Rel: October 27, 2023

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2022-0741

Steven Dixon

v.

City of Auburn; Ron Anders, in his official capacity as the mayor of the City of Auburn; and Beth Witten, in her official capacity as a member of the Auburn City Council

Appeal from Lee Circuit Court (CV-21-900211)

PER CURIAM.

The plaintiff, Steven Dixon, appeals from a summary judgment entered in favor of the defendants, the City of Auburn ("the City"); Ron Anders, in his official capacity as the mayor of the City; and Beth Witten, in her official capacity as an Auburn City Council member who serves as mayor pro tempore of the City. The underlying action arose from a dispute between Dixon and the defendants over Ordinance No. 3288 ("the short-term-rental ordinance"), which amended the City's zoning ordinance to expressly regulate short-term rentals of residential property within the City's geographical limits. Dixon claims that the adoption and enforcement of the short-term-rental ordinance violated his right to due process and also violated his right to equal protection as guaranteed by the Alabama Constitution. For the reasons discussed below, we affirm.

I. Facts and Procedural History

In April 2018, Dixon purchased property located on Green Street in Auburn ("the home") to use as his primary residence. Dixon has continuously resided in the home since that time. Shortly after closing on the purchase of the home, however, Dixon began using online home-

sharing platforms operated by entities such as Airbnb and VRBO, among others, to rent the basement of the home on a short-term basis.

Although, at the time Dixon purchased the home, the City's zoning ordinance did not expressly regulate short-term rentals of residential property, the home was zoned in a Neighborhood Conservation ("NC") District at the time of Dixon's purchase. Under the zoning ordinance in effect at that time and since, only single-family detached dwelling units,[1] accessory dwelling units, private parks, and cemeteries are permitted by right in NC districts. The occupancy of dwelling units in NC districts has also continuously been limited to no more than two unrelated persons.[2]

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[1]Since Dixon's purchase of the home, the City's zoning ordinance has listed "[s]ingle family residential S/D" developments in conventional residential subdivisions as a use permitted by right in NC districts. The zoning ordinance has defined "conventional residential uses" as consisting of "all single-family detached dwelling units" and "conventional subdivision" as consisting of "single-family dwellings on individual lots."

[2]Since Dixon's purchase of the home, the City's zoning ordinance has defined a "single-family detached dwelling unit" as a "[f]reestanding structure … designed to house one (1) family as a single housekeeping unit" and a "dwelling unit" as a "room or group of rooms, providing or intended to provide living quarters for not more than one (1) family." In NC districts, the zoning ordinance has defined "family" to include no more than two unrelated persons residing in a single dwelling unit. Moreover, except for accessory dwelling units, no other special residential uses have been permitted by right in NC districts.

Before the City's adoption of the short-term-rental ordinance, Dixon had not applied for a business license or a zoning certificate pertaining to his short-term-rental use of the home's basement. Dixon also did not directly remit lodging taxes for any short-term rentals of the home's basement. However, in May 2018, pursuant to an agreement between Airbnb and the City, Airbnb began collecting and remitting lodging taxes on behalf of property owners using the Airbnb platform to execute short-term rentals of property within the City's geographical limits. The agreement required Airbnb to share aggregate data on gross tax receipts but permitted Airbnb to withhold "any personally identifiable information" about the short-term-rental operators.

Dixon was elected to a seat on the Auburn City Council in October 2018. In that same election, Anders was elected to his first term as mayor of the City. Following his inauguration in November 2018, Anders established a "Short-Term Rental Task Force" tasked with soliciting feedback from the City's residents and recommending regulations of short-term rentals of residential property.

On March 16, 2021, the city council voted to adopt the short-term-rental ordinance, which, among other things, explicitly prohibited all

short-term rentals in the zoning district for the home.[3] More specifically, the short-term-rental ordinance allowed homestays, defined as short-term rentals of an owner's primary residence, in all zoning districts that permitted up to five unrelated persons to occupy a dwelling unit. The short-term-rental ordinance, however, prohibited homestays in all other zoning districts -- including NC districts.

In May 2021, the City sent Dixon a cease-and-desist letter instructing him to stop renting out the home's basement on a short-term basis. Dixon, however, continued his short-term-rental use of the home's basement. In November 2021, the City issued Dixon a citation and prosecuted him in the Auburn Municipal Court for violating the short-term-rental ordinance. Dixon was convicted and fined.

In June 2021, Dixon commenced an action against the defendants in the Lee Circuit Court ("the trial court"), challenging the validity and enforceability of the short-term-rental ordinance. Dixon and the defendants filed cross-motions for a summary judgment. Following oral

[3]As the owner of a short-term-rental property, Dixon declared a potential conflict of interest and recused himself from all votes and proceedings pertaining to the short-term-rental ordinance.

argument and additional briefing, the trial court entered a summary judgment in favor of the defendants on June 17, 2022. Dixon now appeals.

II. Standard of Review

We review a summary judgment de novo, applying the same standard as that applied by the trial court. Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038 (Ala. 2004). Thus, this Court must determine whether the evidence presented to the trial court establishes that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. In making that determination, we must view the evidence in the light most favorable to the nonmovant. Turner v. Systems Fuel, Inc., 475 So. 2d 539, 541 (Ala. 1985).

III. Analysis

On appeal, Dixon contends that the short-term-rental ordinance violates his rights to due process and equal protection. Dixon also claims that the City should be equitably estopped from enforcing the short-term-rental ordinance to prevent his short-term-rental use of the home's basement. We address those arguments in turn and find each of them unavailing.

A.

According to Dixon, because his short-term-rental use of the home's basement predated the City's adoption of the short-term-rental ordinance, that use qualifies as a preexisting, nonconforming use. Dixon contends that, as a result of this preexisting, nonconforming use, he acquired a vested right to continue renting the basement of the home on a short-term basis despite the City's enactment of the short-term-rental ordinance. Dixon further argues that this vested right is entitled to protection under Alabama law and that the City's enforcement of the short-term-rental ordinance improperly deprived him of that vested right without due process of law.[4] Dixon cites Budget Inn of Daphne, Inc. v.

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[4]Dixon's arguments both below and in this Court, to some extent, mix principles relating to regulatory takings -- or inverse condemnation -- with his legally distinct due-process claim. In fact, Count II of Dixon's complaint was styled as an "unlawful taking without just compensation" claim under the Alabama Constitution. That count, however, also asserted due-process principles that Dixon expounded on in his briefing to the trial court. We note that in Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1 (Ala. 2013), a majority of this Court concluded that the Alabama Constitution does not recognize regulatory-takings claims, and the trial court relied upon Gurley in entering a summary judgment as to Count II. Dixon has not asked this Court to revisit Gurley, and, therefore, to the extent that Dixon attempted to present a takings claim under the Alabama Constitution, the trial court's summary judgment as to that claim must be affirmed. Nevertheless, Dixon argues, as he did in the trial court, that his claim is different from that in Gurley because, he

City of Daphne, 789 So. 2d 154 (Ala. 2000), among other prior decisions, in support of this proposition.

In Budget Inn, this Court did indeed recognize that a preexisting, nonconforming use is "a vested property right that a zoning ordinance may not abrogate except under limited circumstances." Id. at 159. In particular, we addressed the due-process concerns implicated by a zoning ordinance's termination of a preexisting, nonconforming use, explaining that "[a] municipality may not simply divest a property owner of a vested right, without compensation, and any attempt to do so violates the most fundamental principles of due process." Id. Significantly, this constitutional limitation on a municipality's authority to enforce zoning ordinances applies only if the use qualifies as a preexisting, nonconforming use. The parties in Budget Inn agreed that the property owner's use "was, at least initially, a legal-nonconforming use, grandfathered under the zoning ordinance." 789 So. 2d at 159. Here, in

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contends, his short-term-rental use of the home's basement constituted a preexisting, nonconforming use that conferred upon him a right to such use. Citing Budget Inn of Daphne, Inc. v. City of Daphne, 789 So. 2d 154 (Ala. 2000), Dixon posits that the City's attempt to divest him of that right violated fundamental principles of due process. We, therefore, address this claim as a separate due-process claim, rather than as a regulatory-takings claim under the Alabama Constitution.

contrast, the defendants dispute Dixon's claim that his short-term-rental use of the home's basement has ever qualified as a nonconforming use.

As an initial matter, "'[t]he burden of proof is upon the party asserting a right to a nonconforming use to establish the lawful and continued existence of the use at the date of the enactment of zoning laws pertaining to it.'" Mousseau v. City of Daphne Bd. of Zoning Adjustments, 6 So. 3d 544, 550 (Ala. Civ. App. 2008) (quoting 8A Eugene McQuillin, The Law of Municipal Corporations § 25.188.50 at 67-69 (3d ed. rev. 2003)) (emphasis added). The City's zoning ordinance defines a nonconforming use as "an activity using land, buildings, and/or structures for purposes which were legally established prior to the effective date of this Ordinance or subsequent amendment to it ...." (Emphasis added.)

At issue in this case is whether Dixon's short-term-rental use of the home's basement was lawful or "legally established" before the City's enactment of the short-term-rental ordinance. As previously noted, at the time Dixon purchased the home, and continuously since that purchase, the home has been zoned in an NC district. Since that time, the City's zoning ordinance has also provided that "no building, structure, or land

shall be used or occupied except ... for the purposes permitted" and has stated that "[u]ses not listed in [the table of permitted uses] ... are not permitted in any district except pursuant to Article IX, which provides for interpretation of uses, or Article VII, which provides for nonconformities." (Emphasis added.)[5]

Although "[s]tatutes or ordinances which impose restrictions on the use of private property are strictly construed and their scope cannot be extended to include limitations not therein included or prescribed," Smith v. City of Mobile, 374 So. 2d 305, 307 (Ala. 1979), the plain language of the City's zoning ordinance has -- at all times relevant to this litigation -- presumptively prohibited those uses not specifically enumerated as permitted in NC districts. See also Town of Enfield v. Enfield Shade Tobacco, LLC, 265 Conn. 376, 381, 828 A.2d 596, 599 (2003) (reading analogous language in a town's zoning ordinance to conclude that "[a]ll uses that are not expressly permitted ... are prohibited uses").

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[5]Article IX of the zoning ordinance additionally provides that "[n]o use interpretation shall permit a use in any district in which such use is not listed either as permitted or conditional in [the table of permitted uses]."

Crucially, Dixon does not dispute that short-term rentals have never been listed as a permitted use in NC districts. Before the trial court, Dixon also did not contend that his short-term-rental use fell within any other use specifically enumerated as permitted.[6] Our review of the record, moreover, has revealed no evidence indicating that Dixon received -- or requested -- a favorable use interpretation from the City before the enactment of the short-term-rental ordinance.[7] Dixon consequently failed to show that his short-term-rental use of the home's basement was lawfully established before the City's adoption of the short-

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[6]For the first time in his brief before this Court, Dixon argues that the enumerated permitted use of "[s]ingle family residential S/D" encompasses his short-term-rental use of the home's basement. Dixon's brief at p. 28; see, e.g., note 1, supra. This argument, however, has not been preserved for review. See Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992) ("This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.").

[7]In any event, pursuant to Article IX of the zoning ordinance, "no use interpretation finding a particular use to be permitted or conditionally permitted in a specific district shall authorize the establishment of such use … but shall merely authorize the preparation, filing, and processing of applications for any permits and approvals which may be required …." Dixon has not alleged that he ever obtained a zoning certificate or business license authorizing his short-term-rental use of the home's basement before the enactment of the short-term-rental ordinance.

term-rental ordinance, and the trial court, therefore, did not err in concluding that the defendants were entitled to a summary judgment on Dixon's due-process claim.

B.

Next, Dixon contends that the short-term-rental ordinance violates his right to equal protection as guaranteed by the Alabama Constitution.[8] Specifically, Dixon contends that the short-term-rental ordinance treats property owners who own properties in NC districts differently than other property owners and that this distinction is not supported by any rational basis or compelling governmental interest. As this Court has recognized, however, Alabama's Constitution contains no express equal-protection provision. Ex parte Melof, 735 So. 2d 1172 (Ala. 1999). Following the decision in Melof, courts and commentators have debated whether Alabama's Constitution independently provides for an equal-protection claim and what the contours of such a claim would be. See, e.g., Hutchins v. DCH Reg'l Med. Ctr., 770 So. 2d 49, 59 (Ala. 2000) (in which a plurality of this Court noted that whether the Alabama Constitution provides for a guarantee of equal protection "remains in

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[8]Dixon has not asserted a federal equal-protection claim.

dispute"); Marc James Ayers, Interpreting the Alabama Constitution, 71 Ala. Law 286, 289 (2010) (commenting that Melof put an end to Alabama's "phantom equal protection provision"); and Martha I. Morgan & Neal Hutchens, The Tangled Web of Alabama's Equality Doctrine After Melof: Historical Reflections on Equal Protection and the Alabama Constitution, 53 Ala. L. Rev. 135 (2001) (arguing that, notwithstanding the statement by the Melof "plurality," the Alabama Constitution provides equal-protection guarantees). We need not wade into that discussion today. Given the post-Melof "dispute" concerning the existence and scope of the Alabama Constitution's equal-protection guarantee, it was incumbent on Dixon to provide to this Court in his opening brief contextual legal analysis supporting his equal-protection claim. See M.E.T. v. M.F., 892 So. 2d 393, 394 (Ala. Civ. App. 2003). Instead, he cited a single pre-Melof case for the proposition that federal equal-protection standards also apply to equal-protection claims brought under the Alabama Constitution. See Indian Rivers Cmty. Health Ctr. v. City of Tuscaloosa, 443 So. 2d 894, 896 (Ala. 1983). In light of the conclusory and generalized arguments made by Dixon, as well as the facts of this

case, we conclude that Dixon has not established that the trial court erred in entering a summary judgment as to his state equal-protection claim.

C.

Finally, Dixon argues that -- even assuming that his short-term-rental use of the home's basement does not qualify as a preexisting, nonconforming use -- the defendants should be equitably estopped from enforcing the short-term-rental ordinance against him based on the defendants' (1) alleged acquiescence to Dixon's short-term-rental use of the home's basement before the enactment of the short-term-rental ordinance and (2) collection of lodging taxes pursuant to the 2018 agreement with Airbnb. In support of this proposition, Dixon cites this Court's decisions in City of Foley v. McLeod, 709 So. 2d 471 (Ala. 1998), and City of Prattville v. Joyner, 661 So. 2d 1158 (Ala. 1995).

In McLeod, a mobile-home park that had been in operation since 1955 was allowed to continue operating as a nonconforming use after the City of Foley enacted an ordinance that zoned the mobile-home park in a single-family residential district. McLeod, 709 So. 2d at 472. The ordinance, however, prohibited the expansion of the nonconforming use. Id. at 473. In 1994, the owners of the mobile-home park purchased six

new mobile homes to replace existing rental units. Id. at 472. After that purchase, the City of Foley demanded that the owners remove the six new units, alleging that the installation of the new units constituted an impermissible enlargement of the nonconforming use. Id.

Although this Court agreed that the installation of the new mobile homes violated the City of Foley's zoning ordinance, we determined that the City of Foley was estopped from forcing the removal of those six specific units because (1) the City of Foley had presented no evidence indicating that it ever objected to similar replacements in the past, (2) the City of Foley's building inspector had expressed no objection when notified of the owners' plan to purchase the six new mobile homes, and (3) the City of Foley had expressed an objection only after the owners had already purchased the mobile homes. Id. at 474-75. Thus, we concluded that, "[t]aken as a whole, ... the [c]ity's continued acquiescence amounted to a misrepresentation of a material fact, namely that it would not enforce the zoning ordinance to prevent the [owners] from replacing mobile homes ...." Id. Importantly, however, this Court clarified that, although the City of Foley could not compel the removal of those six

specific rental units, the City of Foley could generally enforce the zoning ordinance to preclude additional replacements in the future. Id. at 475.

Here, in contrast, Dixon is asking us to conclude that the City's inaction transformed his short-term-rental use of the home's basement into a lawfully established, nonconforming use and divested the City of any authority to generally enforce the short-term-rental ordinance against him moving forward. McLeod does not stand for that proposition. Furthermore, to invoke the doctrine of equitable estoppel, a party must show (1) "[t]hat 'the person against whom estoppel is asserted ... communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on'"; (2) "[t]hat 'the person seeking to assert estoppel, who lacks knowledge of the facts, relies upon [the] communication'"; and (3) "[t]hat 'the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct.'" Lambert v. Mail Handlers Benefit Plan, 682 So. 2d 61, 64 (Ala. 1996) (quoting General Elec. Credit Corp. v. Strickland Div. of Rebel Lumber Co., 437 So. 2d 1240, 1243 (Ala. 1983)). In addition, and as our prior caselaw has made clear, for the doctrine of equitable estoppel to apply, the "'representation

must be as to the facts and not as to the law .... '" State Highway Dep't v. Headrick Outdoor Advert., Inc., 594 So. 2d 1202, 1205 (Ala. 1992) (quoting First Nat'l Bank of Montgomery v. United States, 176 F. Supp. 768, 772 (M.D. Ala. 1959)) (emphasis omitted).

In the present case, Dixon has presented no evidence indicating (1) that the City intended, by not enforcing the previous zoning ordinance against him, to communicate that Dixon would be exempt from any future ordinance's regulation of short-term rentals or (2) that he relied on the City's alleged enforcement inaction before commencing his short-term-rental use of the home's basement. Dixon also has not alleged that he ever sought a use interpretation, zoning certificate, or business license from the City before the enactment of the short-term-rental ordinance or that the defendants took any other affirmative action to recognize the legality of Dixon's short-term-rental use of the home's basement.

Moreover, even in the event that the City's inaction was intended to convey that Dixon's use was lawful under the previous zoning ordinance, "'"[t]he doctrine of equitable estoppel is not a bar to the correction ... of a mistake of law."'" State Highway Dep't, 594 So. 2d at 1205 (quoting First Nat'l Bank of Montgomery, 176 F. Supp. at 772,

quoting in turn Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 182 (1957)) (emphasis omitted). Thus, the City's failure to engage in any enforcement efforts against Dixon before the enactment of the short-term-rental ordinance does not provide a basis for estopping the defendants from asserting that Dixon’s short-term-rental use of the home's basement is not a preexisting, nonconforming use. See, e.g, State Highway Dep't, 594 So. 2d 1202 (holding that the State Highway Department could not be estopped from contesting the legality of certain billboard signs despite having previously issued permits allowing their erection).

As an additional basis for his equitable-estoppel claim, Dixon also points to the City's 2018 agreement with Airbnb. According to Dixon, the defendants should be estopped from denying that his short-term-rental use of the home's basement qualifies as a preexisting, nonconforming use based on the City's collection of lodging taxes pursuant to that 2018 agreement.[9] Dixon contends that "the City, in a publicly available and

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[9]In support of that proposition, Dixon relies on this Court's decision in City of Prattville v. Joyner, 661 So. 2d 1158 (Ala. 1995) ("Joyner I"). In Joyner I, this Court determined that equitable estoppel prevented the City of Prattville from terminating fire-protection services to residents and businesses within the City of Prattville's police jurisdiction because

publicized contract, held itself open to profit on any and all short term rental 'accommodations located in City of Auburn,'" Dixon's brief at 31 (footnote omitted), and insists that "[i]t was against this backdrop that [he] purchased the [h]ome and began listing that space on Airbnb and other short term rental sites." Id. at 32. That same publicly available contract, however, provided that the agreement between Airbnb and the City would not relieve short-term-rental operators from "responsibilities with respect to Lodging Tax for transactions completed" on non-Airbnb platforms or "constitute a waiver by … [the City] of the provisions of any other law and/or ordinance applicable to" the short-term-rental operator.

As previously noted, pursuant to the 2018 agreement, Airbnb remitted lodging taxes due for short-term rentals without providing "any personally identifiable information" about the short-term-rental operators. Dixon, moreover, has not alleged that he directly remitted lodging taxes to the City for transactions that he completed on any online

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the residents and businesses within the police jurisdiction, who paid business license fees and remitted sales tax to finance those services, reasonably relied on the continuation of those services. However, in City of Prattville v. Joyner, 698 So. 2d 122 (Ala. 1997), we held that Joyner I had been wrongfully decided and concluded that equitable estoppel did not apply. Dixon's reliance on Joyner I is therefore misplaced.

home-sharing platform. As a result, Dixon could not have reasonably relied on the City's 2018 agreement with Airbnb, or that agreement's anonymous data-provisions, to conclude that his short-term-rental use of the home's basement was lawfully established before the enactment of the short-term-rental ordinance. The trial court therefore did not err in failing to apply equitable-estoppel principles to find that Dixon's short-term-rental use of the home's basement qualified as preexisting, nonconforming use.

IV. Conclusion

For the reasons discussed above, we conclude that the trial court properly entered a summary judgment in favor of the defendants, and we affirm the trial court's judgment.

AFFIRMED.

Parker, C.J., and Stewart, Mitchell, and Cook, JJ., concur.

Bryan, J., concurs specially, with opinion, which Wise and Mendheim, JJ., join.

Shaw and Sellers, JJ., concur in the result.

BRYAN, Justice (concurring specially).

I concur in the main opinion. I write specially to note that, insofar as Steven Dixon alleges a "regulatory taking" of his property, his claim is, unfortunately, not a viable claim under Alabama law. It appears to me that Dixon, among other things, attempted to allege a regulatory taking, i.e., that the City of Auburn's zoning ordinance, as amended by the short-term-rental ordinance, is so onerous that it amounts to a taking of his property under the Alabama Constitution despite the absence of a physical intrusion onto the property. See, e.g., Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (discussing regulatory takings under the Takings Clause of the Fifth Amendment to the United States Constitution). However, as the circuit court correctly observed, under Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1 (Ala. 2012), this Court does not recognize a regulatory-takings claim based on the Alabama Constitution. I dissented regarding that issue in Town of Gurley, and I continue to believe that that issue was wrongly decided in that decision. As I observed in my special writing in that case, Alabama's failure to recognize regulatory takings "is out of line with the vast majority of states, which recognize the concept of a regulatory taking

under state constitutions." 143 So. 3d at 55 (on applications for rehearing) (Bryan, J., concurring in the result in part and dissenting in part). Had Dixon asked this Court -- which has significantly changed in composition since Town of Gurley was released -- to overrule that decision, I would have voted to overrule it and to recognize the concept of a regulatory taking under Alabama law. Although I deeply value the principle of stare decisis, at times "this Court has had to recognize ... that it is necessary and prudent to admit prior mistakes and to take the steps necessary to ensure that we foster a system of justice that is manageable and that is fair to all concerned." Foremost Ins. Co. v. Parham, 693 So. 2d 409, 421 (Ala. 1997). Overruling Town of Gurley would provide Dixon and other landowners of this State the same basic protections under well-settled takings law provided by other jurisdictions. However, we have not been asked to overrule Town of Gurley, and, thus, I concur to affirm the circuit court's judgment.

Wise and Mendheim, JJ., concur.