

THELMA AND RICHARD BERRY

NO. 08-CA-184

VERSUS

FIFTH CIRCUIT

VOLUNTEERS OF AMERICA, INC.,  
FORREST TOWERS II, LIMITED  
PARTNERSHIP, AND THE PARISH OF  
JEFFERSON

COURT OF APPEAL  
STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 641-845, DIVISION "N"  
HONORABLE HANS J. LILJEBERG, JUDGE PRESIDING

**COURT OF APPEAL,  
FIFTH CIRCUIT**

SEPTEMBER 16, 2008

**FILED** SEP 16 2008



**MADELINE JASMINE  
JUDGE PRO TEMPORE**

Panel composed of Judges Clarence E. McManus,  
Walter J. Rothschild, and Madeline Jasmine

**ROTHSCHILD, J. CONCURS WITH REASONS**

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**AFFIRMED IN PART; REVERSED IN PART;  
AND REMANDED**

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Plaintiffs, Thelma and Richard Berry, appeal the trial court's grant of defendant The Parish of Jefferson's Exception of Prematurity. Finding merit to the plaintiffs' position on one issue, for the following reasons, we affirm in part, reverse in part, and remand.

In their petition, plaintiffs allege that they are the owners of a parcel of land in Jefferson Parish located on Behrman Highway that was zoned "MUCD" or multi use commercial district. Plaintiffs further alleged that they entered into a sales agreement with Volunteers of America (VOA) in October 2006 for the latter to purchase the property, which sale was to take place on or before February 15, 2007. According to the petition, VOA and its assignee, Forest Towers II, intended to construct on that parcel of land multi-family residences targeted for the elderly. Plaintiffs assert that the zoning in place at the time of the sales agreement was consistent with and allowed for the intended elderly housing development.

Plaintiffs alleged in paragraph 13 of the petition that upon learning of the sales agreement, representatives of the defendant, Parish of Jefferson (specifically,

a certain Jefferson Parish councilman), with the express intention of blocking the elderly housing development, called for the implementation of a zoning study, under the authority of Section 40-880 of the Jefferson Parish Code of Ordinances, to re-classify the plaintiffs' property as "single family residential." Such study would have the effect of prohibiting the issuance of any building permits in connection with this property for a period of twelve months (the "moratorium"). Plaintiffs argued that this study rendered the sale impossible, and furthermore was initiated in bad faith and solely for the purpose of re-zoning the property with the object of denying the contemplated development. Plaintiffs argued three grounds why the study request and accompanying moratorium was arbitrary and capricious and in violation of plaintiffs' vested rights as a property owner.

Plaintiffs' prayer for relief called for a preliminary injunction restraining the enforcement of the moratorium against construction of the development, an injunction restraining the re-zoning of this property, and an injunction requiring the issuance of a building permit for construction of the development.

The Parish of Jefferson filed Exceptions of Improper Cumulation of Actions, Unauthorized Use of Summary Proceedings, No Cause of Action for Writ of Mandamus and Injunctive Relief and Damages, and Prematurity. Following a hearing on the Exceptions, the trial court granted the Exception of Prematurity, finding that plaintiffs' suit was premature on the basis that the parish had not yet rezoned the property, and that plaintiffs had not yet applied for a (building) permit.<sup>1</sup> In light of the above ruling, the trial court found the other Exceptions to be moot. This timely appeal followed.

The dilatory exception of prematurity provided in La.Code Civ. Proc. art. 926 questions whether the cause of action has matured to the point where it is ripe

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<sup>1</sup>Hearing transcript, Record at page 270.

for judicial determination, because an action will be deemed premature when it is brought before the right to enforce it has accrued. Williamson v. Hospital Service Dist. No.1 of Jefferson, 04-0451, p. 4 (La.12/1/04), 888 So.2d 782, 785. The Exception of Prematurity neither challenges nor attempts to defeat the elements of the plaintiff's cause of action; instead, the defendant asserts the plaintiff has failed to take some preliminary steps necessary to make the controversy ripe for judicial involvement. LaCoste v. Pendleton Methodist Hosp. L.L.C., 07-0008 (La. 9/5/07), 966 So.2d 519. The burden of proving prematurity is on the exceptor. Id.

As noted above, plaintiffs sought relief in three different ways. The plaintiffs argued in their petition that the initiation of the zoning study at the request of a Jefferson Parish Council member, and resulting moratorium, was arbitrary and capricious and had the effect of making the sale of their parcel of land to VOA impossible, upon which they sustained damages. This portion of the plaintiffs' suit was not premature, as the moratorium had already been initiated, and furthermore was alleged to have been initiated in bad faith in derogation of plaintiffs' rights as property owners. The trial court erred, therefore, in dismissing the plaintiffs' suit against Jefferson Parish. The trial court was correct, however, in finding that plaintiffs' suit was premature on the two grounds it addressed in its oral reasons for ruling.

Accordingly, the judgment of August 20, 2007, dismissing the plaintiffs' suit against the Parish of Jefferson as premature, is affirmed in part, reversed in part, and the matter remanded for further proceedings.

**AFFIRMED IN PART; REVERSED IN PART;  
AND REMANDED**

THELMA AND RICHARD BERRY

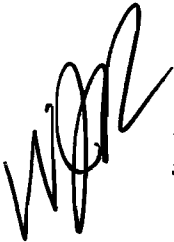
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**Rothschild, J. concurs with reasons**

I agree with the members of the panel that the trial court's judgment sustaining the exception of prematurity should be reversed as it pertains to plaintiffs' claims that the moratorium was issued in bad faith. In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed. 2d 517 (2002), the United States Supreme Court found that moratoria on development lasting one year or less during land use studies does not constitute a regulatory taking of property. However, the Tahoe decision did not address a situation in which there were allegations that the moratorium was issued in bad faith. I agree with the members of the panel that such claims of bad faith were not premature and should have been addressed by the trial court. Accordingly, on remand, the trial court should hear and consider plaintiffs' claims that the moratorium was issued in bad faith and render an appropriate judgment.

I also agree that the remaining claims in plaintiffs' lawsuit were premature when the trial court heard the exception of prematurity, because Jefferson Parish had not yet re-zoned the property. However, even though it is not in the record, the parties' memoranda shows that in December 2007, which was after the trial court's ruling on the exception of

prematurity, Jefferson Parish did in fact re-zone the subject property.

Accordingly, it appears that none of the issues that were ruled premature are premature any longer, and this appeal is essentially moot.

EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

MARION F. EDWARDS  
SUSAN M. CHEHARDY  
CLARENCE E. McMANUS  
WALTER J. ROTHSCHILD  
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**NOTICE OF JUDGMENT AND  
CERTIFICATE OF MAILING**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **SEPTEMBER 16, 2008** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in black ink, appearing to read "Pitgerald", written over a horizontal line.

PETER J. FITZGERALD, JR.  
CLERK OF COURT

**08-CA-184**

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