

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD WHITBECK, JACQUELINE  
WHITBECK, JOHN SEE, LYNNE SEE,  
STEVEN NEWMAN and SANDY D'HEILLY,

Plaintiffs,

v.

MEMORANDUM and ORDER  
05-C-533-S

BARRON COUNTY BOARD OF SUPERVISORS,  
TOWN OF MAPLE PLAIN, PATRICIA A.  
And JOHN T. OLSON,

Defendants.

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Plaintiffs Richard Whitbeck, Jacqueline Whitbeck, John See, Lynne See, Steven Newman and Sandy D'Heilly commenced this action in Barron County Wisconsin Circuit Court. It was removed to this Court by defendants Barron County Board of Supervisors, Town of Maple Plain, Patricia A. Olson and John T. Olson. In their amended complaint plaintiffs allege that a rezoning decision violated their rights under state and federal law.

On November 25, 2005 the Court granted defendant Barron County Board of Supervisors' motion to dismiss plaintiffs' first, fourth and fifth causes of action. Plaintiffs' second, third and sixth causes of action remain against defendant Barron County Board of Supervisors.

On December 15, 2005 plaintiffs and defendant Barron County Board of Supervisors filed cross motions for summary judgment

pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

#### UNCONTESTED FACTS

For purposes of deciding the motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiffs Richard Whitbeck, Jacqueline Whitbeck, John See, Lynne See, Steven Newman and Sandy D'Heilly own real property in Barron County Wisconsin. Plaintiffs Richard Whitbeck, Jacqueline Whitbeck, Steven Newman and Sandy D'Heilly are adult residents of the State of Minnesota. Plaintiffs John See and Lynne See are adult residents of the State of Wisconsin.

Defendants Patricia A. Olson and John T. Olson are adult residents of the State of Wisconsin and own real property in Barron County Wisconsin. Defendant Barron County Board of Supervisors and the Barron County Zoning Committee are governing bodies of Barron County which is a municipal corporation. Defendant Town of Maple Plain is a municipal corporation.

On August 17, 2004 defendants Patricia and John Olson signed a petition to re-zone an 80 acre parcel from Agricultural II/Business to Recreational/Residential so they could develop a 100 unit recreational vehicle campground. The Olson property is adjacent to property that has been owned by plaintiff Richard Whitbeck for 29 years and near property owned by the other plaintiffs.

On September 9, 2004 the Town of Maple Plain took action to approve the proposed re-zoning of the Olson's property. On December 6, 2004 the Town held a public meeting and refused to reconsider the Olson rezoning petition. Town Supervisor Dale Heinecke stated to those in opposition to the proposed rezoning,

including plaintiffs Richard Whitbeck and John See, that they were all just paranoid.

On November 2, 2004 the Barron County Zoning Committee held its first public hearing on the petition. The Committee viewed a video and a slide show of the subject property. This hearing was continued until the Committee could determine the number of acres that the Olsons required for the campground.

A second hearing was held on December 7, 2004. At this hearing plaintiffs Richard Whitbeck, John See and their attorney spoke against the re-zoning. Olson agreed to reduce the area to be rezoned from 80 to approximately 15 acres. On December 14, 2005 the Committee held a meeting and site visit at the Olson property.

On January 4, 2005 the Barron County Zoning Committee convened in executive session. Plaintiffs and their counsel were present. The Committee approved the proposed re-zoning of the Olson property by a vote of four to one. No formal tape recording or transcript of this meeting was made but minutes were taken. In its January 5, 2005 Action and Report the Barron County Zoning Committee stated that the rezoning was good use for the land and promotes recreation in the area.

On January 13, 2005 plaintiff Richard Whitbeck filed a statutory protest against the Olson rezoning petition. On January 17, 2005 the Barron County Board of Supervisors met to consider the statutory protest and the Olsons' petition to re-zone their property. The Board granted the Olsons' petition to re-zone a 14.5

acre section of their property and rejected plaintiff Richard Whitbeck's statutory protest.

Plaintiffs are not aware of any objections to rezoning in matters other than this case nor any other property owner in the area who has requested a rezoning of his/her property.

#### MEMORANDUM

Defendant Barron County moves for summary judgment on plaintiffs' equal protection claim. Plaintiffs may prevail on equal protection violations by asserting that state action was motivated solely by a spiteful effort to "get" them for reasons wholly unrelated to any legitimate state objective. Village of Willowbrook v. Olech, 528 U.S. 562 (2000); Esmail v. Macrane, 53 F.3d 176, 180 (7<sup>th</sup> Cir. 1995). To succeed on their class of one claim plaintiffs must demonstrate that they were treated differently from others similarly situated and that there is no rational basis for differential treatment. Purze v. Village of Winthrop Harbor, 286 F.3d 452, 455 (7<sup>th</sup> Cir. 2002). Plaintiffs could also prevail where they demonstrate that they were treated differently than others similarly situated and that illegitimate animus motivated the differential treatment. Discovery House v. Consol. City of Indianapolis, 319 F.3d 277, 282 (7<sup>th</sup> Cir. 2003); Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7<sup>th</sup> Cir. 2000).

Plaintiffs have not shown that they were treated differently from others similarly situated. See McDonald v. Village of Winnetka, 371 F.3d 992, 1002 (7<sup>th</sup> Cir. 2004). They compare

themselves to the Olsons. It is undisputed, however, that the Olsons were not similarly situated to plaintiffs. The Olsons filed a petition to rezone their property. Plaintiffs did not petition to rezone their property. Plaintiffs, on the other hand, objected to the rezoning request by the Olsons.

Plaintiffs have not presented any evidence that others who objected to rezoning petitions in the Town of Maple Plain or Barron County were treated differently than they were. Plaintiffs have not shown that they were treated differently than others similarly situated. Accordingly, they cannot prevail on their equal protection claim against defendants Town of Maple Plain or Barron County.

Had plaintiffs shown they were treated differently than others similarly situated they would also have to show that there was no rational basis for the decision to rezone the Olson's property or that the defendants were motivated by ill will or personal animus. Plaintiffs have not shown any such basis or motivation. Defendant Barron County is entitled to judgment as a matter of law on plaintiffs' equal protection claim and its motion for summary judgment will be granted. Plaintiffs' motion for summary judgment will be denied.

Federal due process and equal protection claims remain against defendant Town of Maple Plain. These claims are identical to those claims dismissed as a matter of law against defendant Barron

County. Accordingly, the federal law claims against defendant Town of Maple Plain must also be dismissed.

The only remaining claims are state law claims. This Court declines to exercise continuing supplemental jurisdiction over these claims pursuant to 28 U.S.C. §1367(c)(3) and United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1986). See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7<sup>th</sup> Cir. 1993). The Court will remand these state law claims to Barron County Circuit Court.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that the defendant Barron County Board of Supervisors motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants Town of Maple Plain and Barron County Board of Supervisors against plaintiffs DISMISSING their federal law claims with prejudice and costs.

IT IS FURTHER ORDERED that plaintiffs' state law claims against all defendants are REMANDED to Barron County Circuit Court.

Entered this 26<sup>th</sup> day of January, 2006.

BY THE COURT:

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JOHN C. SHABAZ  
District Judge