COURT OF APPEALS
DECISION
DATED AND RELEASED

May 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-2449

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ROY S. THORP AND HELENE T. THORP,

PLAINTIFFS-APPELLANTS,

v.

TOWN OF LEBANON AND COUNTY OF DODGE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order and a judgment of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Roy and Helene Thorp appeal the dismissal of their complaint against the Town of Lebanon and County of Dodge relating to actions taken with regard to the rezoning of the Thorps' property. The trial court dismissed the complaint because it concluded the Thorps did not comply with the

notice of claim and notice of injury requirements of § 893.80(1)(a) and (b), STATS. The Thorps' primary contention on appeal is that their complaint alleges federal constitutional claims, not state statutory or common law claims, and therefore the requirements of § 893.80(1) do not apply. They also contend that they did comply with § 893.80(1). We conclude that the Thorps' complaint does allege certain federal constitutional violations and, as to those claims, the requirement of § 893.80(1) does not apply. We also conclude that the regulatory takings claim was properly dismissed, but on grounds other than those relied on by the trial court. We therefore affirm in part and reverse in part. Because of these conclusions, we do not reach the question whether the Thorps complied with § 893.80(1).[1]

The complaint makes the following pertinent allegations in the "background" section. The Thorps own 225 acres of real estate located in the Town of Lebanon, which for twenty years prior to the actions complained of were zoned as rural development. On July 7, 1994, the town board of supervisors approved a comprehensive rezoning that changed the classification of the Thorps' property to agricultural, and at the Town's request, the County amended its official zoning map to incorporate this rezoning. After that amendment, the Thorps filed a petition with the town plan commission seeking a rezoning of 155 acres from the new agricultural classification back to the original classification of rural development. The plan commission denied the petition but, on appeal to the town board of supervisors, that board approved the petition. The Thorps then filed a petition with the Dodge County Planning and Development Department to seek

[1] We do not understand the Thorps to argue that their complaint contains any state law claim.

confirmation of the reclassification back to rural development and that body, apparently through the planning and survey committee, voted to grant the request on a 4-1 vote. However, the county board of supervisors denied the petition.

The Thorps' complaint seeks declaratory, injunctive and monetary relief, and asserts claims under three headings. The first is a challenge to the validity of the amended zoning ordinance as bearing no reasonable relationship to the public health, safety and welfare of the Town and County, an unlawful exercise of police power, and a violation of equal protection and due process under the United States and Wisconsin Constitutions. Under this claim, the Thorps allege that the highest and best suited use of the Thorps' property is not agricultural but rather rural development because the land is hilly and rocky, there are certain deficiencies in the soil, and part is located in wetlands. Under the amended zoning ordinance, numerous "islands" were left zoned rural development without a logical basis, even though that land is more suitable for agricultural use than the Thorps' property, and for this reason the rezoning is discriminatory. The survey conducted by the Town before the adoption of the rezoning showed that the residents had no objection to residential development and the board of supervisors misinterpreted and misapplied the results of that survey when adopting the ordinance.

The second claim asserts that the amended zoning ordinance is an inverse condemnation and a taking of an interest in the Thorps' property without compensation in violation of the Fifth Amendment to the United States Constitution. Under this claim, the Thorps contend that the rezoning resulted in a permanent and substantial interference with the use and enjoyment of their land. The rezoning has resulted in a substantial loss of the fair market value per acre, and this is the amount of the just compensation they seek. In addition, the value

and amount of their line of credit from local banks has been reduced and substantially jeopardized as a result of the rezoning.

The third claim asserts a denial of the right to a fair and impartial hearing. The factual allegations under this claim are the following. The one negative vote on the 4-1 vote by the Dodge County Planning and Survey Committee on the Thorps' petition for a reclassification to residential development was by Betty Balian, the chair of the Town of Lebanon Board. However, when appearing before the county board of supervisors, the chair of the planning and survey committee represented to that board that the vote was 3-2, with himself, as well as Balian, voting against the petition. Before the county board of supervisors voted on the Thorps' petition, Balian made these misrepresentations to the board: she characterized the Thorps as real estate developers and as having ulterior motives to seek development of their real estate when no such development request had been made; she stated that the town residents favored general agricultural zoning and were antidevelopment; and she otherwise failed to correctly state the reasons in the petition for the Thorps' request.

After answering and raising a number of affirmative defenses, the Town and County moved to dismiss on the ground that the Thorps had failed to comply with § 893.80(1), STATS., before filing suit. The trial court agreed and dismissed the complaint. The trial court rejected the Thorps' argument that, because their complaint asserted federal constitutional violations, under ***Felder v. Casey***, 487 U.S. 131, 147 (1988), the requirements of § 893.80(1) did not apply to their claims. The court stated that "simple allegations of constitutional violations do not render § 893.80 inoperative."

Whether § 893.80(1), STATS., applies to the Thorps' claims presents a question of law, which we review independently of the trial court. *See* ***DNR v. City of Waukesha***, 184 Wis.2d 178, 189, 515 N.W.2d 888, 892 (1994). In ***Felder,*** the Court held that Wisconsin's notice requirements under § 893.80(1) did not apply in an action brought in state court under 42 U.S.C. § 1983. ***Felder***, 487 U.S. at 138. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

Section 1983 is not a source of substantive rights but rather the principal civil remedy for the private enforcement of the federal constitution against state and local governments and their employees. *See* ***Chapman v. Houstin Welfare Rights Org.,*** 441 U.S. 600, 618 (1979). Actions under § 1983 may be brought in state court. ***Riedy v. Sperry***, 83 Wis.2d 158, 160, 265 N.W.2d 475, 477 (1978). To establish a claim cognizable under § 1983, a party must show that a person acting under color of state law deprived him or her of a federal constitutional right. ***Id.*** Local governmental units are "persons" within the meaning of § 1983. *See* ***Monell v. Department of Social Services of City of New York***, 436 U.S. 658, 690 (1978).

The Thorps' complaint does not state that it is brought under 42 U.S.C. § 1983. However, if a complaint alleges that a person acting under color of any state statute, ordinance, regulation, custom or usage has deprived the plaintiff of a right secured by the federal constitution, it is not necessary that the complaint expressly state that it is brought under § 1983. *See* ***Boldt v. State***, 101 Wis.2d 566,

584, 305 N.W.2d 133, 143 (1981). The County and Town do not appear to contest this proposition. They argue, however, that ***Felder*** is not applicable because the claims asserted in the complaint arise under state law, and although they "may involve constitutionally protected rights … the Thorps have not specifically designated a violation of federal law in their pleadings."

We do not understand the distinction the respondents attempt to draw between a claim arising under state law that "involves" federal constitutional rights and a violation of a federal constitutional right. It is true that simply because a complaint states in a conclusory fashion that a federal constitutional right has been violated, the complaint does not thereby state a claim for relief sufficient to withstand a motion to dismiss for failure to state a claim. It is the sufficiency of the facts alleged that control the determination whether a claim for relief is properly pled.[2] ***Strid v. Converse***, 111 Wis.2d 418, 422-23, 331 N.W.2d 350, 353 (1983). However, we reject the implication of the respondents' argument that the operative facts of a complaint are not sufficient to state a claim for a violation of a federal constitutional right simply because those same operative facts might also state a claim arising under state law. The proper inquiry is whether the operative facts in the complaint are sufficient to state a claim for a

[2] The respondents' motion to dismiss was based on a failure to comply with § 893.80(1), STATS., not a failure to state a claim upon which relief could be granted. However, in order to resolve their motion, we must determine whether the complaint contains claims of federal constitutional violations, as the Thorps contend it does. We take our analysis for this purpose from that involved in reviewing a complaint that is challenged based on a failure to state a claim. The facts pleaded and all the reasonable inferences from the facts are taken as true, ***Irby v. Macht***, 184 Wis.2d 831, 836, 522 N.W.2d 9, 11 (1994), and we construe them in the plaintiffs' favor. ***Stefanovich v. Iowa Nat'l Mut. Ins. Co.***, 86 Wis.2d 161, 164, 271 N.W.2d 867, 868-69 (1978). Whether the complaint states a particular claim for relief is a question of law, which we review de novo. ***Irby v. Macht,*** 184 Wis.2d at 836, 522 N.W.2d at 11. However, we emphasize that we are deciding whether the complaint contains the federal constitutional claims only to the extent necessary to resolve the question central to this appeal: whether § 893.80(1) applies to those claims.

violation of any federal constitutional right. If they are, then under ***Felder***, § 893.80(1), STATS., may not be applied to that particular claim. If particular operative facts state a claim for relief under state law but not under the federal constitution, then as to that claim § 893.80(1) applies.

The case on which both the trial court and the respondents rely, ***Medley v. City of Milwaukee,*** 969 F.2d 312 (7th Cir. 1992), does not state otherwise and does not resolve the inquiry against the Thorps. In ***Medley,*** the court affirmed a summary judgment in favor of the defendants, concluding that the Medleys had not established that they had a liberty interest in participating in the Rent Assistance Program and therefore their claim for deprivation of a liberty interest without due process was properly dismissed, and their state law contract claims were properly dismissed because of a failure to comply with § 893.80(1), STATS. ***Medley,*** 969 F.2d at 317-20. In a footnote, the court noted that the plaintiffs also argued that their right to due process was violated for another reason, but the court declined to address it because the argument was perfunctory and undeveloped and not supported by authority. ***Id.*** at 321 n.8. The Thorps' arguments that their complaint contains federal constitutional claims are not undeveloped, perfunctory or unsupported by authority and, because the factual allegations and legal assertions in their complaint bear little resemblance to those in ***Medley***, the decision in ***Medley*** sheds no light on whether the Thorps' arguments are correct.

The Thorps describe their first claim as a claim that the rezoning ordinance is invalid because it violates their right to equal protection and due process in that it is arbitrary, unreasonable and discriminatory. The Fourteenth Amendment to the United States Constitution prohibits states from depriving persons of property without due process of law and of the equal protection of the

laws. The Town and County argue that this first claim is a state law claim because the Thorps seek a declaratory judgment under § 806.04, STATS., as a result of the alleged violation of their constitutional rights. We do not agree. The declaratory judgment statute is not the source of the substantive rights that the Thorps claim were violated. The declaratory judgment statute simply permits the Thorps to seek a particular type of remedy in Wisconsin courts--in this case, a declaration that their rights under the federal constitution have been violated. The substantive rights that the Thorps claim were violated are not affected or defined by the decision to seek declaratory relief for the alleged violations.

A number of Wisconsin cases recognize that a challenge to a zoning ordinance on the ground that it is arbitrary and unreasonable is the equivalent of a claim of unconstitutionality based on a denial of equal protection of the laws or due process.[3] *See, e.g.,* ***Buhler v. Racine County,*** 33 Wis.2d 137, 143, 146 N.W.2d 403, 406 (1966). *See also* ***Cushman v. City of Racine,*** 39 Wis.2d 303, 311, 159 N.W.2d 67, 71-72 (1968) (ordinance changing classification of property from residential to neighborhood shopping, where evidence shows area is principally residential and municipality did not show legitimate purpose for reclassification, "exceeded the bounds of legislative discretion and … in that respect [i]s unconstitutional and void because clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."); and ***Kmiec v. Town of Spider Lake***, 60 Wis.2d 640, 651, 211 N.W.2d

[3] Equal protection in the context of zoning laws means that those in similar circumstances, among whom no reasonable basis for distinction exists, must be treated equally. *See* ***Browndale International Ltd. v. Board of Adjustment***, 60 Wis.2d 182, 203-04, 208 N.W.2d 121, 132-33 (1973). In general, substantive due process protects against arbitrary, wrongful governmental actions regardless of the fairness of the procedures used to implement them. *See* ***Jones v. Dane County***, 195 Wis.2d 892, 912, 537 N.W.2d 74, 79 (Ct. App. 1995).

471, 476 (1973) ("unreasonable classifications in zoning ordinances … and restrictions which are not reasonably germane to legitimate objectives or which prohibit a particular use of land ignoring its natural characteristics for such use or which are arbitrary have been held to be unconstitutional….").

Given the presumption of validity accorded zoning ordinances, it may be difficult to prevail on a claim that a zoning ordinance violates either the equal protection or substantive due process clause, but that is a matter of proof, not pleading. *See* ***Cushman***, 39 Wis.2d at 306, 159 N.W.2d at 69. At this stage, we are concerned only with whether the factual allegations in the complaint are sufficient to state a claim for relief on the ground that the zoning amendment deprived the Thorps of either the equal protection of the laws or substantive due process because it was arbitrary, unreasonable, and discriminatory. We conclude that they are. It is unnecessary at this stage to decide whether the allegations under the first heading and other related factual allegations in the background part of the complaint state a claim for a denial of equal protection or substantive due process or both. The claim is for a federal constitutional violation, as recognized in ***Buhler***, ***Cushman***, and ***Kmiec***, and therefore the requirements of § 893.80(1), STATS., do not apply to that claim.

The Thorps describe their second claim as a violation of the Fifth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation, and this prohibition is made applicable to the states through the Fourteenth Amendment. ***Zealy v. City of Waukesha***, 201 Wis.2d 365, 373, 548 N.W.2d 528, 531 (1996). The Town and County respond that this is really a claim that arises under § 32.10, STATS., which permits a property owner, whose "property has been occupied by a person possessing the power of

condemnation and … the person has not exercised the power, to institute condemnation proceedings by filing a verified petition in the circuit court where the property is located ….”[4] The Thorps do not appear to argue in their reply brief that the complaint asserts a claim under § 32.10. The complaint does not refer to § 32.10 and the complaint is not a verified petition. However, we need not decide whether the Thorps intended to assert a claim under § 32.10 in addition to one under the Fifth and Fourteenth Amendment, because we conclude that the complaint does not state a claim for taking under the federal constitutional provisions and, for the same reason, does not state a claim for taking or inverse condemnation under § 32.10.

In order to be considered a taking for which compensation is required under the Fifth Amendment, the challenged regulation must deny the landowner all or substantially all practical uses of the property. ***Zealy***, 201 Wis.2d at 374, 548 N.W.2d at 531 (1996), citing ***Lucas v. South Carolina Coastal Council,*** 505 U.S. 1003, 1015 (1992). The same is true for a claim under § 32.10, STATS., that is based on a regulatory taking. *See* ***Howell Plaza, Inc. v. State Highway Comm’n***, 66 Wis.2d 720, 722-27, 226 N.W.2d 185, 186-89 (1975).

The pertinent allegations in the complaint are that the highest and best use of the land is not agricultural but rural development, that the rezoning to agricultural has resulted in a permanent and substantial interference in the use and enjoyment of their land, and that the rezoning has resulted in a substantial loss of value per acre. The first allegation is factual and the third may also be considered

[4] Section 32.10, STATS., is based on Article I, Section 13 of the Wisconsin Constitution which, like the Fifth Amendment to the federal constitution, prohibits the taking of private property for public use without just compensation. ***Howell Plaza, Inc. v. State Highway Comm’n***, 66 Wis.2d 720, 723, 226 N.W.2d 185, 186-87 (1975).

factual, but they do not provide a basis for concluding that the rezoning deprived the Thorps of all or substantially all practical uses of all of the property. *See* ***Zealy,*** 210 Wis.2d at 378-79, 548 N.W.2d at 534 (taking did not occur where rezoning from residential to conservancy on 8.2 acres of a 10.1 acre parcel allowed agricultural use on the rezoned portion, even though there was substantial decrease in value resulting from rezoning because of inability to develop for residential use). The second allegation is not only conclusory, but even as a conclusion it is insufficient to constitute a regulatory taking claim. The complaint does not allege the use the Thorps have made of the land while it was zoned rural development and does not allege either the actual or anticipated uses that the Thorps can no longer make of the land. We have searched the exhibits to the complaint and they do not fill in these critical omissions.

The complaint alleges that the third claim--the violation of a right to a fair and impartial hearing--is a violation of procedural and substantive due process and equal protection under the federal and state constitutions. The Thorps rely on ***Marris v. City of Cedarburg,*** 176 Wis.2d 14, 498 N.W.2d 842 (1993). In that case, in the context of a review by certiorari of the decision of a zoning board of appeals, the court held that the property owners' right to due process and fair play were violated by certain comments of the chairperson which indicated either prejudgment or an impermissibly high risk of bias. ***Marris,*** 176 Wis.2d at 28-30, 498 N.W.2d at 848-49. The Town and County respond that this third claim is not a federal constitutional claim because the court in ***Marris*** expressly stated that it was basing its decision on "common law due process" rather than constitutional due process, since that is what the parties both argued. *See* ***id.*** at 25 n.7, 498 N.W.2d at 847. However, that same footnote acknowledged the federal constitutional basis for such a claim, referring to ***Guthrie v. WERC,*** 111 Wis.2d

447, 454, 331 N.W.2d 331, 334-35(1983). In ***Guthrie*** that court stated that it was "indisputable that a minimal rudiment of due process is a fair and impartial decision maker," citing ***Goldberg v. Kelly,*** 397 U.S. 254, 271 (1970). ***Guthrie***, 111 Wis.2d at 454, 331 N.W.2d at 335. ***Goldberg*** holds that a fair and impartial decision maker is a requirement for procedural due process under the Fourteenth Amendment. ***Goldberg,*** 397 U.S. at 271.

We do not understand the Thorps to be relying for their third claim on any state common law that is distinct from the procedural due process rights protected by the Fourteenth Amendment to the federal constitution. We conclude that, liberally construed, the factual allegations in the background section of the complaint and those grouped under the "denial of fair and impartial hearing" allege a claim for a violation of the right to a fair and impartial decision maker guaranteed by the Fourteenth Amendment. Because it is unnecessary, we do not address the other federal constitutional violations asserted under this heading.

The respondents contend that compliance with § 893.80(1), STATS., is required in cases challenging zoning ordinances, citing ***Vanstone v. Town of Delafield,*** 191 Wis.2d 586, 530 N.W.2d 16 (Ct. App. 1995). The respondents overstate the holding of ***Vanstone*** in this regard. The claims asserted by the property owners in ***Vanstone*** were: failure to provide proper notice of the proposed rezoning, private nuisance, and zoning in violation of town ordinances. ***Vanstone***, 191 Wis.2d at 591 n.2, 530 N.W.2d at 18. The property owners did not contend that any of these claims were federal constitutional claims and argued only that they had complied with § 893.80(1). Our conclusion in ***Vanstone*** that the property owners had not complied with § 893.80(1) does not in any way suggest that § 893.80(1) applies to all actions challenging zoning ordinances regardless of the nature of the specific claims asserted.

The respondents also contend, in a footnote, that any claim brought under 42 U.S.C. § 1983 must, in addition to other requirements, assert that there is an inadequate state remedy for the claim. The complaint, both with regard to the first and third claims, alleges that the Thorps "have exhausted all their administrative remedies required to be pursued" and that they "have no adequate legal remedy." The respondents do not explain why these allegations are insufficient at this stage of the proceedings, or what remedies the Thorps needed to exhaust and for which claims.

Because the respondents' contention of an exhaustion requirement is not developed sufficiently for us to discern how it affects the issue on this appeal--whether § 893.80(1), STATS., applies to the first and third claims--we decline to address it further. However, nothing in our opinion precludes the respondents from raising this issue in proceedings on remand before the trial court.

In conclusion, we affirm the trial court's dismissal of the claim for regulatory taking without just compensation because, whether analyzed as a federal constitutional claim or a claim under § 32.10, STATS., the allegations of the complaint are insufficient to state a claim for relief. We reverse the trial court's dismissal of the claim that the amended zoning ordinance deprives the Thorps of due process and equal protection of the law and their claim for a violation of their right to a fair and impartial hearing. We conclude that these claims adequately assert violations of a right secured by the federal constitution such that the requirements of § 893.80(1), STATS., do not apply to these claims.

By the Court.—Order and judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.