STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: March 16, 2016)

MANUEL ANDREWS, JR., et al.,	:	
Plaintiffs,	:	
v.	:	**C.A. No. KC-2013-1128**
JAMES J. LOMBARDI, in his capacity as Treasurer of the City of Providence, Rhode Island	:	
Defendant.	:	
MANUEL ANDREWS, JR., et al.,	:	
Plaintiffs,	:	
v.	:	**C.A. No. KC-2013-1129**
JAMES J. LOMBARDI, in his capacity as Treasurer of the City of Providence, Rhode Island	:	
Defendant.	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is Defendant James J. Lombardi's (Defendant or City) motion for partial summary judgment pursuant to Super. R. Civ. P. 56. At issue are five Counts of Plaintiffs', retired Providence police officers and firefighters (Plaintiffs or Retirees), Complaint in KC-2013-1128 (the Medicare case) and three Counts of Plaintiffs' Complaint in KC-2013-1129 (the Pension case). Plaintiffs objected to Defendant's motion for summary judgment. The Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts

The underlying case was brought by Plaintiffs who elected to opt out of a settlement agreement in The Providence Retired Police and Firefighters Association, Inc., et al v. The City of Providence, C.A. No. PC 12-3590.

In June of 2011, the Rhode Island General Assembly enacted House Bill 2011-5894, which became G.L. 1956 § 28-54-1 (Medicare Enrollment Statute). Pursuant to the authority granted to it by the Medicare Enrollment Statute, on July 18, 2011, the City enacted Ordinance No. 422, Chapter 2011-32 (Medicare Ordinance). The Medicare Ordinance requires all retired individuals and their spouses to enroll in Medicare once they become eligible.

Additionally, the City enacted Ordinance No. 276, Chapter 2012-20 (Pension Ordinance), on April 30, 2012. The Pension Ordinance provides that cost-of-living adjustments (COLAs) would be suspended until the pension fund reached funding levels of 70%.

On October 22, 2013, Plaintiffs filed this action against the City alleging that all three legislations—the Medicare Enrollment Statute,[1] Medicare Ordinance, and Pension Ordinance—are unconstitutional. Plaintiffs challenge these statutes as facially unconstitutional under the Contracts, Takings, and Due Process Clauses and as unconstitutional as applied under the Contracts, Takings, and Due Process Clauses. Furthermore, Plaintiffs seek declaratory

[1] Plaintiffs complied with Super. R. Civ. P. 24 requiring service on the Attorney General's Office when challenging the constitutionality of a state statute, and which states "[w]hen the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency, or employee thereof is not a party, the party asserting the unconstitutionality of the act shall serve the attorney general with a copy of the proceeding within such time to afford the attorney general an opportunity to intervene." Super. R. Civ. P. 24; First Am. Compl.- COLA ¶ 73, filed Feb. 24, 2014; First Am. Compl.- Health Care Benefits ¶ 73, filed Feb. 24, 2014; Summons Proof of Service- Rhode Island Attorney General's Office, served Oct. 25, 2013, filed Oct. 28, 2013.

judgments with respect to the breach of contract claims and assert causes of action based on promissory estoppel. The Plaintiffs also request a preliminary injunction enjoining and restraining the enforcement of the legislation. This motion for summary judgment relates to the following claims: 1) takings clause; 2) due process; 3) facial unconstitutionality; and 4) promissory estoppel. Plaintiffs filed an objection to the motion for summary judgment, but do not oppose summary judgment being entered regarding: 1) the facial challenge to the Medicare Enrollment Statute, Medicare Ordinance, and Pension Ordinance; and 2) the Due Process challenges in regard to the Medicare Enrollment Statute, Medicare Ordinance, and Pension Ordinance.[2] As such, the motion for summary judgment is granted with respect to these three claims. Furthermore, at a hearing on February 5, 2016, Plaintiffs represented to the Court that the calculations included in an affidavit from their expert, Mr. Yamamoto, had changed. The Court continued the proceeding, and Plaintiffs filed a revised opposition and included amended affidavits from two experts—Mr. Yamamoto and Mr. Fornia. Defendant opposed the Court's consideration of the affidavits, but the Court does not have to reach this issue.

The remaining challenges concerning the takings claims and promissory estoppel are now decided.

II

Standard of Review

Summary judgment should be granted when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Indus. Nat'l Bank v. Peloso, 121 R.I. 305, 307, 397 A.2d 1312, 1313 (1979); Super. R. Civ. P. 56(c). The Court must conduct an "examination of pleadings, affidavits, admissions, answers to interrogatories and

[2] See Letter to Judge Taft-Carter by Attorney Kevin Bowen, dated Jan. 29, 2016.

other similar matters" and view the evidence in "a light most favorable to the party opposing the motion." Indus. Nat'l Bank, 121 R.I. at 307-08, 397 A.2d at 1313. The Court is mindful that "[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." DeMaio v. Ciccone, 59 A.3d 125, 129-30 (R.I. 2013) (citing Estate of Giuliano v. Giuliano, 949 A.2d 386, 390 (R.I. 2008) (internal quotation marks omitted)). Furthermore, in its analysis, the Court "must refrain from weighing the evidence or passing upon issues of credibility" because the "purpose of the summary judgment procedure is issue finding, not issue determination." Id. at 130 (quoting Doe v. Gelineau, 732 A.2d 43, 48 (R.I. 1999) and Estate of Giuliano, 949 A.2d at 391 (internal quotation marks omitted)).

Furthermore, when a motion for summary judgment is filed, the adverse party "'bears the burden of proving, by competent evidence, the existence of facts in dispute.'" Jessup & Conroy, P.C. v. Seguin, 46 A.3d 835, 838-39 (R.I. 2012) (quoting Higgins v. R.I. Hosp., 35 A.3d 919, 922 (R.I. 2012)). The adverse party must present evidence, by affidavits or otherwise, and not rest on mere allegations in pleadings, to show there is a genuine issue of material fact. Id. at 839 (citing Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998)); Super. R. Civ. P. 56(e). In deciding questions of law, "'the trial justice often finds it necessary to exercise his or her independent judgment and make findings as to preliminary facts.'" Ferreira v. Strack, 636 A.2d 682, 685 (R.I. 1994) (quoting Rodrigues v. Miriam Hosp., 623 A.2d 456, 461 (R.I. 1993)).

III

Analysis

A

Takings Claim

The Rhode Island Constitution provides that "[p]rivate property shall not be taken for public uses, without just compensation." R.I. Const. art. I, § 16; see also U.S. Const., Amend. V. ("[N]or shall private property be taken for public use, without just compensation."). In determining whether the plaintiff has a protected property[3] right, the United States Supreme Court has explained that, "[b]ecause the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)). Thus, as a threshold matter, the Court must determine if the Plaintiffs have a constitutionally protected property interest. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161

[3] The Supreme Court compared how in both Roth and in Goldberg v. Kelly, 397 U.S. 254, 262 (1970), the Plaintiff's benefits were defined by statutory enactments:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577.

(1980)). Here, the Defendant concedes and the Court recognizes that the Retirees have a constitutionally protected property interest in their COLA and health care benefits. Arena v. City of Providence, 919 A.2d 379, 392-94 (R.I. 2007). Having found such, the Court will now examine the nature of the taking.

The Defendant argues that the statutes are regulatory takings[4] and therefore governed by the test outline in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978). See 10 A.L.R. Fed. 2d 231 (2006). The Plaintiffs, on the other hand, argue that the rationale set forth in Lucas v. S.C. Coastal Council applies. 505 U.S. 1003 (1992). Generally, "'property may be regulated to a certain extent, [but] if regulation goes too far it will be recognized as a taking.'" Alegria v. Keeney, 687 A.2d 1249, 1252 (R.I. 1997) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). However, the United States Supreme Court has not issued a test to determine "when a regulation goes 'too far.'" Id. Rather, the United States Supreme Court directs courts to conduct "essentially ad hoc, factual inquiries" into each case before it involving regulatory takings. Penn Cent. Transp. Co., 438 U.S. at 124. The factors identified in Penn Central are (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." Id.

This ad hoc analysis is not required when the property owner suffers a "physical invasion of his property" and a "regulation denies all economically beneficial or productive use of land." Lucas, 505 U.S. at 1015; Alegria, 687 A.2d at 1252. This exception was later clarified and

[4] The most common and easiest takings cases are physical takings when "the government encroaches upon or occupies private land for its own proposed use[,]" as opposed to regulatory takings, which occur when "government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (citing Lucas, 505 U.S. at 1017). Thus, there must be a "complete elimination of value," or a "total loss," or the Court must apply the analysis as outlined in Penn Central. Id. (quoting Lucas, 505 U.S. at 1019–20, n.8).

The Court recognized that government could not function if it was required to compensate incidental diminution in property values, and thus, the "government may execute laws or programs that adversely affect recognized economic values." Penn Cent. Transp. Co., 438 U.S. at 105. Furthermore, the government can execute laws or programs that adversely affected economic values when it subsequently held that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993) (citing Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (approximately 75% diminution in value)); Brunelle v. Town of S. Kingstown, 700 A.2d 1075, 1082 (R.I. 1997) ("A court should be quick to recognize, however, that a mere governmental interference with one's particular exploitation of a parcel of land is generally insufficient to require compensation, and the court should consider the impact of the regulation on the value of the entire property to determine if a compensatory taking has in fact occurred."). Moreover, when "the health, safety, morals, or general welfare" or common good is promoted, the Court is less likely to find a taking that needs to be compensated. See Penn Cent. Transp. Co., 438 U.S. at 125; Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986); Milardo v. Coastal Res. Mgmt. Council of R.I., 434 A.2d 266, 268 (R.I. 1981) ("When use regulations are reasonably necessary to protect the public health and safety, however, we have considered them permissible exercises of the police power

which did not require compensation."). In Connolly, the Court recognized the common knowledge that pension plans are regulated through legislative action. See Connolly, 475 U.S. at 227. Thus, "knowledge is relevant to the inquiry of whether [the Retirees] maintained *reasonable* investment backed expectations in accordance with *Penn Central*'s * * * analysis." Alegria, 687 A.2d at 1253.

1

Medicare Enrollment Statute and Medicare Ordinance

The Court rejects the Plaintiffs' argument that the healthcare reduction is a complete taking. In order to substantiate a complete taking, there can be no productive or economic benefit remaining. Tahoe-Sierra Pres. Council, Inc., 535 U.S. at 330 (citing Lucas, 505 U.S. at 1017). Lucas does not apply unless the government diminished a property's value by 100%. Id. Here, Plaintiffs retain healthcare coverage provided by the state. Although they are incurring an increase in their contributions along with a reduction in health coverage, the healthcare coverage remains. Therefore, Plaintiffs have not suffered a "complete elimination of value" because the Retirees still retain a benefit from the healthcare provided as part of their pension. See Lucas, 505 U.S. at 1019–20, n.8. Thus, because Plaintiffs have not suffered a complete taking, the partial takings analysis in Penn Central controls. See Alegria, 687 A.2d at 1253.

In applying the factors outlined in Penn Central, this Court recognizes that the Medicare Enrollment Statute and Medicare Ordinance here impacted Plaintiffs by diminishing their healthcare coverage. As to the first factor, Plaintiffs are entitled to a certain level of medical coverage. Since the passage of the Medicare Enrollment Statute and the Medicare Ordinance, Retirees are compelled to enroll in Medicare. This has resulted in an increased expense to the Retirees. It is clear that government can pass legislation that diminishes economic values. Penn Cent. Transp. Co., 438 U.S. at 124. Moreover, a "mere diminution in the value of property" is

not a taking. Concrete Pipe & Prods. of Cal., Inc., 508 U.S. at 645. Here, while the Retirees' expenses have increased, they do retain healthcare coverage. Thus, this legislation does not amount to a takings and is a permissible mere diminution of value. Id. With respect to the second factor, Plaintiffs cannot have a reasonably backed investment expectation in a statutory scheme because public pensions, especially those aspects related to healthcare, are so regulated. See Retired Adjunct Professors of the State of R.I. v. Almond, 690 A.2d 1342, 1347 (R.I. 1997). The Rhode Island Supreme Court held that "[p]ublic pensions have always been a heavily regulated legal arena." Id. Therefore, individual expectations of immunity from future statutory change are unwarranted. Id.; see Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them."). Furthermore, in analyzing the third factor, this governmental action was for the benefit of the citizens of the City of Providence in that it provided a more sustainable retirement system and balanced budget for the rest of the city. See Medicare Ordinance, Chapter 2011-32, passed July 18, 2011. In enacting the Medicare Ordinance, the legislature made findings that concluded that the City's pension system was severely underfunded, by over $800 million, and increasing. Id. To address this "fiscal crisis," the legislation aims to eliminate the duplicity in medical coverage provided by both the federal government and city. Id. As the Medicare Ordinance states, it was passed "to address costs which impact [the City's] financial stability," therefore, it is a permissible exercise of police power that does not require compensation. Id. See also Penn Cent. Transp. Co., 438 U.S. at 125; Milardo, 434 A.2d at 268. After considering the three factors outlined in Penn Central, the Court finds that there was no takings. Therefore, summary judgment must enter for the Defendant.

2

Pension Ordinance

The Pension Ordinance suspends COLA benefits until the pension fund reaches 70% funded level. Plaintiffs argue that the suspension of COLAs has effectuated a total and permanent taking of the Retirees' COLA benefits, resulting in substantial monetary loss. Additionally, Plaintiffs argue that Retirees have a reasonable investment-backed expectation of receiving their vested COLAs and health benefits, and the government's assertion that it acted in the public good is not enough to show there is no genuine issue of material fact in regard to the takings claim.

Retirees have a constitutionally protected property interest in COLAs. See Arena, 919 A.2d at 392-94. However, the city ordinance does not present a "classi[c] taking." E. Enters. v. Apfel, 524 U.S. 498, 522 (1998). Rather, the suspension of the COLA benefit arises from an adjustment of benefits and burdens to promote the common good. Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 374 (2d Cir. 2006) (quoting Penn Cent. Transp. Co., 438 U.S. at 124). Therefore, the challenges to the COLA benefits are regulatory takings rather than per se takings. Gavin Reinke, When A Promise Isn't A Promise: Public Employers' Ability to Alter Pension Plans of Retired Employees, 64 Vand. L. Rev. 1673, 1693 (2011). Despite the Plaintiffs' argument, this Court finds that the current COLA suspension is only temporary and will engage in a Penn Central analysis. See Alegria, 687 A.2d at 1253.

The case at bar is analogous to the decision in Buffalo Teachers Fed'n, 464 F.3d at 375. There, the court concluded that the wage freeze did not constitute an alleged taking. Id. It was temporary and operated "during a control period." Id. Here, the Retirees receive their full pension benefits, and only a small percentage is being withheld to enable the City to address providing a more sustainable retirement system and balanced budget for the rest of the City.

Furthermore, "mere diminution in the value of property" is not a taking. Concrete Pipe & Prods. of Cal., Inc., 508 U.S. at 645. Additionally, COLAs are subject to government regulation and legislation, which means the Retirees cannot have a reasonably backed investment expectation. Retired Adjunct Professors of the State of R.I., 690 A.2d at 1347. The Pension Ordinance also included an intentions section which states that the Pension Ordinance was passed for "the health, safety and welfare of the citizens of Providence and their property and to ensure the sustainability of the employee retirement system of the city of Providence for current and retired employees by promoting the sustainability and longevity of the employees' retirement system of the City of Providence." The Pension Ordinance here articulates a permissible exercise of police power to benefit the general public. Pension Ordinance, Sec. 17-181.1, Apr. 30, 2012; Penn Cent. Transp. Co., 438 U.S. at 125; Connolly, 475 U.S. at 225; Milardo, 434 A.2d at 268. Consequently, after reviewing the Penn Central factors, this Court finds that because the Pension Ordinance results in a diminution of value, Retirees had no reasonably backed investment expectation, and the Pension Ordinance promoted the general welfare there is no takings under the Takings Clause of the Rhode Island or United States Constitutions. Accordingly, this Court grants Defendant's motion for summary judgment.

B

Promissory Estoppel

Defendant moves for summary judgment on Plaintiffs' theory of promissory estoppel in both KC-2013-1128 and KC-2013-1129. Defendant presents three arguments. First, Defendant maintains that Plaintiffs have both a contract claim and promissory estoppel claim, and Plaintiffs cannot recover under both theories, and would circumvent the contracts clause. Second, Defendant notes that promissory estoppel claims cannot be used against a government entity for

public contracts. Lastly, Defendant asserts Plaintiffs were unreasonable in relying on any promise made by the City.

Plaintiffs contend that it can plead in the alternative, as allowed by Super. R. Civ. P. 8. Furthermore, Plaintiffs aver that there is no categorical rule that promissory estoppel claims cannot be brought against government entities and distinguishes the case facts from the prominent cases cited by Defendant. Plaintiffs argue that the government is not performing a government function; therefore, the Plaintiffs are allowed to proceed with a promissory estoppel claim.

Promissory estoppel is defined as "'[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance, [and therefore] is binding if injustice can be avoided only by enforcement of the promise.'" Filippi v. Filippi, 818 A.2d 608, 625 (R.I. 2003) (quoting Alix v. Alix, 497 A.2d 18, 21 (R.I. 1985)); Dellagrotta v. Dellagrotta, 873 A.2d 101, 110 (R.I. 2005); Restatement (Second) Contracts § 90 at 242 (1981). The Rhode Island Supreme Court further extended promissory estoppel "to situations in which the promisee's reliance on the promise was induced, and injustice may be avoided only by enforcement of the promise." Id. In order to find promissory estoppel, the Court must find the following three elements: "1. A clear and unambiguous promise; 2. Reasonable and justifiable reliance upon the promise; and 3. Detriment to the promisee, caused by his or her reliance on the promise." Id. at 626.

However, in Rhode Island, it is well established that promissory estoppel is "ill-suited to public-contract-rights analysis." D. Corso Excavating, Inc. v. Poulin, 747 A.2d 994, 1001 (R.I. 2000) (citing Retired Adjunct Professors of the State of R.I., 690 A.2d at 1346; Romano v. Ret. Bd. of Emps.' Ret. Sys. of R.I., 767 A.2d 35, 39 (R.I. 2001); 73A C.J.S. Public Contracts § 9

("However, it has also been said that implied-in-fact contract theories and notions of promissory estoppel which are routinely applied in private contractual contexts are ill-suited to a public-contract-rights analysis and that since political subdivisions cannot be bound by contract unless the agreement is in writing and formally ratified through proper channels, such entities cannot be made liable upon theories of implied or quasi contract."). Promissory estoppel is ill-suited to public-contract-rights analysis because "[m]ere reliance by benefited parties on legislative enactments and their unilateral beliefs concerning what the statute will mean to them in the future, no matter how reasonable they may seem at the time, cannot create a legislative intent to establish enforceable contractual rights that is not otherwise manifest in the words of the legislation." Retired Adjunct Professors of the State of R.I., 690 A.2d at 1346. As such, "'courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis of a contract or an estoppel.'" Id. (quoting Pineman v. Fallon, 662 F. Supp. 1311, 1316 (D.Conn. 1987), aff'd, 842 F.2d 598 (2d Cir.), cert. denied, 488 U.S. 824 (1988); see also Romano, 767 A.2d at 39.

Moreover, the Rhode Island Supreme Court addressed promissory estoppel claims in regard to public pension benefit schemes and found a "private contract analysis should not be applied here because a statutory public-pension benefit scheme like this one is not the kind of 'bargained-for-exchange' that is the hallmark of contracts." Id. The Court reasoned that treating the pension rights as contractual rights would inhibit the legislature to ever modify the pension scheme, especially in situations where the state found itself in financial crisis. Id. Rhode Island is clear on this issue: promissory estoppel is not applicable to public pension cases, and Plaintiffs have not provided a persuasive reason to deviate from this well-established precedent. As such,

the Court must grant summary judgment in favor of the Defendant on the promissory estoppel claim.

IV

Conclusion

For the reasons stated herein, this Court grants Defendant's motion for summary judgment with respect to: the Takings Clause claims and Promissory Estoppel claims. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Andrews v. Lombardi and** **Andrews v. Lombardi**
CASE NO:	**KC-2013-1128 and KC-2013-1129**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**March 16, 2016**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
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For Defendant:	**Jeffrey M. Padwa, Esq.; William M. Dolan, III, Esq.; Nicholas L. Nybo, Esq.**