

IN THE COURT OF APPEALS OF IOWA

FILED

NOV 29 1988

CLERK SUPREME COURT

MAX YOCUM,)

Plaintiff-Appellant,)

vs.)

STATE OF IOWA and IOWA)

DEPARTMENT OF WATER, AIR)

AND WASTE MANAGEMENT,)

Defendants-Appellees.)

STATE OF IOWA, ex rel. IOWA)

DEPARTMENT OF WATER, AIR)

AND WASTE MANAGEMENT,)

Plaintiffs-Appellees,)

vs.)

MAX YOCUM,)

Defendant-Appellant.)

8-361
87-1287

Appeal from the Iowa District Court for Johnson County
(No. Eq. 48921), William L. Thomas, Judge.

Plaintiff appeals from a district court ruling in favor
of the State regarding use and permit requirements of
Yocum's floodway land. **AFFIRMED.**

Patricia C. Kamath, Iowa City, for appellant Max Yocum.

Thomas J. Miller, Attorney General, and Eliza Ovrom,
Assistant Attorney General, for appellee State of Iowa.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

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Yocum appeals from a district court ruling: (1) dismissing his petition to require the State to condemn his property; (2) ordering Yocum to either comply with the State's permit conditions or remove the nonconforming structure from his land; (3) ordering the removal of two other unauthorized houses on his lots; (4) fining Yocum ten dollars per day per lot civil penalty as long as his lots were not in compliance with State law; and (5) ordering all costs to be taxed to Yocum. Yocum contends that: (1) the State's refusal to grant a building permit for houses on his floodway land constituted a taking requiring just compensation; (2) the unconstitutional taking of his land barred imposition of a civil penalty against him; (3) his permit complied with all floodproofing requirements and was improperly denied; (4) the selective enforcement of the requirements for flood plain development in the area of Yocum's property barred imposition of the civil penalty; and (5) the district court abused its discretion by imposition of the penalties against him.

In 1967, Yocum purchased unimproved real estate adjacent to the Iowa River south of Iowa City. At the time of purchase, the property was zoned as a resort area, permitting single-family residences, cabins, boat docks, and other similar uses. In November 1983, Yocum applied to the State for a permit pursuant to Iowa Code section

455B.275 to allow him to move a house onto his property. While waiting for a decision, Yocum moved a house onto the lot. In July 1984, the State denied Yocum's permit, asking that he submit a floodproofing plan for the house. Yocum did not file a plan nor did he appeal this denial. Subsequently, Yocum moved two more houses onto his property. After this, the State approved Johnson County's flood plain ordinance in September 1985. Other houses have been located in this flood plain area without State permission or objection.

Yocum sued the State in November 1984, seeking to force the State to condemn his property. The State sued Yocum in January 1986, seeking enforcement of the permit denial and removal of the additional two residences. The State prevailed as to both cases and Yocum appeals.

Our review of this matter is de novo. Iowa R. App. P. 4. As a preliminary matter, we must first determine whether Yocum is precluded from raising the issue of a taking because he failed to appeal the denial of a permit to build on Lot 16. The State contends Yocum is required to exhaust all administrative remedies before appealing to the court. We disagree.

The Iowa Administrative Procedures Act provides:

Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action.

Iowa Code § 17A.19 (1987) (emphasis added).

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The Iowa statute regulating flood plain control contains permit application procedures. Iowa Code § 455B.278. Appeal procedures within the department are also specified. Id. § 455B.278(2). The statute goes on to say, "Notwithstanding chapter 17A, petitions for judicial review may be filed in the district court of Polk County or of any county in which the property affected is located." Id.

In construing this statute, we must give effect to the legislative intent as shown by what the legislature said, rather than what it should or might have said. Iowa R. App. P. 14(f)(13). This quoted sentence from Iowa Code section 455B.278(2) expressly provides that judicial review may be taken regardless of the requirements of Chapter 17A. This sentence specifically refers to Chapter 17A. Therefore, we find that exhaustion of all administrative remedies is not required in this case and we may proceed to review the "taking" issue.

I. Yocum contends that the refusal to grant a building or occupancy permit for subdivided rural land after 1985 when the county commenced enforcement of Iowa statute constituted a taking of land requiring compensation of full value of the land when no real value remains. The State asserts that the permit denial is a reasonable agency decision and that enforcement of the flood plain laws in

this case is a valid exercise of police power and does not effect a taking of property.

Land use restrictions . . . reasonably related to the promotion of the health, safety, morals, or general welfare repeatedly have been upheld even though the challenged regulations destroyed or adversely affected recognized real property interests or flatly prohibited the most beneficial use of the property. [citations omitted]

Stone v. City of Wilton, 331 N.W.2d 398, 402 (Iowa 1983).

Hence, such laws, when justifiable under the police power, validly enacted and not arbitrary or unreasonable, generally are held not to be invalid as taking of property for public use without compensation unless the regulation is "so onerous" so as to require compensation. Id.

Yocum claims that when he bought the real estate in question it was zoned A-2 resort area. Permitted uses included single-family residences. In 1983, Yocum applied for a building and occupancy permit pursuant to Iowa Code section 455B.275 concerning construction in a flood plain or floodway. The permit was denied in July 1984. Testimony indicated that no permits for construction would be issued for the floodway. Only agriculture and recreational trails without structures are permitted uses of the land. Yocum contends he has suffered extreme economic hardship as a result of the zoning ordinance.

Iowa has rejected the argument that the floodway and flood plain laws are a taking of property. Easter Lake Estates, Inc. v. Iowa Natural Resources, 328 N.W.2d 906,

910 (Iowa 1982). The test to be applied is: 1) whether the land use regulation substantially advances a legitimate state interest; and 2) whether it denies the landowner economically viable use of the land, particularly to the extent to which it interferes with reasonable investment-backed expectations. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. _____, _____, 108 S. Ct. _____, _____, 94 L. Ed. 2d 472, 488 (1987); Woodbury County Soil Conservation District v. Ortner, 279 N.W.2d 276, 279 (Iowa 1979). The burden is on the complaining property owner to show that the restraint upon him/her outweighs the collective benefit to the people of the state. Ortner, 279 N.W.2d at 279.

The constitutional validity of Iowa Code section 455B.275 was upheld in Iowa Natural Resources Council v. Van Zee, 261 Iowa 1287, 1298, 158 N.W.2d 111, 117-18 (1968) (then codified at 455A.33). Application of the law was held valid when a landowner was ordered to remove his mobile home park from below a dam. Easter Lake Estates, Inc., 328 N.W.2d at 910. The flood plain laws have been found to substantially advance legitimate state interests, and we find no reason to depart from that conclusion here.

The main issue in this case is the second prong of the test, the economic impact on Yocum. Yocum claims to have vested rights in the property for his time, effort, and

money spent preparing the lots for the homes he planned to move onto them. He says he relied on the A-2 zoning when he subdivided the land.

In Stone v. City of Wilton, 331 N.W.2d at 404, Stone's efforts and expenditures were not so substantial as to create vested rights. Stone purchased land relying on the zoning for multi-family residences. He secured funding from the FHA and engaged the services of an architect and engineer who drew up plans and plots. These were "preliminary steps" and not enough to create substantial vested rights. Id. Yocum's efforts are similar to Stone's and constitute only preliminary steps.

Furthermore, there has been no down zoning of Yocum's land as there was in the City of Wilton. The vested rights concept is concerned with the legitimate and valuable expenditures made in connection with the use of the affected area "before imposition of the regulation" which "may" create a property right requiring compensation. Kasperek v. Johnson County Bd. of Health, 288 N.W.2d 511, 518 (Iowa 1980). The floodway permit requirement has been in effect since 1957. Yocum moved the three homes onto the land without the required permits. He cannot now claim these expenses.

Frustration of "investment-backed expectations" may amount to a taking. Id. However, a comparison of values before and after a regulatory act is not conclusive.

Goldblatt v. Hempstead, 369 U.S. 590, 594, 82 S. Ct. 987, 990, 8 L. Ed. 2d 130, 134 (1962). The nature of the regulation is important as the court will hesitate to find a taking when the State merely restrains uses of property that are tantamount to public nuisances. Keystone Coal Ass'n, 480 U.S. at _____, 108 S. Ct. at _____, 94 L. Ed. 2d at 492.

The permit denial for Lot 16 specifically finds that the structure is a public nuisance under Iowa Code section 455B.275(1) because the structure adversely affects the purpose of the floodway. Testimony indicated that the other two houses would also be nuisances. There may be no vested right to maintain or create a nuisance. See Johnson County Bd. of Health, 288 N.W.2d at 520.

Finally, Yocum has not been deprived of all use of his property. He was given the opportunity to keep the first house on the land if he complied with the flood plain requirements for floodproofing the house. The requirements were not onerous as testimony indicated floodproofing was relatively simple and inexpensive. Yocum did not comply with these conditions.

The remaining property may be used for agriculture, nature trails, and other open space activities. These are the uses to which the property is suited by virtue of its location in the floodway of the Iowa River. The flood plain land use restrictions are reasonably related to the

promotion of the health and safety of the public. The regulations were in effect prior to Yocum's efforts to improve his land. Yocum cannot now claim that his expectations to move houses onto the flood plain were his "reasonable" investment-backed expectations. He has not been deprived of all the use value of his land, only the most beneficial use to him. Therefore, we agree with the trial court that no taking has occurred.

II. Yocum contends that he should not be subjected to the civil penalty because his constitutional rights have been violated and because he complied with the State's requirements. As we established in Division I that no taking occurred, we need not discuss the violation of constitutional rights. However, we will consider the alleged error made when the trial court charged Yocum ten dollars per day for failure to comply with the conditions of the permit denial.

The trial court found that Yocum moved the first house onto the flood plain prior to receiving his permit denial. The denial letter allowed him to keep the house if he adequately floodproofed the lower level. Yocum admits that he did not install a window in the basement as required. The trial court was justified in fining Yocum for this violation. "A person who violates a provision of this part . . . or the conditions of a permit issued pursuant to this part is subject to a civil penalty not to exceed five

hundred dollars for each day that a violation occurs." ³⁷³
Iowa Code § 455B.279(2) (1987). The fine of ten dollars per day as established by the trial court is reasonable.

III. Yocum also challenges the fine imposed on the two unauthorized houses claiming that other houses were located on the flood plain without permits. Yocum asserts the State has engaged in selective enforcement of the permit requirements.

Selectivity in prosecution is not per se unconstitutional. State v. Durrell, 300 N.W.2d 134, 135-36 (Iowa 1981). Defendant must show that his selection was deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. Id. at 136.

Yocum asserts that he has been selected for enforcement due to his politically-controversial nature. Our review of the evidence does not support this claim. Yocum has made no showing that an unjustifiable standard has been used. Testimony indicated that the department has a small staff enforcing flood plain laws. Enforcement through a permit system is not discriminatory enforcement. Greenawalt v. Zoning Bd. of Adjustment, 345 N.W.2d 537, 546 (Iowa 1984). Furthermore, the evidence shows that two other permits were denied at the same time as Yocum's.

Yocum has not shown that he has been denied equal protection. He claims the State intentionally

discriminated in the enforcement of the zoning ordinance. The mere failure to prosecute violators is not a basis for finding a denial of equal protection. Greenawalt, 345 N.W.2d at 546. With no proof of the intentional discrimination, we find no denial of equal protection.

The fine is justified under Iowa Code section 455B.279. When penalties are within statutory limits, the reviewing court will not interfere unless there has been a clear abuse of the trial court's power. See State v. Parsons, 401 N.W.2d 205, 210 (Iowa App. 1986). The amount the trial court set is reasonable and we find no abuse of discretion.

The decision of the trial court is affirmed.

AFFIRMED.

Habhab, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

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I respectfully dissent.

I find the State's action has denied plaintiff an economically viable use of his land. I would reverse and remand to the district court.