IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

WENDY WHITAKER, et. al. Plaintiffs, v. SONNY PERDUE, et. al., Defendants.	CIVIL ACTION No. 4:06-cv-140-CC

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON TAKINGS CLAUSE CLAIM

Janet Allison and Lori Collins, persons on the sex offender registry, move for summary judgment on their Takings Clause claim. Allison and Collins rent their residences. O.C.G.A. § 42-1-15(b), by its express terms, summarily deprives them of their leased property, in violation of the Takings Clause of the United States Constitution, the moment a church, school bus stop, or other prohibited location moves within 1,000 feet of their homes. Counsel for Defendants Perdue, Baker, and Dean have suggested that their clients, in an act of unfettered executive discretion, will not enforce the Statute according to its plain language.[1] Counsel's representation provides cold comfort, however, to persons who face 10

[1] See Defs' Mot. to Dismiss, Oct. 28, 2008 [Doc. No. 199] at 7-8.

to 30 years in prison if they violate O.C.G.A. § 42-1-15(b) because of the following: (1) counsel's very clients – Perdue, Baker, and Dean – have declined to enter into a stipulation agreeing that O.C.G.A. § 42-1-15(b) will not be enforced in a manner that deprives persons of their rented residences in violation of the Takings Clause;[2] (2) counsel have provided no guarantee that their clients, in the absence of a stipulation, will not simply change their minds; and (3) counsel's promises in legal briefs will not bind the governor to be elected next year. Meanwhile, counsel for the same Defendants who refuse to enter a stipulation continue to ambiguously concede that the Georgia Supreme Court's decision in Mann v. Ga. Dep't of Corr., 282 Ga. 754, 757 (2007), applies with equal force to both property owners and renters.[3] Plaintiffs respectfully ask this Court to clarify, by order, that the Takings Clause precludes Allison and Collins from being forced to move from their rented property if a prohibited location subsequently is established within 1,000 feet of their residences.

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[2] While the Defendant sheriffs signed a stipulation agreeing that § 42-1-15(b) will not be enforced in a manner that deprives persons of their rented residences in violation of the Takings Clause, see Stipulation, Aug. 10, 2009 [Doc. No. 254], Defendants Perdue, Baker, and Dean declined to enter such a stipulation.

[3] See Defs' First Req. for Admissions of Fact (Ex. 1).

STATEMENT OF FACTS

Per L.R. 56.1(B), the material facts are set forth in *Plaintiffs' Statement of Material Facts in Support of Motion for Summary Judgment on Takings Claim*.

STANDARD OF REVIEW

Summary judgment may be granted if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law.[4]

LEGAL ARGUMENT[5]

I. ALLISON AND COLLINS HAVE STANDING TO RAISE A TAKINGS CLAUSE CLAIM.

This Court previously found that Allison and Collins have standing to raise a Takings Clause claim:

> [T]he Orders of this Court have effectively halted the enforcement of the school bus stop provision and the designation of school bus stops by local school boards. If these Orders were not entered and if this Court's intent to restrain the enforcement of the school bus stop provision during the pendency of this case was unclear or absent, there is a substantial likelihood that the local school boards would have immediately designated school bus stops. Plaintiffs' injury, therefore, is not merely

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4 See Fed. R. Civ. P. 56(c).

5 Plaintiffs hereby incorporate their arguments in previous briefing on this issue. See Pls' Req. for Recon. of Dismissal of Takings Claims and Entry of Partial Summ. J. on Takings Claims, Jan. 30, 2008 [Doc. No 169]; Reply Br. in Supp. of Pls' Req. for Recon. of Dismissal of Takings Claims, Feb. 18, 2008 [Doc. No. 174]; Resp. to Defs' Mot. to Dismiss, Nov. 17, 2008 [Doc. No 207].

hypothetical. Plaintiffs Allison and Collins are in imminent danger of suffering an actual injury occasioned by the enforcement of the school bus stop provision.[6]

Nothing has changed to alter the standing analysis. Allison and Collins are parties to leases and both live within 1,000 feet of a place where a school bus stops to pick up children.[7] Plaintiffs satisfy the standing requirement.

II. ALL PARTIES TO THIS LAWSUIT AGREE THAT APPLICATION OF O.C.G.A. § 42-1-15(B) TO ALLISON AND COLLINS DURING THE TERM OF THEIR LEASES WOULD VIOLATE THE TAKINGS CLAUSE.

Allison and Collins are leaseholders who pay rent pursuant to valid leases.[8] As such, they have a property interest protected by the Takings Clause.[9] The Sheriffs have stipulated and Defendants Perdue, Baker and Dean agree that the Takings Clause prohibits the State from taking renters' property pursuant to

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6 See Order of Mar. 30, 2009 at 33-35 [Doc. No. 223].

7 See Allison Decl. (Ex. 2); Collins Decl. (Ex. 3).

8 See Allison Decl. (Ex. 2); Collins Decl. (Ex. 3).

9 See Greene v. Lindsay, 456 U.S. 444, 450-51 (1982) ("[Tenants] have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes."); United States v. Petty Motor Co., 327 U.S. 372, 374-75 (1946) (oral month-to-month tenant has takings claim); Ammons v. Cent. of Ga. Ry. Co., 215 Ga. 758, 762(1960) (lessee entitled to enjoin taking); Waters v. DeKalb County, 208 Ga. 741, 745 (1952) ("the holder of a valid rent contract for realty . . . has a property right in the leased premises . . . .").

O.C.G.A. § 42-1-15 if there is a subsequent introduction of a prohibited location within 1,000 feet of the rented residence.[10]

III. THE AGREEMENT OF ALL PARTIES – THAT APPLICATION OF O.C.G.A. § 42-1-15(B) TO PLAINTIFFS DURING THE TERM OF THEIR LEASES WOULD VIOLATE THE TAKINGS CLAUSE – IS CONSISTENT WITH CLEARLY SETTLED CASE LAW.

As the Supreme Court recognized in Lingle v. Chevron, 544 U.S. 528, 537 (2005), "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such 'regulatory takings' may be compensable under the Fifth Amendment." Regulations that fall short of eliminating plaintiffs' economic use may still effect a taking, depending upon: (1) the economic impact of the statute on the claimant; (2) the effects of the statute on the investment-backed expectations of the claimant; and (3) the character of the governmental action. See Lingle, 544 U.S. at 538-539 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)). The Penn Central inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." Id. at 540.

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[10] See Defs.' Mot. to Dismiss, Oct. 28, 2008, [Doc. No. 199-2] at 7 ("To the extent that the Plaintiffs have a valid property interest under Georgia law, that property interest cannot be taken if . . . there is a subsequent introduction of a condition that would be prohibited under the Statute.").

A. O.C.G.A. § 42-1-15 Has a Substantial Economic Impact on Allison and Collins.

The locations where Plaintiffs can reside pursuant to O.C.G.A. § 42-1-15 are "severely restricted." Mann, 282 Ga. at 757. Allison and Collins nevertheless managed to find and rent residences that satisfied O.C.G.A. § 42-1-15(b).

The moment a prohibited location moves within 1,000 feet, however, Plaintiffs' interest in their leased residences is "utterly impair[ed]." Mann, 282 Ga. at 758. Section 42-1-15 clearly and unequivocally mandates that the Plaintiffs must immediately vacate their residences and bear all the costs associated with early termination of a lease, including: forfeiting security deposits, paying months of rent on residences at which they cannot reside, incurring costs for an expedited move, and paying for repairs they could not make before being expelled by the Statute.

Janet Allison is a party to a one-year lease that prevents her from subleasing.[11] The lease further requires Allison to use the property "solely as a residence" to be "occupied only by persons named in Resident's application to rent."[12] Should Allison be required to terminate the lease early, she must give 60

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11 See Allison Lease (Ex. 2, Attachment A, p. 6, ¶14).

12 See id. at p. 4; p. 5, ¶ 5.

days written notice, pay two months rent or $1,480, pay an early termination fee of $400, and return the dwelling in a "clean, ready-to-rent condition."[13] Allison's residence was in compliance with all sex offender residence restrictions when she signed her lease.[14] Her leased residence, however, is within 1,000 feet of a place where a school bus picks up children.[15] If school bus stops are designated in Lumpkin County, or if another prohibited location moves within 1,000 feet of the residence, she will have to move.[16]

Lori Collins is a party to a two-year lease that prevents her from subleasing,[17] "carrying on any business, profession, or trade of any kind," or from using the property for "any purpose other than as a private single family dwelling."[18] Should Ms. Collins be forced to abandon the lease, she may be liable for the rent payable under the lease during the balance of the unexpired

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13 See id. at p. 6, ¶ 21.

14 See Probation Case Note Entries (Ex. 4, p.1).

15 See Allison Decl. (Ex. 2 ¶ 7).

16 See O.C.G.A. § 42-1-15(b)

17 See Collins Lease (Ex. 3, Attachment A at p. 4, ¶ 1; p. 5 ¶ 6).

18 See id. at p. 4, ¶ 4.

term (approximately $6,000, if calculated from October 1, 2009).[19] Like Allison, Collins's residence complied with the Statute when she signed the lease.[20] The residence is, however, across the street from (and within 1,000 feet of) a place where a school bus regularly picks up children.[21] According to the Statute, if school bus stops are designated in Screven County, or if another prohibited location moves within 1,000 feet of the residence, Ms. Collins will have to move.[22]

Where, as here, a tenant must physically vacate the premises, both the United States Supreme Court and the Georgia Supreme Court recognize that "[t]here [i]s a complete taking of the entire interest of the tenants in the property." United States v. Petty Motor Co., 327 U.S. 372, 378 (1946); Mann, 282 Ga. at 758 ("immediate physical removal from … residence" is "functionally equivalent to the classic taking in which the government directly … ousts the owner") (citation omitted).[23]

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19 See id. at p. 7 ¶ 22.

20 See Probation Case Note Entries (Ex. 4, p.2).

21 See Collins Decl. ¶ 7.

22 See O.C.G.A. § 42-1-15(b).

23 In Mann, moreover, the Supreme Court of Georgia explicitly rejected the argument that a sex offender could avoid an adverse economic effect by using

B. O.C.G.A. § 42-1-15 Interferes with Plaintiffs' Reasonable Investment-Backed Expectations.

The Supreme Court of Georgia held that O.C.G.A. § 42-1-15 "does not merely interfere with, it positively precludes appellant from having any reasonable investment-backed expectation in any property purchased as his private residence." Mann, 282 Ga. at 759. The same is true for lessees who rent residences. Allison and Collins leased their residences for the sole purpose of securing a home in which to live.[24] At the time of entry into their leases, they were in compliance with the law.[25] See Palazzolo v. Rhode Island, 533 U.S. 606,

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the property for another, non-residential purpose. Mann, 282 Ga. at 758-59 (finding the appellant acquired the home for the sole purpose of serving as his residence and holding that the Statute "force[s] appellant and his wife to become lessors, an unwelcomed and unanticipated role for which they are ill-equipped."). The court further recognized the "financial burden" of having to maintain and pay for two residences following a physical ouster caused by the Statute. Id. Finally, the court recognized a host of other economic consequences of the Statute. Id. at 759, n.6 ("O.C.G.A. § 42-1-15 affects not only the location of appellant's residence but also such essential economic decisions as whether to rent or purchase, the duration of any lease to be signed, . . . whether to invest funds in improving the property, etc.").

[24] See Allison Decl. ¶ 3 (stating "I rented my home for the sole and exclusive purpose of living in it with my family"); Collins Decl. ¶ 3 (stating "I rented my home for the sole and exclusive purpose of living in it").

[25] See Probation Case Note Entries (Ex. 4) (showing that both residences were approved by probation officers).

617 (2001) (O'Connor, J., concurring) (stating that reasonable expectations are shaped by the state of affairs at the time the possessor of property acquires the property interest). But the Statute eviscerates Plaintiffs' expectation that they will be able to live in their homes for the duration of their leases. As this Court held:

> Plaintiffs Allison and Collins' investment in their leased property is not an investment that remains or retains value if [they] can no longer live in the leased property, unlike a homeowner's investment. The Court accordingly finds that Plaintiffs' position that the residency restrictions interfere significantly with their investment-backed expectations is not implausible.[26]

The fact that § 42-1-15 is retroactive further supports Plaintiffs' allegation that the Statute violates the Takings Clause. See E. Enter. v. Apfel, 524 U.S. 498, 523, 532, 534 (1998) (stating that "[r]etroactivity is generally disfavored in the law" and that the Takings Clause provides a "safeguard against retrospective legislation concerning property rights"). The extent of Plaintiffs' retroactive liability is "substantial and particularly far reaching." Id. at 534.

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[26] See Order of March 30, 2009 [Doc. No. 223] at 38.

C. The Character of the Government Action Weighs in Plaintiffs' Favor.

The third Penn Central factor is the character of the public action: "whether it amounts to a physical invasion or instead merely affects property interests." Lingle, 544 U.S. at 539. This test "focuses directly upon the severity of the burden that government imposes upon private property," see id., and asks whether the claimant has been "singled out" to bear this public burden.[27]

In weighing the third Penn Central factor, this Court need not question the legislature's "policy decision" regarding sex offenders. E. Enter., 524 U.S. at 536.[28] Instead of looking at the "rationality of the regulation," this Court instead must consider "the actual burden imposed on property rights, or how that burden is allocated." Lingle, 544 U.S. at 543. In this case, the third Penn Central

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[27] See E. Enter., 524 U.S. at 537 (finding that "character" factor weighed in favor of a taking where the government singled out appellant to bear the substantial burden of funding retirement benefits to coal miners).

[28] The extent to which § 42-1-15 may or may not "substantially advance[] legitimate state interests" in protecting children plays no part in the takings analysis. Lingle, 544 U.S. at 542 (abandoning the "substantially advances" test); see also Franklin Memorial Hosp. v. Harvey, 575 F.3d 121, 128, n.9 (1st Cir. 2009) (stating that whether a regulation substantially advances a legitimate state interest "is not a valid method of discerning whether private property has been taken for purposes of the Fifth Amendment"). As the Supreme Court of Georgia further recognized in Mann: "**The focus of the takings analysis is on whether the government act takes property, not on whether the government has a good or bad reason for its action**." Mann, 282 Ga. at 760 n.7 (emphasis added).

factor weighs in Plaintiffs' favor as § 42-1-15 does not "leave the core rights of property ownership in tact," Franklin Mem'l Hosp., 575 F.3d at 129, but rather amounts to a physical ouster from property. Moreover, as the Georgia Supreme Court recognized in Mann, Plaintiffs bear the Statute's entire financial burden.[29]

In balancing the Penn Central factors, this Court must be mindful that "[a] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." E. Enter., 524 U.S. at 523 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)). The Constitution "does not permit a solution to the problem" of sexual abuse that "imposes such a disproportionate and severely retroactive burden" upon all 17,468 persons on the sex offender registry. Id. at 536.

IV. THE TAKINGS CLAUSE VIOLATION IS NOT CURED BY DEFENDANTS' AGREEMENT IN LEGAL BRIEFS TO "READ IN" AN EXCEPTION FOR RENTERS THAT DOES NOT EXIST IN THE STATUTE.

The parties agree that the Takings Clause prohibits the State from taking renters' property pursuant to O.C.G.A. § 42-1-15 if there is a subsequent introduction of a prohibited location within 1,000 feet of the rented

[29] Mann, 282 Ga. at 760 ("All of society benefits from the protection of minors, yet registered sex offenders alone bear the burden of the particular type of protection provided by the residency restriction in O.C.G.A. § 42-1-15(a).").

residence.[30] Section 42-1-15, however, does not make any such exception for renters. On the contrary, the Statute explicitly requires renters to vacate their homes if a third party moves a prohibited location within 1,000 feet of the home.

Defendants argue that Plaintiffs fail to show "that the Statue will be interpreted in such a manner so as to prohibit them from keeping their lease."[31] But there is simply no other way to interpret the Statute. It contains no "move-to-the-offender" exception when it comes to renters. Indeed, provisions that would have protected renters were proposed, but not passed, in the Georgia General Assembly.[32] By the terms of the Statute, renters must forego their property interest if a prohibited location moves within 1,000 feet of the residence.

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30 See Defs.' Mot. to Dismiss, Oct. 28, 2008 [Doc. No. 199-2] at 7.

31 See id. at 8.

32 See Proposed Amendments to House Bill ("HB") 908 (Ex. 5, p. 3-4) (containing a provision that would have protected renters); Minority Rept. on the House Judiciary Comm.'s Consideration of HB 908 (objecting to HB 908 on the ground that it did not protect renters) (Ex. 6). Plaintiffs note that, following Mann, the House Judiciary Committee discussed the issue of renters on the sex offender registry in the context of HB 908, which did not pass. See Ga. Gen. Assembly website: http://www.legis.ga.gov/legis/2007_08/sum/hb908.htm. SB 1, which became law, included a protection for homeowners but did not protect renters. See Ga. Gen. Assembly website: http://www.legis.ga.gov/legis/2007_08/sum/sb1.htm.

The constitutional violation, moreover, is not cured by the fact that Defendants Perdue, Baker and Dean have agreed in legal briefs to "read in" an exception for renters where it does not exist in the statutory language.[33] The State Defendants fail to acknowledge that "voluntary cessation of a challenged practice rarely moots a federal case," City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 n.1 (2001), and that a defendant who voluntarily ceases challenged conduct "bears the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Env'tl Serv. (TOC), Inc., 528 U.S. 167, 189-92 (2000). [34]

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[33] See Atlanta Journal and Constitution v. City of Atlanta Dep't of Aviation, 277 F.3d 1322, 1323 n.1 (11th Cir. 2002) ("**The City may not 'moot' an issue by making promises in legal briefs that it has ceased the activity in question, particularly when it continues to maintain the restriction is constitutional**.") (emphasis added); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 833-34 (11th Cir. 1989) (in non-moot case, cessation came only "[u]nder the imminent threat of the [plaintiffs'] lawsuit"); Hall v. Bd. of Sch. Comm'rs of Conecuh Cty., 656 F.2d 999, 1000 (5th Cir. Unit B Sept. 1981) ("To defeat jurisdiction ..., defendants must offer more than their mere profession that the conduct has ceased and will not be revived.").

[34] "[E]ven when a plaintiff seeks only equitable relief, a defendant's voluntary cessation of a challenged practice does not render a case moot 'unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Serv., 532 U.S. 598, 638 (2001) (Ginsburg, dissenting on other

This Circuit has almost never found that voluntary cessation moots a controversy, especially where the changes occur in the midst of litigation. See Shelly v. MRI Radiation Network, P.A., 505 F.3d 1173, 1186 (11th Cir. 2007) (collecting Eleventh Circuit and Supreme Court case law).

In the instant case, the State Defendants have repeatedly asserted they have no authority to enforce the Statute.[35] Assuming (but not conceding) that they are correct in this regard, they certainly cannot dictate how the law will be interpreted. And law enforcement officials have, in fact, interpreted the Statute to force renters with property interests to abandon those interests.[36]

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grounds) (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167, 189-192 (2000)); Sierra Club v. EPA, 315 F.3d 1295, 1303 (11th Cir. 2002) ("Where a defendant voluntarily ceases challenged conduct, the case is not moot because nothing would prevent the defendant from resuming its challenged action.").

[35] See Defs.' Br. in Supp. of Mot. to Decertify the Class [Doc. No. 181-2] June 9, 2008, p. 25 ("Neither the Governor nor the Attorney General have the authority to arrest or charge persons who fail to comply with the residency provision . . . ."); Defs.' Reply Br. in Supp. of Mot. to Decertify the Class, July 11, 2008, p. 4 (Denying that the Governor and Attorney General have "enforcement authority," and stating that neither defendant has "the ability to control independently elected sheriffs. . . .").

[36] See *Statement of Material Facts* ¶ 6(a-d).

The State Defendants, moreover, have given no indication that their decision to suspend enforcement of the Statute is permanent; unlike the Sheriffs, they have not entered a stipulation agreeing that § 42-1-15 will not be enforced in a manner that violates the Takings Clause. These Defendants could decide to enforce the Statute against renters tomorrow, leaving Allison and Collins in the same position in which they have been since July 2006. Finally, Defendants Perdue and Baker are elected officials. Georgia will have a new governor next year; it will not be Sonny Perdue. Whoever the new governor may be, that governor will not be bound by the non-binding, non-stipulated assertions by Defendants' counsel to "read in" an exception for renters. The Defendants' attempt to cure the Statute's constitutional infirmity with nothing more than statements in legal briefs should be rejected.[37]

CONCLUSION

Plaintiffs respectfully request that this Court enter an order granting Plaintiffs' Motion for Summary Judgment on the Takings Clause Claim.

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[37] Plaintiffs request that any order this Court may issue include all Georgia sheriffs. Although Sheriff Whittle has entered a stipulation for purposes of this lawsuit, an order is needed to protect Plaintiffs' rights after this case has been resolved and to bind future sheriffs.

Respectfully submitted this 25th day of September, 2009.

SOUTHERN CENTER
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CERTIFICATION OF COMPLIANCE WITH L.R. 5.1B

Pursuant to L.R. 7.1, I, Sarah Geraghty, hereby certify that this document has been prepared in compliance with Local Rule 5.1B.

Dated this 25th day of September, 2009.

s/ Sarah Geraghty

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing *Brief in Support of Motion for Summary Judgment on Takings Clause Claim* upon Defendants by causing a true and correct copy thereof to be delivered by the Court's ECF filing system to Defendants' counsel of record at the following addresses:

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This 25th day of September, 2009.

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