Ki Fla. Props. v. Walton County

United States District Court for the Northern District of Florida, Pensacola Division

October 15, 2021, Decided; October 15, 2021, Filed

CASE NO. 3:20cv5358-RH-HTC

Reporter

2021 U.S. Dist. LEXIS 226830 *

KI FLORIDA PROPERTIES, INC. et al., Plaintiffs, v. WALTON COUNTY et al., Defendants.

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BUSH, LIONEL ALFORD, CO-TRUSTEES OF THE LIONEL D ALFORD JR AND TAMMY NIX ALFORD REVOCABLE TRUST, TAMMY ALFORD, CO-TRUSTEES OF THE LIONEL D [*3] ALFORD JR AND TAMMY NIX ALFORD REVOCABLE TRUST, Plaintiffs: DWAYNE KENT SAFRIET, HOLTZMAN VOGEL BARAN ET AL - TALLAHASSEE FL, Tallahassee, FL.

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Judges: Robert L. Hinkle, United States District Judge.

Opinion by: Robert L. Hinkle

Opinion

ORDER GRANTING SUMMARY JUDGMENT ON THE JUST-COMPENSATION AND DAMAGES CLAIMS AND DISMISSING THE OTHER CLAIMS AS MOOT

For six weeks in March and April 2020, the Walton County Board of County Commissioners closed the county's beaches in an effort to hold off the coming covid-19 pandemic. Little was known at the time about how the virus spreads. What was known was that people were getting sick and some were dying. Caution seemed a good idea.

The plaintiffs own beachfront property in Walton County. For 29 days during the beach closure, they were not allowed to go onto the part of their own property that is on the beach—that is, the part comprised of soft sand seaward of permanent dune vegetation or a seawall.

The plaintiffs filed this lawsuit challenging the county's action. They assert claims for just compensation, damages, and declaratory and injunctive relief. This order grants summary judgment for the county on the just-compensation and damages claims. The order dismisses the declaratory and injunctive-relief claims as moot.

I

On March [*5] 17, 2020, the Governor of Florida issued Executive Order 20-68. The order included this statement: "I direct parties accessing *public* beaches in the State of Florida to follow the CDC guidelines by limiting their[] gatherings to no more than 10 persons, distance themselves from other parties by 6 feet, and support beach closures at the discretion of local authorities." Fla. Exec. Order No. 20-68 (Mar. 17, 2020) (emphasis added).

Two days later, on March 19, 2020, the Walton County Board of County Commissioners adopted Ordinance 2020-08. The ordinance temporarily closed all Walton County beaches and prohibited *the public* from accessing them. This did not, however, preclude landowners from going onto the part of the beach they owned.

Walton County struggled to effectively enforce the ordinance. County officials became increasingly concerned over the number of out-of-state residents traveling to the county's beaches.

On April 1, 2020, the Governor issued Executive Order 20-91. The order required individuals in Florida to "limit their movements and personal interactions outside of their home to only those necessary to obtain or provide essential services or conduct essential activities." [*6] The list of essential activities included "[p]articipating in recreational activities (consistent with social distancing guidelines) such as walking, biking, hiking, fishing, hunting, running, or swimming." Fla. Exec. Order No. 20-91 (Apr. 1, 2020). The order was promptly amended to preempt "any conflicting official action or order issued by local officials in response to COVID-19." Fla. Exec. Order No. 20-92 (Apr. 1, 2020).

One day later, on April 2, 2020, the Walton County Board of County Commissioners adopted Ordinance 2020-09. The ordinance modified the previous ordinance and closed all beaches, prohibiting any person from going onto the beach, including onto beach property the person owned. The ordinance contained a sunset provision: it would expire on April 30 unless extended by the Board. It was not extended. The beaches reopened on May 1, 2020 and have remained open.

Both Walton County ordinances defined "beach" as "the soft sandy portion of land lying seaward of the seawall or the line of permanent dune vegetation." Walton County Code § 22-02. Thus the plaintiffs were prohibited from going onto their own property seaward of the dune line or any seawall from April 2 to April [*7] 30, 2020. While the policy was in place, Walton County law enforcement regularly patrolled the beaches, private and public, to enforce the ordinance.

II

The plaintiffs filed this action on April 6, 2020 challenging the April 2 Walton County ordinance. The plaintiffs named as defendants both Walton County and, in his official capacity, the Walton County sheriff—the official responsible for enforcing the ordinance.

The plaintiffs immediately moved for a preliminary injunction. The court, acting through the district judge presiding at that time, conducted a hearing by telephone on April 13 and denied the motion. The court issued a written order on April 17 confirming the decision. The court held the plaintiffs were unlikely to prevail on the merits and could not meet the other prerequisites to a preliminary injunction. The plaintiffs did not appeal.

After the challenged ordinance lapsed by its own terms, all the plaintiffs dropped their claims against the sheriff, and some plaintiffs dropped their claims against the county, too. But a judgment dismissing the dropped claims was not entered under Federal Rule of Civil Procedure 54(b).

The remaining plaintiffs eventually filed an amended and then a second amended complaint—the pleading [*8] now before the court. The second amended complaint includes six counts. Count 1 asserts a claim for damages under 42 U.S.C. § 1983 and a claim for just compensation under the Fifth Amendment Takings Clause. Count 2 seeks a declaration that the challenged ordinance was preempted by the Governor's executive orders. Count 3 asserts a claim for

declaratory and injunctive relief based on the Florida Constitution's privacy provision. Count 4 asserts a claim for damages under 42 U.S.C. § 1983 and the Fourteenth Amendment's Due Process Clause. Count 5 asserts a claim for damages under § 1983 and the Fourth Amendment's prohibition of unreasonable seizures. Count 6 seeks a declaration that the county lacked authority under state law to adopt an ordinance of this kind.

III

A federal court cannot decide an issue that is moot. The challenged ordinance is no longer in effect, having lapsed on April 30, 2020. This presents a threshold question of mootness.

The Eleventh Circuit long ago described its approach to this issue, saying the circuit:

> has consistently held that a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated. In the absence of any such evidence, there is simply no point [*9] in allowing the suit to continue and we lack [the] power to allow it to do so.

Troiano v. Supervisor of Elections in Palm Beach Cty., Fla., 382 F.3d 1276, 1285 (11th Cir. 2004). The first question here is whether the county has "unambiguously terminated" the private beach closure. It plainly has.

To be sure, a "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Env'l Servs., Inc.*, 528 U.S. 167, 174 (2000). A case becomes moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 189 (internal quotation marks and citations omitted). The Eleventh Circuit places an initial burden on the defendant in determining whether a governmental entity has unambiguously terminated an allegedly illegal practice. *See Troiano*, 382 F.3d at 1285. The defendant "bears a heavy burden of demonstrating that his cessation of the challenged conduct renders the controversy moot." *Rich v. Fla. Dep't of Corr.*, 716 F.3d 525, 531 (11th Cir. 2013) (quoting *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1265 (11th Cir. 2010)).

Courts properly consider a number of factors in deciding whether a case has become moot. It may have been unclear, in May 2020 or even during the next few months, whether the challenged ordinance would be reenacted. Now, though, substantial time has passed. In the current environment, the chance that the ordinance will be reenacted is about as close to zero [*10] as the chance of reenactment of a government policy can be. This is so not only because of the current political approach to covid-19 in this state but, more importantly, because scientists and even public officials have learned a great deal more about how covid-19 is transmitted. Not even the most aggressive advocates of mitigation efforts now contend it is necessary or even helpful to preclude single-family gatherings on private beaches. This ordinance isn't coming back.

This renders moot the claims for declaratory and injunctive relief and thus leaves at issue only the Takings Clause claim for just compensation and the § 1983 claims for damages. The plaintiffs sought only declaratory and injunctive relief on the state-law claims, so those claims are entirely moot.

IV

Before turning to the remaining claims, it is useful to note the constitutional principles that apply to public-health emergencies. In *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), the Court

upheld a smallpox vaccine mandate, concluding that such a law should be upheld unless it has "no real or substantial relation" to the protection of public health, morals, or safety. *Id.* at 30. Courts addressing covid-19 issues have repeatedly cited *Jacobson* with approval. *See, e.g., South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613, 207 L. Ed. 2d 154 (2020) (Roberts, C.J., concurring) [*11] (quoting *Jacobson*: "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"). The Eleventh Circuit, too, has given wide berth to measures addressing emergencies. *See, e.g., Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) (upholding a curfew imposed by Miami-Dade County after Hurricane Andrew) (abrogated on other grounds by *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); *Robinson v. Attorney General*, 957 F.3d 1171, 1179 (11th Cir. 2020) (citing *Jacobson* and *Avino* and noting that, while still subject to justification and judicial review, "states and the federal government have wide latitude in issuing emergency orders to protect public safety or health").

To be sure, the proper analysis under *Jacobson* and later cases may not be settled. *See, e.g., Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608, 207 L. Ed. 2d 1129 (2020) (Alito, J. dissenting) ("[I]t is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (Gorsuch, J., concurring) ("*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so."). But *Jacobson* at least makes clear, and later cases do not question, that the existence of a public-health emergency is a factor in the analysis. In a pandemic, public health is an important, though not necessarily controlling, [*12] factor.

V

The plaintiffs assert that by prohibiting access to their privately owned beaches, the county took their property without just compensation, thus violating the Fifth Amendment Takings Clause, made applicable to the states by the Fourteenth Amendment.

There are two distinct types of takings: per se physical takings and regulatory takings. The plaintiffs assert the challenged ordinance effected a per se physical taking. They assert alternatively that they are entitled to prevail even if the ordinance effected only a regulatory taking.

A

Physical takings are governed by a "simple, *per se* rule: The government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021).

A per se physical taking occurs when the government directly appropriates property for use by someone other than the owner. The leading case is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). There the Court held that a statute requiring a landlord to permit the installation of television cables on the landlord's property was a taking. The Court said that a "permanent physical occupation," even one this minor, deprived the property owner of both the right to possess the occupied area and the right to exclude others from it. *Id.* at 435.

In *Cedar Point*, the Court made clear that the permanent physical occupation need not be constant; intermittent occupation can also [*13] constitute a per se physical taking. The regulation at issue there required owners of agricultural property to allow union organizers onto their property for up to three hours per day, 120 days per

year. The Court held this was a per se physical taking.

The Walton County ordinance, in contrast, did not constitute a per se physical taking. This is so because the ordinance did not authorize anyone to go onto or use the plaintiffs' property. "When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies." *Cedar Point*, 141 S. Ct. at 2071 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321-22, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)). That is what happened here.

In nonetheless asserting the Walton County ordinance effected a per se physical taking, the plaintiffs say the ordinance "prevents them from exercising any stick of the property-rights bundle that they possess as private landowners." ECF No. 49 at 24. But that of course is not true. The plaintiffs could still use part of their property, could exclude the public from all of it, and could still sell the property. The ordinance authorized nobody to use the plaintiffs' property.

The plaintiffs also cite *Chmielewski v. City of St. Pete Beach*, 890 F.3d 942 (11th Cir. 2018). There [*14] a city repeatedly invited the public to trespass on the plaintiffs' private beachfront property, put up beach-access signs, provided public parking, and conducted on the property a whiffle-ball tournament attended by several hundred people. The Eleventh Circuit held this was a per se physical taking due to the constant physical occupation of the property by the public, as authorized and encouraged by the city. *Id.* at 951. Walton County did nothing of the kind.

That the ordinance did not effect a physical taking at all makes it unnecessary to decide whether the temporary nature of the ordinance, standing alone, also would preclude per se treatment. In *Loretto*, the Court said *temporary* physical intrusions are not subject to the per se rule but are instead subject to a "more complex balancing process." *Loretto*, 458 U.S. at 435 n.12. This was so because temporary intrusions "do not absolutely dispossess the owner of his right to use, and exclude others from, his property." *Id.* Similarly, in *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23, 39, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012), the Court held that a temporary invasion—there, by flooding—was again subject to a "more complex balancing process." But *Cedar Point* calls into question any assertion that per se treatment is never appropriate for a temporary taking. *See Cedar Point*, 141 S. Ct. at 2078 ("The duration [*15] of an appropriation—just like the size of an appropriation—bears only on the amount of compensation.") (internal citation omitted).

In any event, here the challenged ordinance temporarily restricted the plaintiffs' use of their property but did not authorize an intrusion, even temporarily. The ordinance did not take the property for use by the county, the public, or anyone else. Quite the contrary: the ordinance explicitly *prohibited* use of the property. The challenged ordinance did not effect a per se physical taking.

B

A regulatory taking occurs when private property rights are eliminated or diminished through government regulation. Regulatory takings come in two types. The first is a categorical taking, in which the property owner is deprived of all economically viable use of the property. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). The Walton County ordinance did not effect this kind of taking. The second type, a non-categorical taking, includes anything less and is subject to analysis under the balancing test set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

The plaintiffs assert that, even if the Walton County ordinance did not effect a per se taking, it effected a regulatory taking subject to the *Penn Central* balancing test. That test weighs (1) the economic effect [*16] of the regulation on the property, (2) the property owner's reasonable investment-backed expectations for development, and (3) the character of the government regulation. *Penn Cent.*, 438 U.S. at 124. The *Penn Central* test is an "ad hoc factual inquiry, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra*, 535 U.S. at 322.

The *Penn Central* test raises what is sometimes referred to as the "denominator problem." The issue is how the property should be defined. The plaintiffs say they were deprived of "all" use of the property at issue, which they define not as an entire parcel but as the part of a parcel lying between the dunes or seawall and the water. But all the plaintiffs save one could still use the lion's share of the property—usually a house as well as the land not on the sandy beach. The exception is the plaintiff Sandy Shores Property Owners Association, whose entire parcel is on the beach. For all the plaintiffs, the restriction on their use of the property was temporary.

The *Penn Central* test is driven by "justice and fairness," and the outcome "depends largely 'upon the particular circumstances [of the] case.'" *Tahoe-Sierra*, 535 U.S. at 337 (quoting *Penn Central*, 438 U.S. at 124). The circumstances in this case are extraordinary and unprecedented. The county acted pursuant to [*17] a state declaration of emergency to protect public health, and for a limited time—just 29 days. During those 29 days, the plaintiffs were prohibited from using and enjoying one of the most valuable aspects of their property—what they refer to as their backyard. But unlike most backyards, beaches are unique. *See Buending v. Town of Redington Beach*, 10 F.4th 1125, 1131 (11th Cir. 2021) (detailing Florida caselaw recognizing "the unique nature of its beaches"). The plaintiffs' properties abut state sovereign lands and the Gulf of Mexico that, whether the plaintiffs like it or not, attract the beach-going public.

More importantly, the government was acting pursuant to its police power in a public-health emergency. In *Penn Central* the Court noted that in reviewing reasonable exercises of police powers, "the Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests . . . which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." *Penn Central*, 438 U.S. at 125.

The bottom line is this. The Board of County Commissioners faced an escalating pandemic that posed an enormous threat to public health. There was no way to know at that time how many people would die or become gravely ill and how best [*18] to minimize the number. Decisive action seemed appropriate. In closing the beaches, the county exhibited no animus toward these plaintiffs or anyone else. Instead, the commissioners exercised their best judgment, based on the limited knowledge available at the time, on how to preserve life and health.

In asserting the contrary, the plaintiffs say that only public beaches posed a public-health risk and that the county closed the private beaches only to make it easier to enforce the public-beach closure. For at least two reasons, the assertion does not help the plaintiffs.

First, the assertion that private beaches posed no risk is not true. Private beaches were available not just to owners of single-family houses but to multi-unit facilities and rental properties. And even the owners of single-family houses had visitors, as shown by an example emphasized in the plaintiffs' own brief. *See* ECF No. 49 at 16-19. If, as the county reasonably believed at the time, covid could be spread on the beach, closing the

beaches served a legitimate public-health purpose.

Second, enforceability is a legitimate governmental interest, especially when public health is at risk. The county could reasonably conclude [*19] that if owners of beachfront property could go on the beach and into the gulf, members of the public—who might not recognize the plaintiffs' special privilege—would go on the beach, too. The county could reasonably seek to foster an appearance of fairness and the public's voluntary compliance with the county's public-health measures.

The plaintiffs had full, unfettered, exclusive access to some of the world's most beautiful beaches for 337 days during 2020. They had the right to exclude the public all year long. That the plaintiffs' access to part of their property was restricted for 29 days in an effort to safeguard the community was not an unconstitutional taking.

VI

The second amended complaint alleges that the ordinance "fails to afford procedural and substantive due process." ECF No. 41 at 14 ¶ 49. The plaintiffs have not further addressed procedural due process, and there is no indication the county failed to provide any required notice, hearing, or other essential element of procedural due process. The plaintiffs still do, however, assert a substantive-due-process claim.

The claim fails because a takings claim is a takings claim; it cannot be repackaged as a substantive-due-process [*20] claim. The challenged ordinance affected the plaintiffs' property rights—no more and no less. Those rights—the right to use and enjoy one's property and to exclude others—are at the very center of the Takings Clause. Indeed, the plaintiffs' substantive-due-process arguments are in substance the very same arguments they make under the Takings Clause.

The Supreme Court has made clear a plaintiff has no substantive-due-process claim in circumstances like these: "The first problem with using substantive due process to do the work of the Takings Clause is that we have held it cannot be done. Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'l Prot.*, 560 U.S. 702, 721 (2010) (quoting in part *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)). *See also Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 615 (11th Cir. 1997) ("[T]here is no substantive due process 'takings' claim that would protect a specific property right not already protected by the Takings Clause"); *Bickerstaff Clay Prod. Co. v. Harris County*, 89 F.3d 1481, 1489 (11th Cir. 1996) (holding that a substantive due process claim was "subsumed" by a takings claim).

The county is entitled to summary judgment on the due-process claims.

VII

Finally, the plaintiffs assert that the beach closure was an unreasonable [*21] seizure of their property in violation of the Fourth Amendment, made applicable to the states by the Fourteenth Amendment.

The plaintiffs' property was not seized; its use was restricted. And even if the restriction on use could be deemed a seizure, the claim would fail, because the Fourth Amendment prohibits only *unreasonable* seizures. As set out above, closing the beaches, private as well as public, was a reasonable public-health measure based on what was known at that time about the spread of covid-19. Restricting the plaintiffs' use of their property in an effort to hold off the pandemic was

equally permissible whether viewed under the Takings Clause or the Fourth Amendment.

The plaintiffs have made clear they assert only that their property was seized, not that law enforcement officers conducted an unconstitutional search by entering the property. And the ordinance itself says nothing about the ability of officers to go on the plaintiffs' land. That officers occasionally went on the plaintiffs' property to address violations they observed—to insist on compliance—was not objectionable. The Fourth Amendment does not prohibit an officer from going onto unfenced property to address an ongoing violation of the law. The record does not indicate the county authorized officers to go [*22] on the plaintiffs' land over objection for any other purpose.

The county is entitled to summary judgment on the Fourth Amendment claim.

VIII

For these reasons,

IT IS ORDERED:

1. The plaintiffs' summary-judgment motion, ECF No. 48, is denied.

2. The county's summary-judgment motion, ECF No. 53, is granted in part.

3. The clerk must enter judgment stating, "This case was resolved on motions. It is adjudged that the federal claims for just compensation and damages that were not abandoned are dismissed on the merits with prejudice. The plaintiffs who did not abandon such claims were K1 Florida Properties, L.L.C.; Lionel and Tammy Alford, as Co-Trustees of the Lionel D. Alford, Jr. and Tammy Nix Alford Revocable Trust; Douglas B. Bush; Shelly L. Bush; Michael D. Huckabee and Janet M. Huckabee, as Co-Trustees of the Angus B. Wiles Trust; Camping on the Gulf Land, L.L.C.; Sandy Shores Property Owners Association, Inc.; Todd Harlicka; Christopher F. Corrado; Edward J. McMillian; Joy L. McMillian; JE Coastal Properties, L.L.C.; Eric and Deborah Wilhelm, as Co-Trustees of the Eric and Deborah Wilhelm Revocable Trust; Parker H. Petit; Toscana 41, L.L.C.; Jason Bradley Rudd; and Seth Nicholas Rudd. The defendant against [*23] whom such claims were not abandoned was Walton County. All other plaintiffs abandoned all their claims; their claims are voluntarily dismissed without prejudice. All plaintiffs abandoned all their claims against the defendant Sheriff of Walton County in his official capacity; those claims are voluntarily dismissed without prejudice. All other claims are dismissed as moot."

4. The clerk must close the file.

SO ORDERED on October 15, 2021.

/s/ Robert L. Hinkle

United States District Judge

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