

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Cameron Arnegard and Mary Susan)	
Arnegard,)	
Plaintiffs - Appellants –)	
Cross-Appellees,)	
)	
vs.)	
)	Supreme Court Case No.: 20170242
Arnegard Township,)	
)	McKenzie County District Court
Defendant - Appellee –)	(Northwest Judicial District)
Cross-Appellant.)	No.: 27-2013-cv-00191

**APPEAL FROM ORDER FOR JUDGMENT, DATED APRIL 24, 2017,
JUDGMENT, DATED APRIL 25, 2017, AND NOTICE OF ENTRY OF
JUDGMENT, DATED MAY 1, 2017, AFFIRMING THE NOVEMBER 17, 2016,
MEMORANDUM AND ORDER GRANTING JUDGMENT AS A MATTER OF
LAW IN FAVOR OF PLAINTIFFS**

**THE DISTRICT COURT OF MCKENZIE COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE DANIEL S. EL-DWEEK**

REPLY BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT

Scott K. Porsborg (ND Bar ID # 04904)
sporsborg@smithporsborg.com
 Austin T. Lafferty (ND Bar ID # 07833)
alafferty@smithporsborg.com
 122 East Broadway Avenue
 P.O. Box 460
 Bismarck, ND 58502-0460
 (701) 258-0630

Attorneys for Defendant – Appellee –
 Cross-Appellant, Arnegard Township

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I. ARGUMENT

A. The District Court erred granting the Arnegards' Motion for Judgment as a Matter of Law

1. The Township did not Violate Due Process

[¶1] The Arnegards do little to resist the Township's argument that it did not violate their due process rights. Their only argument appears to be agreeing with the Township that it cannot bring a claim under the North Dakota Constitution.

The court went on to find that the deprivation was actionable as a state claim not a federal claim. North Dakota has not recognized "a direct cause of action for damages for violation of the North Dakota [due process] constitutional provisions." Kristensen v. Strinden, 343 N.W.2d 67, 70 (N.D. 1983). This claim should have been considered in a federal due process context under § 1983. Then, because the court correctly concluded that the first two elements were met, proximate cause and damages should have gone to the jury.

Reply Br. ¶ 3 (emphasis in original).

[¶2] The Arnegards thus appear to agree with the Township – they do not have a state law claim. They argue their only claim is under federal law, § 1983. The Kristensen case cited by the Arnegards agrees that a state court may hear a § 1983 claim, but that does not mean the Arnegards have brought a successful § 1983 claim that should have gone to the jury.

[¶3] The United States Supreme Court requires that "a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." Board of Cty. Com'rs of Bryan Cty. Okl. v. Brown, 520 U.S. 397, 403 (1997). "The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the moving force behind the injury alleged." Id. (emphasis in original).

[¶4] The Arnegards have not established a policy or custom that caused their alleged injury. Nor did the District Court find such a policy or custom. In fact, when the Arnegards attempted to amend their complaint to add a §1983 claim, the District Court denied the request. Thus, they agree they cannot bring a state law claim for violation of due process, and the District Court found they did not and could not bring a federal law claim for due process violation.

[¶5] Additionally, the Arnegards' argument, and the District Court's subsequent findings, are contradictory. The District Court found "Due Process is clearly violated when a governmental entity imposes a regulation that is not published pursuant to N.D.C.C. 58-03-10." AA at 414. However, under Section 58-03-10, without publication, there is no valid bylaw. The zoning amendment that grants the authority allowing the Arnegards' CUP also sets forth the one year expiration date. If the expiration date is invalid due to lack of publication, the Arnegards' CUP is also invalid due to lack of publication. The two are a package deal.

[¶6] Further, the Arnegards' argument that they had no notice of the expiration of the CUP is also confusing, as they had clear notice of the law. Again, the same law that set the expiration date, also granted the ability to the Board to provide a CUP. The Arnegards knew the law, because they applied for a CUP. They cannot claim ignorance of a portion of the law, while attempting to benefit from the rest.

2. The Arnegards did not have a property interest in their CUP

[¶7] The Arnegards argue their CUP is a "valuable property right" and that N.D.C.C. § 28-34-01 and Dahm v. Stark Cnty Bd of Comm'rs, 2013 ND 241, places limits upon the Township. The Arnegards argue under this law, the Township may not act

in an arbitrary, capricious or unreasonable manner, or in a way unsupported by substantial evidence.

[¶8] The Township did not act in an arbitrary, capricious, or unreasonable manner, or in a way unsupported by substantial evidence. The Township passed an amendment which allowed it to grant a CUP for man camps, and which gave any such CUP a one-year expiration, upon which it must be renewed. The Arnegards, pursuant to this amendment, applied for a CUP. The CUP was granted. A year passed, and the CUP expired. An additional few months passed, and the Township sent notice to the Arnegards that the CUP had expired. The Arnegards have made no argument as to how these actions are arbitrary, capricious, or unreasonable. The Township passed a law, and is following that law.

[¶9] The CUP is not a property right.

A crucial factor in determining whether a particular statutory benefit constitutes a property interest is the nature and degree of discretion given to the government administrator in awarding or denying the benefit. A statute does not create an entitlement for due process purposes if the statute confers discretion on the governmental agency or official without providing objective criteria for and limitations upon that discretion.

Ennis v. Williams County Bd. Of Comr's, 493 N.W.2d 675, 678 (N.D. 1992).

[¶10] The relevant zoning regulations provide conditionally permitted uses that are subject to the issuance of a CUP. AA at 327. The amendment, allowing for a CUP for man camps, allows the Planning and Zoning Commission to develop any standards it sees fit and to make additional requirements above and beyond those standards when CUPs are issued. AA at 33. This gives the Commission a high degree of discretion, as the Commission is allowed to implement standards as it sees fit, without criteria or

limitations restricting it. Therefore, pursuant to Ennis, the amendment creating the CUP for man camps does not create an entitlement for due process purposes. The Township's decision to grant or deny a CUP is entirely discretionary. Likewise, the decision to renew a CUP is entirely discretionary. Therefore, the Arnegards have no property interest in their CUP.

[¶11] Further, the Arnegards argue that their CUP “is even more valuable than a CUP requiring renewal because of the ability to continually operate so long as there is compliance with it.” Reply Br. ¶ 2. But the Arnegards acknowledged their CUP required renewal.

THE COURT: [. . .] Is it your clients' expectation that the conditional use permit was a property right that was granted in perpetuity?

MR GRIFFIN: No, Your Honor, but it was a property right, and the point here is that they lost the opportunity to apply to renew it.

Tr. Sum. Judg. 12:23-13:3.

[¶12] The Arnegards have acknowledged, their CUP was not a continuous use permit, it was something that needed to be renewed. Again, the Arnegards' argument is the lack of notice of the expiration date, not the validity of the expiration date. This is because to challenge the validity of the expiration date is to challenge the validity of the CUP itself. There is no requirement of the Township to provide notice to the Arnegards beyond what was provided. “When zoning decisions are confided to a legislative rather than a judicial body . . . the affected persons have no right to notice and an opportunity for a hearing: no right, in other words, to procedural due process.” Ind. Land Co., LLC v. City of Greenwood, 378 F.3d 705, 710 (7th Cir. 2004). An individual “is charged with knowledge of the provisions of statutes and regulations and must take notice thereof.”

Gonzales v. Tounjian, 2003 ND 121, ¶ 20, 665 N.W.2d 705. The CUP is not a property right.

II. CONCLUSION

[¶13] The District Court erred when it granted the Arnegards' Motion for Judgment as a Matter of Law. There was no due process violation. The parties agree, there is no state constitutional provision that allows for this type of due process claim. The District Court did not allow the Arnegards' federal claim to move forward. Even if the Court had, the Arnegards fail to meet the requirements for a federal § 1983 claim. There was no violation of due process. Additionally, the Arnegards loss of the CUP was not a loss of a property right. The Planning and Zoning Commission was given too much discretion for a property right to have been established.

[¶14] For these reasons, the Township respectfully requests that this Court reverse and remand the District Court's judgment as a matter of law, with an instruction to dismiss the claim in favor of the Township.

Dated this 26th day of December, 2017.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By /s/ Scott K. Porsborg

Scott K. Porsborg (ND Bar ID # 04904)

sporsborg@smithporsborg.com

Austin T. Lafferty (ND Bar ID # 07833)

alafferty@smithporsborg.com

122 East Broadway Avenue

P.O. Box 460

Bismarck, ND 58502-0460

(701) 258-0630

Attorney for Defendant-Appellee/Cross-
Appellant, Arnegard Township

CERTIFICATE OF SERVICE

[¶15] I hereby certify that on the 26h day of December, 2017, a true and correct copy of the foregoing **REPLY BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT**, was served via e-mail to the following:

Garth H. Sjue
Lisa M. Six
Attorneys at Law
P.O. Box 1206
Williston, ND 58802-1206

gsjue@crowleyfleck.com
lsix@crowleyfleck.com

By /s/ Scott K. Porsborg
SCOTT K. PORSBORG