for which it is reasonably adapted. Further, plaintiff has failed to establish that the ordinance rendered his property unsuitable or unmarketable as zoned, and has thus failed to rebut the presumption that the ordinance is valid. Accordingly, we conclude that its enforcement did not constitute a regulatory taking in this case.

IV. Notice

Plaintiff argues that the defendant's zoning ordinance should be declared invalid because the manner in which it was adopted did not comply with the notice provisions of the enabling statute. Specifically, plaintiff contends that defendant failed to publish adequate notice of the language contained in the ordinance, failed to indicate that the ordinance would replace an existing ordinance, and failed to include the requisite language following adoption of the new ordinance. However, before the trial court resolved the factual dispute concerning this issue, plaintiff voluntarily withdrew this claim and abandoned his request for a decision on the merits. Plaintiff may not revive on appeal an issue that he chose to remove from the trier of fact in the proceedings below. See *Peterman, supra* at 183. This issue is waived, and we will not address it.

Affirmed.

All Citations

Not Reported in N.W.2d, 1998 WL 1988693

Footnotes

1 The misdemeanor complaint against plaintiff, initially adjourned pending resolution of his civil suit, was ultimately dismissed for lack of evidence.

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