STATE OF IDAHO)
County of Kootenai)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

CITY OF COEUR D'ALENE,	
Plaintiff,	**Case No. CV 1999 3763**
vs.	**MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION TO STRIKE**
RONALD S. ALMGREN et al.,	
Defendants.	

Plaintiff seeks enforcement of its Ordinances as it relates to property lying south of East Lakeshore Drive in Coeur d'Alene. Plaintiff moved for summary judgment and a hearing was held on December 20, 2002. Plaintiff's Motion for Summary Judgment is granted. Plaintiff's Motion to Strike is denied.

Michael L. Haman for Plaintiff.

Ausey H. Robnett for Defendants.

I. INTRODUCTION

The present controversy concerns the use of property lying south of East Lakeshore Drive in Coeur d'Alene. The property consists of two parcels; the first parcel containing the home and the second parcel ("waterward") being located across the road and encompassing the beachfront section. The plaintiff City of Coeur d'Alene ("City") claims that the defendants Almgrens are in violation of City Ordinances Nos. 676, 1197 and 1722, each respectively adopted in 1928, 1965, and 1982. These ordinances relate to building and structure restrictions for the parcel of land consisting of the beach property that were enacted to prevent owners of Sanders Beach property from erecting fences, docks, and buildings. Since 1907 until 1990, the property was conveyed numerous times, until finally being purchased by the Almgrens. The Almgrens began constructing a trellis-type structure and retaining wall below the seawall/stairway on the subject waterward parcel. On January 11, 1996, the City sent a letter to the Almgrens' attorney regarding the construction of nonconforming structures on the subject waterward parcel, requesting that all construction activity cease. After fruitless negotiations and requests, the City filed suit on July 1, 1999 for injunctive relief regarding the nonconforming structures on the Almgrens' waterward parcel and the Almgrens' violation of City Ordinances Nos. 676, 1197 and 1722 (1722 being codified as § 17.05.200-229 of the Coeur d'Alene Municipal Code, and another ordinance enforcing Nos. 676 and 1197). On June 28, 2001 the City moved for summary judgment on the issue of the constitutionality and enforceability of the Ordinances. The initial round of briefing concluded with the September 14, 2001 filing of "Plaintiff/Counter-Defendant's Reply Brief." Additional briefing was spontaneously filed by each party later in September 2001. On January 31, 2002, Judge Michaud entered his "Order

Requesting Further Briefing." Additional briefing was filed. All briefs filed were read by the undersigned, who was assigned on July 30, 2002.

II. INVERSE CONDEMNATION/TAKING

The first issue to decide is whether the City is entitled to summary judgment on the Almgrens' claim that the application of City Ordinances Nos. 676, 1197, and 1722 inversely condemns their property. A taking under the Fifth Amendment clearly occurs when the government physically occupies land for its own use. Even a minimal, permanent, physical occupation of real property constitutes a taking requiring just compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (The U.S. Supreme Court found a New York law requiring landlords to allow television cable companies to place cable facilities in their apartment buildings constituted a taking even though the facilities occupied, at most, only one and a half cubic feet of the landlord's property). Case law also recognizes instances of regulatory takings when government actions affect and limit property to such an extent that a taking occurs. One type of regulatory taking has been termed a "categorical" taking. If a regulation denies all economically viable uses of the land, or compels the property owner to endure a physical intrusion of his property, then a categorical taking has occurred requiring just compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

With regard to regulatory takings, there is another set called non-categorical takings. Where the regulation places limits on land, but the limits imposed fall short of eliminating all economically beneficial use, then a non-categorical taking may have occurred. Whether a regulatory taking has occurred, where the government actions have placed limits on land that limit but do not eliminate all economically beneficial use, depends upon an analysis of complex

factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment backed expectations, and the character of the government action. *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000). This is a more general test, as set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 67 L.Ed.2d 631 (1978), and will be referred to herein as the *Penn Central* analysis.

Where the challenge to the ordinance or regulation goes to the mere adoption and existence of the ordinance, the challenge has been referred to by courts as a "facial" challenge. Where the claims concede a facially valid statue or ordinance, but challenge the manner of application, courts have used the term "as-applied" to define the takings claim. The Almgrens allege that the City's Ordinances are facially unconstitutional and deprive them of all economically viable uses of their property. And, in the alternative, Almgrens allege if the Ordinances are held to be valid they are unconstitutional as applied to the Almgrens.

The Almgrens try to bypass the *Penn Central* analysis by arguing that the City has both opened up their property to occupation by the public and deprived the Almgrens of all economically viable uses of their property, thereby, placing this case into the "categorical" takings analysis. As the City points out, the Ordinances only affect the construction of structures on the waterward parcel, and do not authorize or grant the public an easement to use the Almgrens' property. As analyzed below, the Court has determined that the Almgrens have not been deprived of all economically viable uses of their property, and that at least Ordinances Nos. 676 and 1197 are constitutional. Therefore, as a matter of law the Court finds that the City has not engaged in a "categorical" taking of the Almgrens' waterward property by opening up their property to occupation by the public.

The next "categorical" taking prong is whether the Almgrens have been deprived of all economically viable uses of their property. In order to fall into this category the Almgrens argue that their parcel of land, which was purchased as an integrated unit, should be divided and analyzed separately. This argument has been rejected in *Chapman v. City of Coeur d'Alene*, CIV-99-0379-N-WFN (D. Idaho Feb. 6, 2001), and in the state court cases of *Sanders Beach Preservation Association, et al., v. City of Coeur d'Alene*, Kootenai County Case No. CV 97-05743 (1997) and *The City of Coeur d'Alene v. Jack Simpson et al.*, Kootenai County Case No. CV 98-04107 (2002). The law regarding conceptual severance has recently been addressed by the Ninth Circuit: "Most modern case law rejects the invitation of property holders to engage in conceptual severance, except in cases of physical invasion or occupation." *Tahoe-Sierra*, 216 F.3d at 774. Thus, property effected by a regulatory scheme cannot be severed for purposes of a takings analysis simply because the regulation applies to one portion of the property or because of a landowner's self-serving intent to have it treated differently. Because this case does not fall into the physical invasion or occupation exception as analyzed below, the Court determines that the waterward parcel must be analyzed as an integrated whole with the homestead parcel.

Because the Court has concluded that the waterward parcel must be analyzed as an integrated whole with the homestead parcel, significant residual value to the real property remains, making any claim for a "categorical" taking fail. Even though the Almgrens allege in their first brief that the waterward parcel is worth $1,000,000.00 and the homestead parcel only $200,000.00, this is a self-serving conclusion without any support in the record. Therefore, as a matter of law the Court finds that no "categorical" taking has occurred.

The only claim left to analyze is whether under the *Penn Central* analysis the Almgrens have alleged facts that would prevent the granting of summary judgment in favor of the City.

The issue then becomes whether Ordinance No. 676, prohibiting fences within the 40' setback zone of the waterward parcel, is a non-categorical taking. Under the *Penn Central* analysis this Court must look at (1) the regulation's economic effect on the landowner; (2) the extent to which the regulation interferes with the landowner's reasonable investment backed expectations; and (3) the character of the government action. *Penn Central*, 438 U.S. at 124.

As addressed above, the Almgrens have not put forth any admissible evidence as to the diminution in value of their property due to the Ordinances preventing the building of structures on the waterward property. Even if they had, a taking does not occur simply because of a diminution in or a deprivation of the highest and best use of an owner's property. *Euclid v. Amber co.*, 272 U.S. 365, 396-397 (1926). Nor does a taking occur where there is a substantial diminution in the value. *MacLeod v. Santo Clara County*, 749 F.2d 541 (9th Cir. 1984) (citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (diminution in value from $800,000.00 to $60,000.00 not a taking). The Almgrens are not able to meet the first prong of the *Penn Central* analysis.

Likewise, the Almgrens are not able to meet the *Penn Central* prong that looks at the extent to which the regulation interferes with the landowner's reasonable investment backed expectations. The Almgrens allege that they are not able to increase the value of their lot by cleaning up the beach area, building garden structures, and planting a garden. Nothing in the City's Ordinances prevents the Almgrens from cleaning up the beach area or planting a garden. They do, however, prevent the Almgrens from erecting a fence. The Court is sympathetic to the Almgrens' difficulty in preventing trespassers from entering the waterward parcel or preventing them from ruining the Almgrens' flowerbeds. However, this does not advance the Almgrens' argument that the Ordinances interfere with the their reasonable investment backed expectations.

This is further so because the Ordinances were in place when the Almgrens' purchased the property, giving them constructive notice of the Ordinances. The Almgren's fail to meet the second prong of the *Penn Central* analysis.

Finally, the Almgrens cannot meet the third prong of the *Penn Central* analysis, which requires the Almgrens to show that the Ordinances do not advance a legitimate state interest. The City argues that the purpose of the Ordinances is for the "purposes of protecting and preserving the aesthetic features and physical characteristics of Sanders Beach." Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 13. Ordinance 1722 states that its purpose is "to protect, preserve, and enhance visual resources and public access of the Coeur d'Alene shoreline, as defined herein, by establishing certain limitations and restrictions on specifically defined shoreline property located within the city limits." Coeur d'Alene Municipal Code § 17.08.205. The Almgrens have seized on the "public access" language to argue that the City is trying to compel the Almgrens to make their property available for public use. Even if the Court were to find that Ordinance No. 1722 is unconstitutional as a taking, Ordinances Nos. 676 and 1197 still prevent structures from being built on Sanders Beach, and they are rationally related to the advancement of the City's interest in preserving the aesthetic beauty of Sanders Beach. However, the Court need not determine the constitutionality of Ordinance No. 1722 upon summary judgment, because Ordinances Nos. 676 and 1197 are constitutional and enforceable.[1] Therefore, the Almgrens fail to meet the third and last prong of the *Penn Central*

[1] Almgrens are correct that the stop work order (Susan K.Weathers' Affidavit, Exhibit D) references only Coeur d'Alene Municipal Code § 17.08.245. However, those regulations existed in addition to the underlying Ordinance Nos. 676 and 1197 (Plaintiff/Counter Defendant's Memorandum in Support of Summary Judgment, p.3, Statement of Undisputed Facts ¶ 4), and this District Court has already determined that Coeur d'Alene City Ordinance Nos. 676 and 1197 were valid ordinances and are not in conflict with Ordinance 1722. *Id.,* p.*45, ¶¶ 10-12, Sanders Beach Preservation Association, et al., v. City of Coeur d'Alene*, Kootenai County Case No. 97-0573 (October 21, 1997). In the present case, the City sued under all three ordinances. Complaint ¶ III and Prayer for Relief 1.

analysis. The City's motion for summary judgment is granted on the issue of inverse condemnation.

III. SUBSTANTIVE DUE PROCESS

The Almgrens allege that their substantive due process rights have been violated under both the U.S. and Idaho Constitutions because the City's Ordinances are not rationally related to the City's public interest of visual aesthetics. Substantive due process means that state action which deprives a person of life, liberty, or property must have a rational basis…that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary. *Pace v. Hymas*, 111 Idaho 581, 586, 726 P.2d 693, 698 (1986). Thus, substantive due process requires that "a statute bear a reasonable relationship to a permissible legislative objective." *Aberdeen-Springfield Canal Co.*, 133 Idaho 82, 90, 982 P.2d 917, 925 (1999). The substantive component of the Due Process Clause limits what government may do regardless of the fairness of procedures that it employs, and covers government conduct in both legislative and executive capacities. *County of Sacramento v. Lewis,* 523 U.S. 833, 845-46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). A substantive due process claim does not require proof that all use of the property has been denied, but rather that the interference with property rights was irrational or arbitrary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

In order for the Almgrens to prevail on their substantive due process violation claim, they must show that the Ordinances are not rationally related to the City's stated objective of visual aesthetics. The Almgrens have not met this requirement. There is no evidence that the Ordinances affect only the Almgrens. To the contrary, each and every property on Sander's Beach is constrained by the Ordinances. It cannot be said as a matter of law that the Ordinances

are irrational or arbitrary in nature; they were enacted to preserve the natural state of Sander's Beach. The only real issue is whether the Court may find, as a matter of law, that the Ordinances are rationally based, or must instead defer this question of fact to a jury. The Almgrens cite *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999) for the proposition that issues of substantive due process violations are exclusively in the province of a jury determination. In *City of Monterey*, land developers had put forward numerous proposals to the City of Monterey to develop land which they owned. After five years of fruitless negotiations and broken agreements, the developers sued the City of Monterey under § 1983. A jury determined that the City of Monterey had unreasonably and irrationally denied the developers' request to develop their parcel of land. On appeal, the Supreme Court held that the narrow issue of whether "the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose", was properly decided by the jury. *Id.* at 705. In contrast to our case, the developers/claimants' due process claim in *City of Monterey* was not about general laws or ordinances but about a particular zoning decision. Because the Almgrens have cited no law that requires substantive due process claims to be decided by a jury, as a matter of law, the Court finds that no substantive due process violation took place. The City's Ordinances are rationally related to the goal of keeping Sanders Beach free from structures that impede the natural aesthetic view. The City's motion for summary judgment is granted on the issue of substantive due process.

IV. PROCEDURAL DUE PROCESS

The Almgrens allege that they have been denied procedural due process, but have presented no evidence to support this allegation. By the very nature of the Ordinances, the City

has no leeway to grant proposed construction projects on Sanders Beach. Because it would have been futile for the Almgrens to propose a plan, the very nature of this suit guarantees that due process is being given. The City's motion for summary judgment on the issue of procedural due process is granted.

V. EQUAL PROTECTION

The Almgrens argue that they have been denied equal protection under the law because of the City's selective prosecution of the Ordinances on Sanders Beach. This claim has no merit because there are three other persons who have been prosecuted for Ordinances violations in the past six years. Further, the Almgrens do not allege an equal protection violation due to a suspect class such as race, sex, religion ect. *Henson v. department of Law Enforcement*, 107 Idaho 19, 684 P.2d 996 (1984). Therefore, the City's motion for summary judgment on the issue of equal protection is granted.

VI. MISCELLANEOUS

On January 31, 2002, Judge Michaud issued an "Order Requesting Further Briefing" on the issues of ripeness/exhaustion of remedies and statute of limitations. The Court has reviewed that briefing. At oral argument, counsel for both sides agreed these issues are no longer relevant at this juncture. This Court agrees.

VII. MOTION TO STRIKE

Plaintiff City filed "Plaintiff/Counter-Defendant's Motion to Strike, or in the Alternative, Reply" on March 19, 2002, moving to strike Almgrens' brief filed March 15, 2002. City's motion to strike is **DENIED**, Almgrens' brief was reviewed and considered by the Court.

VIII. CONCLUSION

The City's motion for summary judgment is **GRANTED** in full against defendants on the issues of (1) Inverse Condemnation (2) Substantive Due Process (3) Procedural Due Process; and (4) Equal Protection. Defendant's Counterclaim is **DISMISSED**, the plaintiff City's request for a permanent injunction is **GRANTED.**

ENTERED this _____ day of January, 2003.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2003, a true copy of the foregoing was faxed to each of the following:

Michael L. Haman	Ausey H. Robnett
Fax: 664-5830	Fax: 664-6338

_____
Deputy Clerk