

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:05-CV-100-BO

WESTWOOD VILLAGE LIMITED)
PARTNERSHIP, *et al.*,)
)
Plaintiffs,)
)
v.)
)
CITY OF WILSON, *et al.*,)
)
Defendants.)
_____)

FILED
SEP 27 2005
FRED L. BORCH III, CLERK
US DISTRICT COURT, EDNC
BY _____ DEP. CLK

ORDER

This matter is before the Court on Wilson County's Motion to Dismiss; the City of Wilson's Motion to Dismiss; and Plaintiffs' Motion for Partial Summary Judgment. The underlying dispute involves Plaintiffs' challenge to the municipal defendants' development agreement with Defendant Heritage Place of Wilson, LLC to develop a shopping center in Wilson. A hearing was held on this matter on July 12, 2005. For the reasons discussed below, Defendants' Motions to Dismiss are GRANTED. This matter is DISMISSED.

BACKGROUND

This action was filed on February 10, 2005. Plaintiffs seek declaratory, injunctive, and other appropriate relief against Defendants City of Wilson ("City of Wilson") and County of Wilson ("Wilson County"), arising out of their decisions to enact an allegedly unlawful plan to provide a government subsidy of \$2 million or more from property tax revenues to a private real estate developer, Defendant Heritage Place of Wilson, LLC ("Heritage Place"), to enable it to entice Target Corporation ("Target"), through financial incentives, to open a Target store in Wilson.

cc to counsel

39

Heritage controls a large piece of real property in Wilson known commonly as the “Adkins farm property,” which Heritage is developing for residential and commercial use. Compl. ¶ 12.¹ Heritage has a development plan for the property, which includes the creation and construction of a retail shopping center (the “Project”). The Project encompasses approximately 99 acres of the Adkins farm property. Compl. ¶ 15.

Heritage proposed to Wilson County a plan whereby Heritage would pay approximately \$2 million in incentives to Target as an inducement to locate a store in Wilson. Wilson County would use the increase in tax value of the property to reimburse Heritage for those payments. Compl. ¶ 20.

On September 14, 2004, the Wilson County Board of Commissioners adopted a Retail Incentive Policy. The Policy stated that “the County will provide incentives to large retail projects to help locate those projects in Wilson County.” Pl. Ex. A. The Policy required that to be eligible for the incentives, the respective projects must, *inter alia*, “exceed 50 acres of development area,” “include an anchor tenant, which has been agreed upon by the County and the developer,” “be comprised of at least 75% new retail locations,” and include “incentives...only...paid to reimburse the retailer or developer for actual infrastructure cost.” *Id.*

On July 28, 2004, Heritage submitted its proposed agreement to the City and the County for approval. The first public hearing on the proposed agreement between Wilson County and Heritage occurred on October 21, 2004. The hearing was continued to permit the Commissioners to review evidence submitted by those opposed to the Agreement. The second hearing was held on November 18, 2004. The Board of Commissioners heard testimony from supporters and opponents of the proposed Agreement, including Plaintiffs. The Wilson City Council

¹ The Court recounts the facts as alleged in Plaintiffs’ Complaint.

unanimously approved the Agreement with Heritage on November 18, 2004. The Wilson County Board of Commissioners approved the Agreement on December 6, 2004.

The Agreement is dated December 17, 2004. *See* Pl. Ex. E. The Agreement specifies that Heritage “intends to develop a portion of the Property as a major regional retail commercial center to benefit the community and consisting of at least one national “big box” retailer which will occupy more than 100,000 square feet...” *Id.* Examples of a national “big box” retailer include “a national chain retailer or other retailer suitable to the City and County.” *Id.*

Plaintiffs allege that the municipal defendants’ actions violate the Commerce and Equal Protection Clauses of the United States Constitution. They also asserts claims for alleged violations of North Carolina law. Plaintiffs seek declaratory and injunctive relief. Wilson County and Heritage filed their Motion to Dismiss on April 1, 2005. The City of Wilson filed its Motion to Dismiss on April 4, 2005. Plaintiffs responded, and Defendants replied. Plaintiffs filed their Motion for Partial Summary Judgment on May 16, 2005. Defendants responded, and Plaintiffs replied. At the July 12, 2005 hearing, the Court heard arguments from both sides. The motions are ripe for ruling.

ANALYSIS

I. Defendants’ Motions to Dismiss

a. Plaintiffs’ Claims under the United States Constitution

A Rule 12(b)(1) motion questions the Court’s jurisdiction over the subject matter of the case. When such a motion challenges the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In determining whether jurisdiction exists, the district court is to regard the pleadings’ allegations as mere evidence on the issue, and may consider evidence outside the

pleadings without converting the proceeding to one for summary judgment. *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

A party's standing to bring a suit "is perhaps the most important of [the jurisdictional] doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). "With respect to the standing question, the Supreme Court...has carefully explained the 'irreducible constitutional minimum' required." *Dixon v. Edwards*, 290 F.3d 699, 711 (4th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

To have standing, first, a party "must have suffered an injury in fact, i.e., an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal citations omitted).

Plaintiffs' Equal Protection and Commerce Clause challenges rest on the idea that the municipal defendants expressed a preference in their Retail Incentive Policy and their Agreement with Heritage favoring "national" over "regional" retailers. An equal protection challenge requires evidence of a distinction made between two or more classes of persons. A "dormant" Commerce Clause challenge requires evidence of a distinction between in-state and out-of-state commerce. *Yamaha Motor Corp., USA v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 566 (4th Cir. 2005) ("The dormant Commerce Clause thus limits the power of the States to erect barriers against interstate trade.") (internal quotations omitted).

Here, the Retail Incentive Policy refers only to an "anchor tenant, which has been agreed upon by the County and the developer." Pl. Ex. A. The Policy contains no specific requirement that "large retail projects," *see id.*, contain "national" versus "regional" retailers. There are size requirements for receipt of the incentives, but, otherwise, the Retail Incentive Policy is blind as to the national or regional character of "projects" receiving funds.

The Agreement between Heritage and the municipal defendants does refer to Heritage's commitment to include "at least one *national* 'big box' retailer" in their Project. Pl. Ex. E (emphasis added). However, the language of that specific agreement does not set the criteria for others seeking to take advantage of Wilson's Retail Incentive Policy; it is only the language of the particular agreement between Heritage and Wilson. Defendants correctly point out that nothing alleged by Plaintiffs shows that a "large retail project" they might propose would be rejected by Wilson because it did not contain a *national* retailer.

This case turns on the relationship between the Retail Incentive Policy and the Agreement between Heritage and Wilson. The Policy can be correctly viewed as an "invitation to deal" made by Wilson to developers seeking to compete for economic incentives that would aid in developing Wilson's economy. Wilson specified the terms on which it would be willing to deal, namely certain requirements for "creat[ing] jobs, add[ing] to the tax base, and generat[ing] sales tax." Pl. Ex. A.

The Agreement between Heritage and Wilson was a single arrangement that arose under Wilson's Policy. Nothing alleged by Plaintiffs prevents them from competing for economic incentives, and nothing alleged shows that Plaintiffs have even attempted to compete for incentives. Thus, they cannot show that they have been treated differently based on their specialization in bringing "regional," but not "national," retailers to Wilson. Nor can they allege that they have suffered an injury from the Policy's alleged burden on interstate commerce. Accordingly, Plaintiffs lack standing to pursue those claims.²

² For the same reasons, Plaintiffs' status as taxpayers does not give them standing to challenge the Retail Incentive Policy and ensuing Agreement between Heritage and the municipal defendants. "Federal courts will not adjudicate a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Here, Plaintiffs have not alleged any concrete injury that distinguishes them from the other taxpayers of Wilson. Because their grievance—that the municipal

In addition, this case is not ripe for review. The “basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1966); *see also American Paper Inst. v. Env'tl. Prot. Agency*, 660 F.2d 954, 959 n.12 (4th Cir. 1981) (citing same). While the *Abbott* Court discussed ripeness in the context of reviewing an executive agency decision, the analysis is also appropriate given the federalism concerns presented by this case.

It remains unclear whether Plaintiffs, who claim to be “regional-sized” developers, could have received similar economic incentives had they approached Wilson with a proposal, as Heritage did. Defendants contend that there was no “national” requirement to be eligible for participation in the Retail Incentive Policy. Plaintiffs contend that the neutral language of the Policy was a pretext for favoritism for a “national” retailer, to the exclusion of “regional” retailers. The dispute is not ripe. Had Plaintiffs submitted a proposal for development with only a “regional” retailer included and been rejected, the controversy here would be much more defined. Because they did not, the Court should not reach the merits of Plaintiff’s claims.³ For these reasons, Defendants’ Motions to Dismiss Plaintiffs’ Equal Protection and Commerce

defendants should not favor national retailers over regional retailers—is shared by all who opposed the Agreement, the Court should not hear their claims.

³ The ripeness and standing inquiries overlap significantly. The Fourth Circuit, in an opinion written by Judge Wilkinson, has recognized that “[t]hrough the justiciability concepts of ‘standing’ and ‘ripeness’ are theoretically distinct, little is gained from an attempt to identify the particular doctrine at work in an individual case. Plaintiff’s personal stake in the outcome (standing) is directly limited by the maturity of the harm (ripeness). In any event, both doctrines require that those seeking a court’s intervention face some actual or threatened injury to establish a case or controversy.” *Doe v. Duling*, 782 F.2d 1202, 1206 n.2 (4th Cir. 1986). However, analyzing this case under both justiciability doctrines is instructive.

claims are GRANTED, pursuant to Fed. R. Civ. P. 12(b)(1).⁴

b. Plaintiffs' Claims under North Carolina State Law


28 U.S.C. § 1367 permits federal district courts to exercise jurisdiction “over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.” However, the district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). Here, Plaintiffs have raised claims that concern the power of the State and its municipalities to grant economic development incentives and whether that power is limited by North Carolina law. North Carolina courts should hear those claims. Accordingly, the Court declines to exercise its supplemental jurisdiction over them.

CONCLUSION

For the reasons discussed above, Defendants’ Motions to Dismiss are GRANTED, pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiff’s Motion for Partial Summary Judgment is DENIED AS MOOT. This matter is DISMISSED IN ITS ENTIRETY.

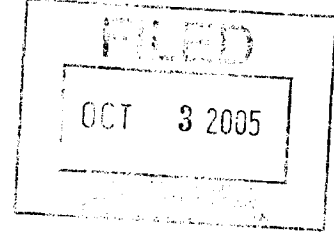
SO ORDERED.

This 27 day of September 2005.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

⁴ 42 U.S.C. § 1983 permits parties to seek redress from the courts for violation of “rights, privileges, or immunities secured by the Constitution and laws” of the United States. Section 1983 does not create substantive rights; instead it provides a procedural vehicle through which individuals can remedy violations of substantive rights. *See Dennis v. Higgins*, 498 U.S. 439, 445 (1991). For these reasons, the Court’s dismissal of Plaintiffs’ substantive Constitutional claims disposes of Plaintiffs’ Section 1983 claim.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION



WESTWOOD VILLAGE LIMITED)
PARTNERSHIP, a North Carolina)
Limited Partnership, by and through)
its General Partner, MML of Raleigh, Inc.,)
MML OF RALEIGH, INC., a North)
Carolina Corporation, DAVID JAMES,)
and RUSSELL HESMER,)

Plaintiffs,)

v.)

CITY OF WILSON, NORTH CAROLINA;)
C. BRUCE ROSE, Mayor of Wilson, in his)
official capacity, and members of the)
Wilson City Council, A.P. COLEMAN,)
GWEN C. BURTON, NOBLE G.)
BLACKMAN, IV, JAMES M. JOHNSON,)
III, DONALD I. EVANS, ROBERT L.)
THAXTON, and WILLIE J. PITT, in their)
official capacities; COUNTY OF WILSON,)
NORTH CAROLINA; FRANK E. EMORY,)
Chair of Wilson County Board of)
Commissioners, in his official capacity, and)
members of the Board of Commissioners,)
R.S. BOYETTE, GRADY M. ROBBINS,)
ELDON S. NEWTON, JR., ROGER)
LUCAS, JOSEPHINE F. EDWARDS, and)
BOBBIE D. JONES, in their official)
capacities; and HERITAGE PLACE OF)
WILSON, L.L.C., a North Carolina)
Limited Liability Company,)

Defendants.)

JUDGMENT

No. 5:05-CV-100-BO

Decision by Court.

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Motions to Dismiss are GRANTED pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiff's Motion for Partial Summary Judgment is DENIED as MOOT. This matter is DISMISSED IN ITS ENTIRETY. (BOYLE, J)

This Judgment Filed and Entered on October 3, 2005, and Copies To:

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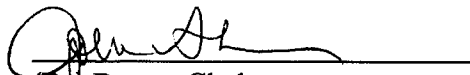
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October 3, 2005

FRED L. BORCH III, CLERK


(By) Deputy Clerk