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Easements: City Unable to Establish that it Has Easement by Estoppel or Prior Use, But Landowner's Federal Takings Claim is Time-Barred

Redburn v. City of Victoria, No. 17-40369 (5th Cir. Aug. 1, 2018).

A Texas city has not been able to demonstrate that its draining of runoff across a landowner's property for more than a century is conclusively allowed under the terms of an easement by estoppel or an easement by prior use; however, because his federal claim is time-barred, the landowner's case has been remanded to state court.

Victoria, Texas (City) has used 'Phillip's Ditch' on a residential property to drain and filter storm water since the late 1800's. The property has since come into the possession of Keith Redburn (Redburn) and, according to him, the ditch has widened to 60 or 70 feet and deepened to as much as 14 feet, causing erosion damage to his property and bringing with it debris and rubbish spread on his land. Redburn initially filed suit in state court, but amended his suit to include a Takings claim, prompting the City to remove the case where the district court granted the City summary judgment. It held the City had an implied drainage easement and that Redburn failed to

show the City exceeded the scope of that easement. Redburn appealed, arguing the district court erred because (1) the City did not have an easement, (2) if there was one, the City must accommodate his reasonable use of his property and (3) there was a physical taking for which he must be compensated. The Fifth Circuit reversed.

Setting out the state law, the Fifth Circuit noted an easement by estoppel in Texas requires a representation by a promisor (Redburn's predecessor-in-interest) in either words or actions to a promisee (the City) that was believed and relied on to the promisee's detriment. While the district court based its decision on a letter from 1941 (wherein Redburn's predecessor-in-interest had asked and received from the City the authority to build a fence over the ditch), the Circuit found the meaning, intent and interpretation of the letter ambiguous. Instead, it found it was a bit of a red-herring in the sense that the City failed to show it relied on the letter's representations to its detriment - a requirement under Texas law for an easement by estoppel. As a result, there were genuine issues of material fact, requiring reversal of the summary judgment won below by the City.

The City's alternative argument was that it had an easement by prior use, which under Texas law required it to prove "(1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the use of the claimed easement was open and apparent at the time of severance; (3) the use was continuous, so the parties must have intended that its use pass by grant; and (4) the use [was] necessary to the use of the dominant estate." The Circuit found several faults with this argument, foremost of which was Redburn's evidence that showed the purpose of the original easement was to complete a street and not drain a 122-acre portion of the City. Noting that the success of proving a prior use easement, generally, is closely-related to the purpose and intent of the original grantor and grantee, it found the documents pertinent. In closing the Court noted that if on remand the City could not show it has an easement, Redburn might be able to claim and obtain damages.

On a bright note for the City, however, the Circuit agreed a that federal takings claim is time-barred by a two-year statute of limitations. In light of Redburn's having purchased the property in 2004, he had until 2006 to prosecute his federal case. This claim was thus vacated and the case remanded to state court for consideration of the remaining issue.

LINK

Employment: No Qualified Immunity if Township Declines to Promote Police Officer Based on Presidency of Police Union

Mrazek v. Stafford Township, No. 17-2061 (3d Cir. Aug. 1, 2018).

Affirming the lower court, the Third Circuit finds that a municipality cannot rely on qualified immunity where it is alleged to have denied promotion to a police officer because he also served as the police union president; Supreme Court precedent striking employment actions based on political affiliation, while not identical, was enough to satisfy the "clearly established" requirement.

Joseph Mrazek (Mrazek) sought promotion to sergeant in the Stafford Township (Township) Police Department in the 2012-13 round of applicants. He also served as the president of the police union. The Township process for promotion had two phases and was comprised of 80% objective and 20% subjective evaluation. Mrazek ranked seventh among eleven candidates and therefore did not make the cut to move from Phase I to Phase II. He filed suit against the Township and the police chief, alleging he was retaliated against for his status as union president. The Township and other defendants moved for qualified immunity and the district court

denied it, holding "Mrazek's right to be free from a public official negatively influencing a police promotion process solely because of [his] union-related activities (resulting in his being passed over for a promotion) was clearly established." The Township appealed.

The Third Circuit homed in quickly on the First Amendment's guarantee of freedom of association of which union membership is one, and that the government cannot infringe on the guarantee by sanctioning one for views held or opposed or for a union association itself. Thus, though it is clear a public employee has no entitlement to promotion, the government cannot deny a promotion or effect an adverse action on a basis that infringes on these constitutionally-protected association and speech rights. The Circuitt noted the Supreme Court held in the 1990 *Rutan* case that "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." Though *Rutan* was a political affiliation case - not a union case - the Circuit held that it clearly established the proposition that "union affiliation is protected from infringement under the First Amendment; and a retaliatory decision not to promote an employee on a protected basis can constitute infringement of First Amendment rights." It affirmed the lower court.

LINK

Guns: No Equal Protection Violation Where Only Retired Peace Officers Allowed to Carry Loaded Firearms on School Grounds; Rational Basis Applies

Gallinger v. Becerra, No. 16-56125 (9th Cir. Aug. 3, 2018).

The Ninth Circuit affirms a lower court's finding that California's SB 707, which prohibits concealed carry license holders from having weapons on school grounds but allows retired peace officers to do so, is rationally-related to safety of the officers and the public.

In 1994, the California Legislature (Legislature) enacted the Gun-Free School Zone Act, which banned the possession of firearms in schools and within 1,000 feet thereof. The Act exempted two groups: (1) individuals licensed to carry a concealed firearm under California law; and (2) retired peace officers authorized to carry a loaded firearm. In 2015, the Legislature passed SB 707, which preserved the retired-officer exception but prohibited concealed carry weapon (CCW) holders from possessing a firearm on school grounds.

CCW proponents alleged that SB 707 lacked a rational basis and violated the Equal Protection Clause because it treated concealed weapon permit holders differently from retired peace officers. The district court dismissed their complaint. While the district court agreed that the CCW permit holders and retired peace officers were "similarly situated" for constitutional purposes, the district court reasoned that the Legislature had a rational basis for treating retired peace officers differently on school grounds-unlike CCW permit holders, peace officers risked facing enemies made during their law-enforcement careers, and this need for self-protection did not end merely because officers stepped school grounds.

The Ninth Circuit agreed. It first rejected plaintiffs' argument that *Silveira v. Lockyer*, a 2003 Ninth Circuit precedent, controlled. There, the court had held that a provision of California's Assault Weapons Control Act exempting retired peace officers from a statewide ban on *assault weapons* violated the Equal Protection Clause. SB 707 presented a far different scenario: permitting retired peace officers to carry firearms other than assault weapons on school grounds was sufficiently connected to the goal of ensuring such officers' safety--and public safety--to survive rational-basis review.

While the CCW group argued that they were "similarly situated" to the retired police for Equal Protection analyses, the Circuit found that question to be superfluous, because rational basis scrutiny governed: "[W]e need not answer this question because, even assuming that the two groups are similarly situated, we hold that SB 707 does not violate the Equal Protection Clause, given the applicable level of scrutiny." There could be little doubt that rational-basis review was appropriate, as made evident by the Supreme Court in *Heller*: "We made it clear in Heller that our holding did not cast doubt on such longstanding regulatory measures as . . . 'laws forbidding the carrying of firearms in sensitive places such as schools . . . .'" *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Futhermore, "a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (citation omitted). California claimed two such interests: (1) the protection of retired peace officers and (2) public safety. Plaintiffs argued that the first interest was both too broad and too narrow to be rationally related to retired-officer and public safety: it covered many desk officers who never carried or needed a firearm, and it lefts out people with real enemies. That reasoning ran contrary to the Supreme Court's clear precedent upholding classifications that are "to some extent both underinclusive and overinclusive" under rational-basis review.

With regard to retired-officer safety, in *Silveira* the Circuit had held that permitting retired peace officers to carry assault weapons was too attenuated from the goal of ensuring their safety. Here, permitting retired peace officers to carry other kinds of firearms on school grounds was sufficiently connected to the goal of ensuring such officers' safety to survive rational-basis review. "In so doing, we refuse to second-guess the Legislature's determination that (1) retired peace officers are at a heightened risk of danger based on their previous exposure to crime, and (2) allowing them to carry firearms other than assault weapons on school grounds mitigates that risk and increases officer safety."

Plaintiffs' second argument was that SB 707 violated the Equal Protection Clause because it was enacted to "favor[] a politically powerful group and to disfavor a politically-unpopular one." Plaintiffs, supported by the Cato Institute as amicus curiae, challenged the district court's holding that they needed to present "evidence of explicit legislative intent to cause harm to civilian gun owners." While outright animus "need not be explicit in the legislative history for a plaintiff to establish impermissible intent," the Circuit was unwilling to "credit conclusory allegations of law that are unsupported by specific factual allegations."

Plaintiffs had made no factual allegations to support their theory of "impermissible animus" relying simply on SB 707's legislative history, as well as letters and newspaper articles, to demonstrate that the Legislature retained the retired-officer exception as the result of "political pressure," after "potent lobbying efforts by the law enforcement community." Undeniably, the record demonstrated that the retired-officer exception was a product of lobbying efforts by law-enforcement organizations. But the right to lobby is constitutionally protected, and "[a] plaintiff cannot establish invidious discrimination by merely alleging that a legislature responded to such efforts . . ."

The lower court's dismissal of the CCW group's challenge to the retired peace officer exception in SB 707 was affirmed.

LINK

Labor: City's Ballot Initiative to Eliminate Pensions instead of Meeting and Conferring with Union is Improper; Agency's Decision Upheld

Boling v. Public Employment Relations Board, No. 2464-M (Cal. Aug. 2, 2018).

City of San Diego v. Public Employment Relations Board, No. 2464-M (Cal. Aug. 2, 2018).

Deferring to the California Public Employment Relations Board, the California Supreme Court has reversed a lower court decision which had sanctioned San Diego's effort to effect government employee pension reform via a ballot initiative instead of conferring with the employees' union.

In 2010, the City of San Diego (City) sought to enact pension reform to eliminate pensions for new government employees via a ballot initiative instead of conferring with the Union as was required by California's Meyers-Milias-Brown Act (MMBA). The City, including the Mayor's office, began promoting the ballot initiative. The Union notified the City of their violation of the meet-and-confer obligations under state statute and demanded the City meet to discuss pension reform. When the City refused to meet with the Union, they filed an unfair labor practice charge in 2012, alleging the City's promotion of the ballot initiative was an attempt to avoid the City's obligations to negotiate with the Union under the MMBA. The Public Employment Relations Board (PERB) agreed with the Union. The City appealed the decision and received a favorable verdict from the appellate court. The case was appealed again to the California State Supreme Court.

The California State Supreme Court agreed with the judgment of PERB. They reiterated that agency decisions are entitled to deferential review and will not be set aside unless clearly erroneous. The State Supreme Court explained that under the MMBA, PERB's factual findings are conclusive. Next, the State Supreme Court explained that under the MMBA, the City is required to meet with unions on matters within the scope of representation before arriving to a determination of policy or a course of action. This portion of the MMBA applies to more than formal government action and because of that, under the circumstances in this case, the MMBA applies to the Mayor's official pursuit of pension reform as a matter of policy. The State Supreme Court reversed the appellate court decision.

LINK

Qualified Immunity: Court Declines to Create Presumption of Excessive Use of Force by Police Officers Merely Due to Lack of Evidence

Church v. Anderson, No. 17-2077 (8th Cir. Aug. 3, 2018).

A plaintiff's failure to recall a violent incident with a police officer and the officer's body camera being out of range does not create a presumption against the officer's recollection of the incident in a case alleging excessive use of force.

In the early morning hours of Christmas in 2013, Bob Anderson (Anderson), an officer with the Cedar Falls Police Department noticed a car running and identified Zachary Church (Church) at the wheel smelling of alcohol and marijuana. He planned to take him to the station for field sobriety testing, but instead Church roundhouse punched the officer, knocking him to his knees. As the officer fumbled around after the punch, he radioed for backup, while still being hit by Church, and with Church - according to Anderson - tugging at his belt, the officer accessed his gun and shot Church three times in his abdomen and shoulders. Church survived and was

convicted of assaulting a police officer. He then filed a civil suit, alleging the officer used excessive force. The district court found, since Church had no memory of the event at all, that Anderson's testimony was the only evidence of what occurred and granted him qualified immunity under the facts. Church appealed.

On appeal the critical facts were that the assault took place out of the officer's camera range, that Anderson did not activate the audio recording, and that Church had no memory of the event. Church's primary appellate argument and request of the court was it create "an evidentiary presumption at the summary judgment stage against an officer who fails to use audio or video recording equipment that he has been issued." The issue, as Church saw it, was that Officer Anderson was benefiting from Church's inability to remember what happened. But for the court, granting Church's request would equate to inferring from a *lack* of evidence that an officer's use of force was excessive, allowing any such claim to proceed to trial. The issues with this were compound for the court: first, it ran counter to circuit precedent, which places the burden on individuals to show a violation of clearly established rights (not on officer's to disavow such); second, Church admitted no court recognized such a presumption; and, third, Supreme Court precedent sets forth factors to evaluate constitutional excessive force claims and such a presumption would prevent courts from undergoing the analysis step, moving claims straight to trial. The Eighth Circuit demurred at instituting such a presumption and the lower court's qualified immunity holding was affirmed.

LINK

Statutory Interpretation: State Statute Punishing Non-True Threats Made Against an Officer Found to be Unconstitutionally Broad

Seals v. McBee, No. 17-30667 (5th Cir. Aug. 3, 2018).

Statute criminalizing threats against police officers struck down as unconstitutionally broad because it applied not only to true threats, but also non-true threats, such as the threat to sue an officer if he arrested the defendant.

Travis Seals (Seals) and Ali Bergeron were arrested after an exchange with a neighbor. While the facts of the underlying exchange are immaterial, the interpretation of what occurred between the officers and Seals begot a Section 1983 claim and appeal. Seals argued he objected to his arrest on the night in question and threatened to lawfully complain about the officer. On the other hand, the officer and state argued Seals violently resisted and made threats of physical harm to the officer. Louisiana Revised Statutes §14.122 criminalizes "the use of violence, force, or threats" on any public officer or employee with the intent to influence the officer's conduct in relation to his position. Based on Seals' conduct and the potential for the state to charge him with a violation of this statute, Seals filed suit arguing §14.122 is unconstitutionally overbroad. The district court deemed the statute unconstitutional and the state appealed.

To win Seals had to show that §14:122 encompasses a substantial number of unconstitutional applications "judged in relation to the statute's plainly legitimate sweep." Beginning with the statutory text, the Fifth Circuit was persuaded by the state's citation to case law showing the statutory text has always been interpreted to require "corrupt intent" - in short, that this "gloss" from state precedent was part and parcel of the statute. Beyond that narrow "gloss," however, the Circuit was faced with a yet-still very broad statute and it refused the state's second narrowing argument, namely that the statute only encompassed "true threats" (i.e. serious threats to commit unlawful violence against a person). The precedential argument Louisiana made previously ultimately became a double-edged sword; it showed the state courts upheld a non "true threat" conviction against a person that threatened to sue an officer if he was arrested. Thus, the court

concluded, it followed that § 14.122 applied to any "threat meant to influence a public official or employee, in the course of his duties, to obtain something the speaker is not entitled to as a matter of right." So construed, the statute encompassed substantial unconstitutional applications and the court struck it down as unconstitutionally overbroad.

LINK

Trials: Contractor Who Settles Dispute with City About Development Costs in State Court Cannot, Under Res Judicata, Bring Takings Claim in Federal Court

Talismanic Properties, LLC v. Tomb, No. 18-3036 (6th Cir. July 31, 2018).

A residential property developer who sued a City over electrical upgrade costs after being denied a permit to build could not subsequently bring a Fifth Amendment takings case in federal court premised on the same electrical cost dispute.

Talismanic Properties, LLC (Talismanic) sought to build a residential subdivision in Tipp City, Ohio (City) called Cedar Grove. In order to do so, the City required Talismanic to fund electrical upgrades out to its new subdivision. Talismanic conceded it would pay for the upgrades, after much complaining, but ultimately the City did not approve the development for other reasons. Talismanic sued in state court to compel approval by the City, in which the electrical upgrade costs were included, and the case settled. Thereafter - not long in fact - Talismanic sued in federal court arguing the electrical upgrade costs both "(1) amounted to a taking without compensation in violation of the Fifth Amendment, and (2) violated its right to equal protection under the Fourteenth Amendment." The district court determined *res judicata* barred the case and Talismanic appealed.

Looking to the rules of *res judicata* in Ohio, as the doctrine requires, led the Sixth Circuit to find that the case was barred if four elements were met: "(1) a prior suit litigated to a final, valid decision on the merits; (2) the same parties as in the prior suit, or their privies; (3) a second suit that raises claims that were or could have been litigated in the prior suit; and (4) claims in the second suit that aris[e] out of the transaction or occurrence that was the subject matter of the prior suit." Having conceded the first two, Talismanic argued the third and fourth were at issue.

Talismanic's argument under the third prong - that the constitutional claims were not ripe - was quickly quashed by the Circuit since, most notably, the first state suit *included the costs of the electrical upgrades* meaning that case included Talismanic agreeing to the harm it was now complaining of in the second suit. Talismanic's argument for the fourth element met the same fate as the third. The Court found the suits involved the same transaction or occurrence, even though the facts had "different shadings," because the same facts were necessary to obtain relief. The lower court was affirmed.

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www.imla.org
51 Monroe Street
Suite 404
Rockville, MD 20850
202-466-5424

