

LAND USE LITIGATION UNDER THE CIVIL RIGHTS ACT

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1. INTRODUCTION

Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, can be a valuable tool for the vindication of constitutional rights in land use cases because it is liberally construed to promote its remedial purposes. The following discussion is intended to provide a general overview of the issues that a land use practitioner is likely to encounter in Section 1983 litigation.

2. SECTION 1983, GENERALLY

- A. “Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, 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,....” 42 U.S.C. § 1983.
- B. Section 1983 alone creates no substantive rights; rather it provides a remedy for deprivations of rights established elsewhere in the Constitution or federal laws." *Barfield v. Brierton*, 883 F.2d 923, 934 (11th Cir. 1989).
- C. A plaintiff must show: “(1) that he suffered a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, and (2) that the act or omission causing the deprivation was committed by a person acting under color of law.” *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1032 (11th Cir. 1987) (quoting *Dollar v. Haralson County*, 704 F.2d 1540, 1542-43 (11th Cir. 1983)).
- D. Advantages and disadvantages of Section 1983 over state law remedies:
 - i. Section 1983 offers several procedural and substantive advantages.
 - (1) Generally no exhaustion of remedies requirement. *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1226 (11th Cir. 2006) , overruled on other grounds by statute, (“The Supreme Court and this Court have held that there is no requirement that a plaintiff exhaust his

administrative remedies before filing suit under § 1983.”). There are, however, at least two exceptions to this general rule:

- (A) Procedural due process. While Section 1983 plaintiffs are not generally required to exhaust state remedies, they must exhaust state remedies before bringing a Section 1983 action alleging denial of procedural due process. *Faucher v. Rodziewicz*, 891 F.2d 864, 870 (11th Cir. 1990);
 - (B) Taking without just compensation. Similarly, when claiming a deprivation of property without just compensation under the Fifth Amendment to the U.S. Constitution, a plaintiff must first seek compensation from the government before filing suit under Section 1983. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, , 195 (1985) (“Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause [of the Fifth Amendment] until it has used the procedure and been denied just compensation.”).
- (2) No state law *ante litem* requirements. *Armour v. Davidson*, 203 Ga. App. 12, 416 S.E.2d 92 (1992) (Section 1983 trumps state law *ante litem* requirements).
 - (3) Counties and cities are not entitled to sovereign immunity in Section 1983 actions. *Howlett v. Rose*, 496 U.S. 356, 375, 378, 380-381 (1990).
 - (4) Prevailing plaintiff almost always recovers attorneys’ fees under 42 U.S.C. § 1988.
- ii. There is one serious disadvantage to using Section 1983 in land use cases filed in, or removed to, the federal courts insofar as federal judges seem less receptive to such disputes. “We [consider the merits of the zoning dispute] with a proviso that zoning decisions, as a general rule, will not usually be found by a federal court to implicate constitutional guarantees and with a disinclination to sit as a zoning board of review.” *Greenbriar Village, LLC v. Mountain Brook City*, 345 F.3d 1258, 1262 (11th Cir. 2003).

3. PROPER DEFENDANTS IN A SECTION 1983 ACTION

- A. By virtue of the Eleventh Amendment, a state (or agency thereof) is not a “person” for Section 1983 purposes and is therefore not subject to suit under Section 1983 in state or federal courts. *Will v. Michigan Dept. of State Police*,

- i. When a state waives its Eleventh Amendment sovereign immunity and consents to suit in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985);
 - ii. When Congress, acting pursuant to § 5 of the Fourteenth Amendment (“[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article”), abrogates a state's Eleventh Amendment sovereign immunity by expressing an unequivocal intent to do so. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-73 (1996); and
 - iii. When a state official is sued for prospective injunctive relief to end a continuing violation of federal law. *Ex parte Young*, 209 U.S. 123, 155-56 (1908).
- B. In contrast to states, counties and cities are “persons” within the meaning of Section 1983 and subject to suit in federal civil rights actions. *Owen v. City of Independence*, 445 U.S. 622, 647-48 (1980) (“By including municipalities within the class of ‘persons’ subject to liability for violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State's sovereign immunity the municipality possessed.”).
- i. *Monell* liability. There is no respondeat superior under Section 1983. Thus, a municipality can only be liable upon a showing that the constitutional violation was pursuant to official policy or custom. *Monell v. Dep’t of Social Svcs.*, 436 U.S. 658 (1978). This means that the challenged decision must have been made by a “final policy maker,” which is determined either by operation of “state and local positive law” or by “custom or usage having the force of law.” *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 109 S. Ct. 2702, 2723, 105 L. Ed. 2d 598 (1989).
 - (1) A member or employee of a governing body is a final policy maker only if his decisions have legal effect without further action by the governing body, and if the governing body lacks the power to reverse the member or employee's decision.” *Holloman v. Harland*, 370 F.3d 1252, 1292 (11th Cir. 2004) (internal citations and quotations omitted).
 - (2) Thus, if an official’s action must be ratified by a board of commissioners before it can take effect, the official is not the final policymaker. *Matthews v. Columbia County*, 294 F.3d 1294, 127-97 (11th Cir. 2002).

- (A) Legislators and persons acting in a legislative capacity are entitled to absolute immunity under Section 1983 for conduct in furtherance of legitimate legislative activities. *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402-06 (1979) (bi-state regional planning agency entitled to absolute immunity for the adoption and enforcement of a regional land use plan).
- (B) In distinguishing between legislative and administrative acts, courts look to the facts considered and the impact of the action, not the title of the person performing the act. *Bryant v. DeKalb County*, 575 F.3d 1281, *53-60 (11th Cir. 2009).
 - (i) First, focus on the nature of the facts giving rise to a particular decision. If “legislative facts” such as policy or state of affairs are considered, the act is legislative. If the facts considered are more specific, the act is probably administrative.
 - (ii) Second, focus on the particularity of the impact of the state action. If the action involves general policy, it is legislative. On the other hand, if it applies general policy to specific individuals, it is administrative. *Crymes v. DeKalb County*, 923 F.2d 1482, 1485-86 (1991).
 - (iii) Thus, the adoption of ordinances and budgeting decisions are legislative in nature. See *Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998); *Bryant v. DeKalb County*, 575 F.3d 1281, *53-60 (11th Cir. 2009); see also *R.S.W.W. v. City of Keego Harbor*, 397 F.3d 427, 437-38 (6th Cir. 2005).
 - (iv) The denial of a development permit, on the other hand, is administrative in nature. *Crymes v. DeKalb County*, 923 F.2d 1482, 1485-86 (1991).

(2) Judicial Immunity

- (A) Judges are absolutely immune for all acts except non-judicial acts or judicial acts undertaken with a complete absence of the court’s jurisdiction. *Stump v. Sparkman*, 435 U.S. 349 (1978). For example, a judge acting in an administrative capacity is not absolutely immune. See, e.g., *Forrester v. White*, 484 U.S. 219, 229-30 (1988).

4. CONSTITUTIONAL CLAIMS MOST LIKELY TO ARISE IN LAND USE LITIGATION

A. Due Process

i. Procedural due process

(1) “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const., Amend. XIV.¹

(A) Property interests

(i) Created and defined by statutes, rules or understandings “that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); see also *Goldrush II v. City of Marietta*, 267 Ga. 683, 695, 482 S.E.2d 347, 358 (1997) (“A license which entitles the holder to operate a business and the continued possession of which ‘may become essential in the pursuit of a livelihood’ is a protectable property interest under the Due Process Clause”) (citing *Bell v. Burson*, 402 U.S. 535, 539 (1971)).

(B) Procedural protections

(i) All that is required is reasonable notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Parratt v. Taylor*, 451 US 527, 540 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986).

(ii) Post-deprivation remedy is sufficient process so long as it is reasonable. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (“Unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available.”).

ii. Substantive Due Process.

(1) The substantive component of the Due Process clause guards against “certain government actions regardless of the fairness of

¹ The Fifth Amendment contains a nearly identical provision but it has been interpreted to apply only to actions taken by the federal government. *Patterson v. Fuller*, 654 F. Supp. 418 (N.D. Ga. 1987).

the procedures used to implement them.” *Collins v. City of Harker Heights*, 503 U.S. 115 (1992).

- (2) Two part test for substantive due process claims:
 - (A) Was there a deprivation of a federal constitutionally protected interest, and
 - (B) If so, was it the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation? *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir. 1980).
- (3) The Eleventh Circuit has limited substantive due process claims to those arising under the U.S. Constitution. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994). Thus, an allegation of a non-procedural interference with a state law property right fails to state a substantive due process claim as a matter of law. *Id.*
- (4) The Eleventh Circuit has also held that substantive due process claim in land use cases are duplicative of, and subsumed into, Fifth Amendment just compensation cases. *Bickerstaff Clay Products Co., Inc. v. Harris County, Ga.*, 89 F.3d 1481 (11th Cir. 1996). Thus, substantive due process claims are not at all useful to land use plaintiffs litigating in federal court.
- (5) Georgia courts, on the other hand, are more inclined to find substantive due process violations arising from interference with property rights. In *Sellars v. Cherokee County*, 254 Ga. 496, 497, 330 S.E.2d 882 (1985), for example, the applicant sought a rezoning from residential to neighborhood commercial so he could build a real estate office. In reversing the denial of that request on substantive due process grounds, the Supreme Court held that “commercial development in and of itself is not harmful to the safety, morals or general welfare of the public, and a zoning decision based on a policy that there is enough commercially zoned property is alone insufficient to justify a denial of rezoning.” *Id.* at 497.

iii. Void for Vagueness

- (1) Another species of due process claim is that a statute or ordinance is unconstitutionally vague such that “persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application.” *Floyd Rd., Inc. v. Crisp County*, 279 Ga. 345, 347, 613 S.E.2d 632 (2005).

- (2) A law that gives too little guidance as to its enforcement will also be struck down on vagueness grounds. In *Folsom v. City of Jasper*, 279 Ga. 260, 263, 612 S.E.2d 287, 290 (2005), for example, the City suspended Folsom’s liquor license under an ordinance that authorized suspension or revocation if the City Council determined, “to their own satisfaction,” that the licensee was guilty of “any violation of federal or state law.” In striking down the ordinance, the Supreme Court held: “That type of absolute discretion in both the determination of the occurrence of the violation as well as the relevance of the violation does not comport with basic principles of due process or the statutory requirements.” *Id.* at 264.
- (3) Nevertheless, a person whose conduct is clearly proscribed by the law has no standing to challenge the law as void. *Catoosa County v. R.N. Talley Properties, LLC*, 282 Ga. 373, 375, 651 S.E.2d 7 (2007).

B. Fifth Amendment Takings Claims

- i. “[N]or shall private property be taken for public use, without just compensation.” U.S. Const., Amend. V.
 - (1) A reduction in value alone arising from regulation prohibiting certain uses does not constitute a taking so long as other uses are permitted. *Dirt, Inc. v. Mobile County Commission*, 739 F.2d 1562, 1566 (11th Cir. 1984); see also *Nasser v. City of Homewood*, 671 F.2d 432, 438 (11th Cir. 1982) (neither deprivation of most beneficial use of land nor severe decrease in property value is a taking).
- ii. The U.S. Supreme Court has held that the Fifth Amendment requires states to provide inverse condemnation remedies for takings. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).
 - (1) Georgia’s inverse condemnation procedure has been found to be constitutionally adequate. *Benton v. Savannah Airport Comm.*, 251 Ga. App. 759, 760, 555 S.E.2d 110 (2001).

C. First Amendment

- i. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and petition the Government for redress of grievances.” U.S. Const., Amend. I.

- ii. First Amendment claims are somewhat unique in that a plaintiff has standing to challenge a law on that basis whether or not he has suffered actual harm under the law. *Lamar Co., L.L.C. v. City of Marietta*, 538 F. Supp. 2d 1366, 1372 (N.D. Ga. 2008).

D. Equal Protection

- i. “No state shall... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amend. XIV.

- (1) There are three types of equal protection claims that could arise in the context of land use litigation:

- (A) Facial challenge to a law

- (i) In cases involving suspect classifications (such as race), the plaintiff must show that the government's action is not narrowly tailored to achieve a compelling state interest. *Williams v. Pryor*, 240 F.3d 944, 947-48 (11th Cir. 2001).
- (ii) In cases involving a quasi-suspect classifications (such as gender), an intermediate level of scrutiny applies, which requires that the government action be upheld as long as it is substantially related to an important government objective. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).
- (iii) If the plaintiff is not a member of a suspect class, he must show that the classification is not rationally related to a legitimate state purpose. *E&T Realty v. Strickland*, 830 F.2d 1107, 112-13 (11th Cir. 1987).

- (B) Discriminatory application of a facially neutral law

- (i) Plaintiff must show: (1) he was treated differently than similarly situated persons; and (2) the defendant unequally applied the facially neutral statute for the purpose of discriminating against the plaintiff. *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996).

- (C) “Class of one” claims

- (i) The U.S. Supreme Court has recognized “class of one” equal protection claims where the plaintiff alleges that he has been intentionally treated differently from others similarly situated without a

- (ii) Eleventh Circuit precedents conflict with themselves and the Supreme Court on the standard of proof the plaintiff must meet.
 - 1. In *Campbell v. Rainbow City*, 434 F.3d 1306 (11th Cir. 2006), the court distinguished between traditional equal protection claims, which require purposeful discrimination, and the newer class-of-one claims, which only require no rational basis.
 - 2. In *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027 (11th Cir. 2008), however, the court incorrectly cited *Campbell* for the proposition that “Under the class of one analysis, ‘Plaintiffs must show (1) that they were treated differently from other similarly situated individuals; and (2) that Defendant unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiffs.’”

5. REMEDIES

A. Types of Damages Available

i. Compensatory Damages

- (A) Section 1983 is a species of tort law so damages are similarly available. *Carey v. Phipps*, 435 U.S. 247, 257-58 (1978).
- (B) Although compensatory damages must be proven, general compensatory damages, as opposed to special damages, need not be proved with a high degree of specificity and may be inferred from the circumstances. *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 476 (11th Cir. 1999). "A plaintiff may be compensated for intangible, psychological injuries as well as financial, property, or physical harms." *Id.*

ii. Punitive Damages

- (1) Under Section 1983, a plaintiff may recover punitive damages from a public officer acting in his individual capacity, but not from

- (2) A punitive damage award requires evidence that defendant's conduct was motivated by evil motive or intent, or involved reckless or callous indifference to the federally protected rights of others. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

B. Attorneys' Fees and Expenses

i. 42 U.S.C. § 1988

- (1) In any action or proceeding to enforce a provision of 42 U.S.C. § 1983, “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs[.]” 42 U.S.C. § 1988.

ii. O.C.G.A. § 13-6-11

- (1) “The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.”
- (2) Jury may award attorneys’ fees and expenses under O.C.G.A. § 13-6-11 even in the absence of a state law claim. *Fulton County v. Legacy Investment Group, LLC*, 676 S.E.2d 388 (2009).
- (3) However, a plaintiff who seeks costs of litigation under O.C.G.A. § 13-6-11, must file an *ante litem* notice. *Dover v. City of Jackson*, 246 Ga. App. 524, 541 S.E.2d 92 (2000) (treating a claim for attorneys’ fees as a claim for damages for which an *ante litem* notice is required.).

C. Declaratory Judgment

- i. Section 1983 is an appropriate vehicle for obtaining declaratory relief. *Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237 (D. Del. 1968).
- ii. An actual case or controversy is required. *Pilgrim v. First Nat. Bank of Rome*, 235 Ga. 172, 174, 219 S.E.2d 135(1975) (“For a controversy to justify the making of a declaration, it must include a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute. There can be no justiciable controversy unless there are interested parties asserting adverse claims upon a state of facts which have accrued.).

- iii. Georgia courts will not enjoin administrative proceedings in progress or grant declaratory relief concerning a constitutional question that could be raised on appeal from the administrative decision. *Ledford v. Department of Transp.*, 253 Ga. 717, 324 S.E.2d 470 (1985).
- iv. While the mootness doctrine frequently arises in declaratory judgment actions, a court will still grant declaratory relief if the issue is capable of repetition yet evading review. *Fulton County v. Legacy Investment Group, LLC*, 676 S.E.2d 388, 394 (2009) (holding that Fulton County’s withdrawal of a debarment notice did not moot Legacy’s challenge to the constitutionality of the ordinance upon which the debarment was based because so long as the ordinance was in effect, the issue was capable of repetition yet evading review).

D. Equitable Remedies

i. Mandamus

- (1) Mandamus is the remedy for inaction of a public official. Mandamus is appropriate if the plaintiff has no adequate remedy at law, and has demonstrated a clear legal right to the relief requested or that the defendant public official has committed a gross abuse of discretion. *Voyles v. McKinney*, 283 Ga. 169, 169-70 (2008); *Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533 (1980).

ii. Injunctive Relief

- (1) Preliminary and permanent injunctive relief is available to Section 1983 plaintiffs if they have no adequate remedy at law. *Pearson v. Callahan*, 129 S. Ct. 808, 822 (2009).
 - (A) Courts construe this requirement flexibly; holding that injunctive relief is available so long as the movant’s legal remedy is not as complete or effective as his equitable remedy. *See Hampton Island Founders, LLC v. Liberty Capital, LLC*, 283 Ga. 289, 293, 658 S.E.2d 619 (2008).
- (2) In a state court action, a plaintiff must show that a preliminary injunction will:
 - (A) Maintain the status quo pending a resolution on the merits; and
 - (B) Weigh in favor of the movant when the equities are balanced. *Wilson v. Sermons*, 236 Ga. 400, 223 S.E.2d 816 (1976).

- (i) As a practical matter, courts usually find that the equities weigh in favor of the movant if the movant has a likelihood of succeeding on the merits. See, e.g., *Garden Hills Civic Assoc. v. MARTA*, 273 Ga. 280 (2000).
- (3) In a federal action, the test is somewhat more rigorous, requiring proof of:
 - (A) Substantial likelihood of success on the merits;
 - (B) Irreparable injury to the movant unless an injunction issues;
 - (C) The threatened injury to the movant outweighs possible injury an injunction may cause the opposing party; and
 - (D) The injunction will not disserve the public interest. *See Bank of America, N.A. v. Sorrell*, 248 F. Supp. 2d 1196 (N.D. Ga. 2002).

6. CONCLUSION

Section 1983 should not be overlooked in land use cases because it offers several procedural and substantive advantages over traditional state law causes of action.