FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2301

KOS 11838, LLC and BHNVN, INC.,

Appellants,

v.

CITY OF PANAMA CITY BEACH, a Florida municipal corporation,

Appellee.

On appeal from the Circuit Court for Bay County.
John L. Fishel II, Judge.

August 19, 2021

BILBREY, J.

In 2017, Appellants operated businesses in Panama City Beach renting low-speed vehicles (LSVs).[1] That year, the City capped the number of LSVs available for rent at 300 and evenly divided the 300 among six licensed businesses which thus received

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[1] Section 320.01(41), Florida Statutes, defines a LSV as "any four-wheeled vehicle whose top speed is greater than 20 miles per hour but not greater than 25 miles per hour, including, but not limited to, neighborhood electric vehicles." The City refers to LSVs as "street legal golf carts."

50 LSV "medallions" each. Appellants were not among the six businesses awarded medallions. They did not prevail in the trial court in their constitutional challenge to the distribution of medallions by the City and now seek relief in this court. We affirm.

Background

In their amended complaint, Appellants challenged the LSV ordinance (City of Panama City Beach Ordinance 1398) on two constitutional grounds: denial of equal protection and denial of substantive due process.[2] By these claims, Appellants did not challenge the City limiting the number of LSVs which may be operated or that the number of medallions was set at 300. Instead, Appellants first argued the ordinance as applied violated equal protection in discriminating against them because other similarly situated LSV rental businesses were granted medallions. Second, Appellants claimed the ordinance denied them substantive due process because it infringed on their vested property rights in an arbitrary and capricious manner.

In response, the City alleged that Adi Rahatlev owns Appellants as well as several other LSV rental businesses. One of Rahatlev's LSV businesses not involved here, MOT Dead Sea, was awarded medallions.[3] The City argued below that Appellants were properly denied medallions since MOT Dead Sea was one of the six businesses awarded medallions and that to grant medallions to

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[2] Ordinance 1398, enacted in February 2017, was written to sunset after two years. The selection of the six businesses previously awarded of 50 medallions was later made permanent by the enactment of City of Panama City Beach Ordinance 1484.

[3] Adi Rahatlev is not a party to this appeal and was not a plaintiff below. As a result, he cannot assert here that he was personally denied equal protection or substantive due process by the City's distribution of the 300 LSV medallions. Appellants do not deny the City's allegation and trial court's subsequent findings on Rahatlev's ownership and control of Appellants and MOT Dead Sea.

more than one of Rahatlev's businesses would grant him a disproportionate share of the LSV rental marketplace.

Upon motion by the City and following a hearing, the trial court granted it summary judgment. In considering Appellants' equal protection challenge, the trial court applied a rational basis test because the ordinance neither discriminates against a suspect class nor infringes on a fundamental right.

In denying Appellants' equal protection claim, the trial court held Appellants were not similarly situated to the businesses granted medallions given their "unity of ownership" with one of the licensed businesses. The trial court also found the grouping of Appellants with MOT Dead Sea, since all three are owned by Rahatlev, was not arbitrary or irrational because to allow otherwise would give Rahatlev a disproportionate share of the marketplace. The trial court therefore held the challenged ordinance did not deny equal protection or substantive due process.

Standard of Review

"Constitutional challenges to statutes are pure questions of law, subject to de novo review." *Jackson v. State*, 191 So. 3d 423, 426 (Fla. 2016). We also review de novo the grant of summary judgment. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

Equal Protection

A municipal ordinance is subject to an equal protection challenge under federal and state law. *See, e.g.*, *State v. Peters*, 534 So. 2d 760 (Fla. 3d DCA 1988) (analyzing a municipal ordinance regulating pit bull ownership under the equal protection clauses of the federal and state constitutions). To succeed on a claim that an enactment violates the equal protection clauses as applied, a plaintiff must show: "(1) that he was treated differently under the law from similarly-situated persons, (2) that the law intentionally discriminates against him, and (3) that there was no rational basis for the discrimination." *Graham v. State*, 286 So. 3d 800, 806 (Fla. 1st DCA 2019).

Our focus here is only on the third prong of the test from *Graham*, and applying that prong, there is a rational basis for the ordinance, meaning no equal protection violation has occurred. Appellants agree that the rational basis test is the appropriate standard by which their equal protection claim is to be evaluated. *See Heller v. Doe by Doe*, 509 U.S. 312, 319–20 (1993) (holding that "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose"). It is the burden of the party challenging a law to prove that "there is no conceivable factual predicate which would rationally support the [law]." *Florida High Sch. Activities Ass'n v. Thomas By and Through Thomas,* 434 So. 2d 306, 308 (Fla. 1983). Thus, the test for consideration of equal protection is "whether individuals have been classified separately based on a difference which has a reasonable relationship to the applicable statute, and the classification can never be made arbitrarily without a reasonable and rational basis." *Estate of McCall v. United States*, 134 So. 3d 894, 901 (Fla. 2014).

When applying this "rational basis" test, a court is to give great deference to economic and social legislation. *See WCI Communities, Inc. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004) (citing *Gary v. City of Warner Robins, Ga.*, 311 F.3d 1334, 1339 (11th Cir. 2002)). "Essentially the same as the federal rational basis test, the Florida rational basis test has played a central role in the separation of powers under the Florida Constitution for decades." *Silvio Membreno v. City of Hialeah*, 188 So. 3d 13, 19 (Fla. 3d DCA 2016).

Limiting the number of LSVs which operate on the public streets of the City by limiting the number of medallions bears a rational relationship to the legitimate municipal goal of promoting public safety and protecting limited police resources. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) (holding that a government "has a strong interest in ensuring public safety and order" as well as "in promoting the free flow of traffic on public streets"). As noted, Appellants did not object to the limit of 300 permissible LSV medallions.

In limiting the pool of 300 licensed LSVs, the medallions had to be divided among owners in some fashion. Limiting one owner to 50 medallions, and thereby permitting six separate owners to obtain some medallions, bears a rational relationship to the uncontested legitimate purpose of limiting lawful rental LSVs to 300 while at the same time promoting competition. As Judge Posner wrote, a city choosing to promote competition rather than allowing monopolies "is a legally permissible choice" when considering an equal protection claim. *Illinois Trans. Trade Ass'n v. City of Chicago*, 839 F.3d 594, 599 (7th Cir. 2016); *see also VTS Transp., Inc. v. Palm Beach Cnty.*, 239 F. Supp. 3d 1350, 1356 (S.D. Fla. 2017) (holding that "facilitating competition is a legitimate government purpose"). The classification at issue, then, does not violate equal protection since it has a rational basis.

Substantive Due Process

As to Appellants' substantive due process challenge to the ordinance, which is also subject to rational basis review, we reject that challenge. "When a law regulating business or economic matters, which does not create a suspect class or infringe upon a fundamental right, is challenged as violating the substantive due process protected by Florida's Declaration of Rights, the law must be upheld if it bears a rational basis to a legitimate government purpose." *Silvio Membreno*, 188 So. 3d at 19. The right to substantive due process under the Fourteenth Amendment to the United States Constitution is subject to the same analysis. *See Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 781 (Fla. 2004).

As we explained in *Polakoff v. Dep't of Ins. & Treasurer*, 551 So. 2d 1223, 1225 (Fla. 1st DCA 1989),

> [W]hile the right to engage in a lawful business or occupation enjoys constitutional protection, such right may be limited when justified by the benefit to the public. "The right to earn a livelihood by engaging in a lawful occupation or business is subject to the police power of the state to enact laws which advance the public health,

> safety, morals or general welfare." *Fraternal Order of Police v. Department of State*, 392 So. 2d 1296 (Fla. 1980).

When applying the rational basis test in a substantive due process claim, a court is again to give great deference to economic and social legislation. *See WCI Communities*, 885 So. 2d at 914.

While Appellants argue that the ordinance does not prevent a concentration of ownership of the rental LSVs as one entity in theory could transfer their medallions to another under the current ordinance, the fact that a legitimate governmental purpose is not perfectly served by legislation is not a test of its constitutionality. *See Belk-James, Inc. v. Nuzum*, 358 So. 2d 174, 177 (Fla. 1978). ("[A]rguments . . . which essentially question whether the best means of regulation has been chosen, can be seen as directed more to the wisdom of the legislation than to its asserted rationality [and are] inappropriate for our judicial function."); *see also Heller*, 509 U.S. at 320–21. Instead, the substantive due process test, under federal and Florida law, asks only whether an act bears "any" relationship to "a valid governmental interest." *Silvio Membreno*, 188 So. 3d at 20 (quoting *Haire*, 870 So. 2d at 782).[4]

In their substantive due process claim, Appellants do not deny that fair competition is a legitimate governmental interest. Whether that legitimate governmental interest was articulated at the time of the ordinance's enactment is of no consequence under the rational basis test. *See Heller*, 509 U.S. at 320; *WCI Communities*, 885 So. 2d at 914. Thus, because Appellants have not "negate[d] every conceivable basis" which might support the ordinance, it must be upheld against a substantive due process challenge. *Haire*, 870 So. 2d at 782*; see also Heller*, 509 U.S. at 321.

Conclusion

[4] As the court noted in *Silvio Membreno*, "legislation can be based on nothing more than experiment" and there is no prohibition on "enacting unwise or unfair laws." 188 So. 3d at 19.

The summary judgment entered in favor of the City on the amended complaint is affirmed.

AFFIRMED.

ROBERTS and MAKAR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

A. Benjamin Gordon and Jonathan V. Schlechter of AnchorsGordon, P.A., Fort Walton Beach, for Appellants.

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