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SPEAKERS

Anthony Sanders, Adam Shelton, Diana Simpson

A Anthony Sanders 00:06

Hello, and welcome to Short Circuit, your podcast from the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, April 20, 2022. That's 4/20 for those of you celebrating the special significance of today's date in your own way, but today's episode won't be on marijuana laws or civil forfeiture or any other 4/20-adjacent subject. We'll delve into something much more fun than what you do on 4/20. Actually much more sinister: sovereign immunity. If you've listened to our sister podcast, Bound by Oath, you will know all about that pernicious doctrine, which originated with the maxim "the king can do no wrong." My colleague Adam Shelton is going to share the latest example of how the doctrine is carried out in practice and how that doesn't make any sense, even if sometimes the government actually loses. He'll also tell us about a brief we recently filed at IJ on how the doctrine could be made a bit better. Then my colleague Diana Simpson will tell a story about zoning, standing land use annexation, NIMBYism, and a reminder that not all property rights opinions from the Lochner era have been overruled. We keep hearing we need to build more homes. This opinion will explain why that keeps not happening. Welcome, both of you. Thanks for coming, you guys.

A Adam Shelton 01:37

Thanks, Anthony. Happy to be here.

D Diana Simpson 01:39

Thank you.

A Anthony Sanders 01:40

Also, I want to say thanks to those student groups who have reached out about Short Circuit coming to your campuses next school year. If you would like us to come to your campus as

well, please feel free to reach out to me or my colleague Anya Bidwell. You can find our emails both at our web pages at ij.org. And one of us will be glad to visit your school and record a session with a live studio audience or classroom, whatever you want to have it in, and a couple of professors and practitioners who will discuss cases from your local circuit or other jurisdiction. We already have some planned for next school year, but we'd love to do more. In the past, we've done them often as guests of the local Federalist Society chapter, which is great. But we've been sponsored by other groups as well, including the American Constitution Society, and we do it at the behest of anyone. So whatever group you're involved with, please feel free to contact us. Your law school's wine pairings, society, for example, I'd be especially interested in receiving an invitation from but on 4/20. We don't do wine pairings, do we? So instead, Adam, tell us about the next best thing, the Federal Tort Claims Act and flash floods.

A

Adam Shelton 02:59

Yes, the Federal Tort Claims Act or the FTCA. Flash floods are definitely equal to any other excitement on 4/20. This case actually involve some some sad facts. An individual government contractor was killed in a flood when he was traveling through a large military base outside of the San Antonio area. His parents brought suit under the FTCA, which allows you to sue the government directly for certain torts committed by federal employees. This whole case turns on one of the limited exceptions to the FTCA, the discretionary function exception, which basically says that while the government is waiving its sovereign immunity for certain torts, it's not waiving it for torts that arise out of any inaction or action that was committed to the discretion of a government employee. So the courts kind of have a two-step test for determining whether or not he exception applies. First, it looks to see, you know, was the action discretionary or not? So is there some sort of statute, regulation, possibly the Constitution, but a little bit more on that later, that prescribes a certain action for the employee to follow? And if it is discretionary in nature, so there wasn't some sort of statutory or regulatory mandate or guide, whether or not it was a decision that the exception was designed to shield from judicial second guessing, which really was kind of more of your public policy decisions, your general kind of decisions based off of economic or political public policy issues. They didn't want the FTCA to be used to kind of challenge large-scale government policies. At least that's how the Court has interpreted it. So this case actually turns all on kind of a textual interpretation of the regulations of a military base. A little bit more background: There are two main roads that go through this military base. And there was a large rainstorm in Texas, which I'm given happens quite frequently or at least somewhat frequently, and both roads flooded. Guards and employees of the military base inspected one road and shut the gates to that one road. So it was closed through like the low flood area. They did not do that with the other road and the contractor here, Anthony Barron, took that road, entered the area and his vehicle was swept away. His parents brought suit alleging both that the government was responsible for the death because they failed to close the gate, because they didn't warn of the danger of kind of like the low flood area, and because there are no guardrails along each side of the road, which would have prevented the vehicle from being kind of swept away in the floodwaters. The only issue that the Court deals with here is the issue of the gate, whether or not not closing the gate or not having the gate closed was a discretionary action. There is a regulation from the military base, which says that all range control area or impact area gates will either be locked or guarded by the unit using the area. Kind of like the really important language here is either be locked or guarded by the unit using the area, no commas, no punctuation. So it's kind of a straightforward reading. The government alleged that the kind of the modification phrase "by the unit using the area" went to both locked and guarded. Meaning that the gate only had to be locked or guarded if a unit was using the area at the time. And this gate was kind of on the way

to a shooting range. So there were lots of kind of like safety issues that were going on not concerned with flooding at all, but concerned with the fact that there was a gun range on the other side of this road. And you certainly don't want vehicles driving into a gun range when people are using the area. So that's what the district court ruled. So the district court rule that was discretionary because no unit was using the area at the time. And the modifying phrase only went to whether or not only modified "guarded," not "locked." The court of appeals here, the Fifth Circuit, disagreed and held that the phrase only modified "guarded." Whether or not the gate was locked was not discretionary. They didn't have discretion not to use the gate, the gate had to be locked, it could only be guarded when the unit was using the area. So because they didn't have discretion to not lock the gate, the court held that the discretionary function exception did not apply, and thus the case would go forward against the federal government. The court also pointed to a couple other things, which I thought were kind of weird. Having read a lot of these discretionary function exception cases, courts generally don't do a lot of digging and are very quick to find that the government agent acted with discretion, and therefore kind of flowing a lot of cases into this exception and meaning a lot of people are not able to sue the federal government or to the FTCA. But the court actually looked to the fact that there are witnesses who said the gates were frequently closed and locked, so they use that to bolster the reading of the regulation, that they didn't have discretion to not lock the gates. So this case will go forward. This has kind of been an interesting issue that we've been seeing a lot more in a lot of cases, the discretionary function exception to the FTCA and how it's been interpreted by the courts, has been interpreted very, very broadly. We actually filed an amicus brief recently in a Third Circuit case, where the Third Circuit held that the discretionary function exception could apply, even if a government employee violated the Constitution. You know, it kind of seems a little weird. It seems that it shouldn't really take a lot of reasoning to see that if a government employee violates the Constitution, they necessarily are acting outside of their discretion. It seems kind of logical, you can't violate the Constitution. It's absolute. The government can't violate the Constitution, and it certainly can't then empower its employees to violate the constitution. Unfortunately, the Third Circuit district court didn't seem to see it this way. And a few other circuit courts, including the Eleventh and Seventh, have recently held that whether or not an accident violates the Constitution has nothing to do with whether or not the action was discretionary. Meaning that in the Eleventh and Seventh Circuit, essentially government employees have discretion to violate the Constitution, which we thought was kind of very weird. So we filed this brief in the Third Circuit Court of Appeals asking the court to kind of reconsider the district court's decision here. Especially because the district court did something weird coming to this decision. They also imported qualified immunity's clearly established analysis into the equation, which there's no reason for it to be in here. As longtime listeners are sure to know, qualified immunity is a completely policy decision created by the Court in the 1980s, out of the perceived unfairness to government at holding government officials liable for their actions, but under the FTCA, you're not actually holding the government officials liable for anything, you're holding the government itself liable for something. So all of the kind of the policy considerations of, you know, not wanting to deter employees from vigorously kind of carrying out their duties, or you don't want, you know, a random government employee crippled by a large damages settlement, don't apply in the context of the FTCA or the discretionary function exception. But, we filed that brief. I think this is an area that's going to become increasingly popular in litigation. But it's nice to see the Fifth Circuit actually holding that something was not discretionary, and that the case could go forward.

D

Diana Simpson 10:48

So it seems to be a very straightforward kind of decision for me, you know, reading through it,

it's like, well, yeah, you know, locking the gate is the thing that if it is not done has consequences, and it's really sad in this case, like what the consequence of that decision was, and it just makes sense that someone should be held liable in that kind of a situation. And, you know, I think the Fifth Circuit got it right. You know, and without even getting into all of the FTCA and the discretionary function decision, it's just like a gut feeling that this is the right decision to have been made. And that's not always the case in federal courts. And it was nice to see that they made that decision here.

A

Anthony Sanders 11:29

I guess what I didn't understand before I read this opinion and talked with Adam about it is, so there's a regulation that says they have to close the gate. And therefore, it's not really discretionary. And so there's the government can be held liable there. I get that part. But the part I didn't really understand is if there wasn't a regulation and so sometimes they left the gate open. And yet, this flash flood comes. And you could like establish that under the standard of care, which is how torts or suits usually are decided, that the landowner here, the federal government, should close the gates because it would be incredibly dangerous for cars to drive across this area. And of course, they show they understood that because they closed the different gate, they just didn't close the gate this guy went through. That if you could show that the standard of care was breached, and so therefore the federal government was negligent or even grossly negligent, that wouldn't be enough. It's only because there's this regulation that actually has nothing to do with floods, it's because there happens to be a shooting range on the other side, that means that the government can be held liable. That's absolutely nuts. And yet, that's how this law works. It's just crazy.

A

Adam Shelton 12:58

Yeah, it's unfortunate that this is how this law frequently works. The Fifth Circuit definitely got to the right decision here. But like you said, without this statute that was related entirely, really, to gun range safety and just general kind of security of a military base, there would be no recourse for the parents of this individual. And that's why the court didn't even look into, you know, whether or not they should have warned the individual about kind of like the flooded waters or whether or not guardrails should have been installed on the road to prevent the vehicles from being washed away. It's all about whether or not there is a specific mandatory statute rule regulation. And if there's not one, the government had kind of discretion to act, and therefore the tort gets swept up into the discretionary function exception. You can't file a suit under the FTCA. That wasn't how it was always interpreted. There was an early 1950s Supreme Court case dealing with this, where the Coast Guard established a lighthouse and then allowed the lighthouse to fall into disrepair. And then a boat crashed because the lighthouse was not there and it was not working. And the court held that you know, what was discretionary was to take over the lighthouse, once you take over the lighthouse, you have to operate it with due care, and you have to use due care in making sure that it's working and that, if it's not working, you're fixing it, or at least warning individuals that it was not working. That's how it originally was interpreted. Over the intervening years, it has become, you know, much looser, and part of the problem is that the Supreme Court actually hasn't taken up a case involving the discretionary function exception in almost 30 years. So it's been quite a long time since the Supreme Court has actually sat down and dealt with, you know, what does it actually mean for an action to be discretionary? Is this kind of meant to shield your higher-level public policy decisions or just kind of your individual decisions? And this is why there's lots of cases in like

the lower courts, where, you know, individuals were killed by falling trees, kind of going through national forests and they have no recompense or their families have no recompense, because there was no kind of specific order or regulation or policy about how to deal with kind of diseased and damaged trees or in kind of like the timeframe with which those had to be dealt with.

A

Anthony Sanders 15:16

So the brief that you wrote about the constitutional aspect of this. So the circuits that have said, the government has the discretion to violate the Constitution, so to speak, I'm guessing those are cases where there was a discretionary act like, say, the Forest Service you said just now, but that the argument, is it what was done was, say, a Fourth Amendment violation, if it was maybe a federal police brutality kind of case or something like else like that. And so the constitutional argument is just kind of grafted on to that discretion? Or is it something else than that?

A

Adam Shelton 16:00

Right, so the way it usually works, when the Constitution comes into play, is that you're suing for a tort like a just a trespasser, a Fourth Amendment tort, or the the Eleventh Circuit case recently was alleging that a prison didn't exercise due care in placing a prisoner who had a history of being a very bad cellmate into a cell with a person who then had his eye stepped out. He sued for for that, and then kind of the Eighth Amendment was lurking under this claim. And he said, Well, you know, because they violated my Eighth Amendment rights, there action wasn't discretionary, so I should be able to go forward with my tort claim against the government. So the Constitution only comes in to kind of rebut this idea that the officers or whatever federal employee was acting with discretion. So the Federal Tort Claims Act is never actually going to kind of remedy the constitutional violation directly. The Constitution just comes into rebut the applicability of the discretionary function exception. If there was no exception, then there'd be no need to bring in the Constitution in. So the Constitution really is just to say, like, look, once the government violates the Constitution, or once a government employee violates the Constitution, they cease to be acting with discretion, they can no longer be acting with discretion if they're violating the Constitution, because the Constitution is absolute. The Seventh Circuit and the Eleventh Circuit have said that because the Federal Tort Claims Act only remedies torts, in state torts, that the Constitution doesn't come into play at all, so there's no reason to even consider it, which I think definitely misses the point and misses the role kind of the Constitution is playing, which again, is just to rebut the applicability of the discretionary function exception. And part of the reason for this problem is, in general, there's no real like set circuit agreement over who even bears the burden that the discretionary function exception applies. Some hold that the plaintiff must prove that the claim falls outside the discretionary function exception, and some hold that it's more of like an affirmative defense, that the government has to prove that the employee was acting with discretion. So there's all these kinds of like confusing kind of like doctrinal things in here, again, because the Supreme Court hasn't taken up a case about the discretionary function exception since 1992. So there's a lot of these kinds of confusing things that makes the constitutional aspect a little more confusing.



A

Anthony Sanders 18:28

To make it even more confusing for our listeners, I know that they want to be confused, if someone brings an action that the Constitution was violated, and that's the basis for their action, that's actually a separate thing where they sue the government employee themselves, as a what we call a Bivens Claim. And then there's only certain kinds of claims they can even bring, because the Supreme Court's only recognized a few of them, including this case called Bivens. And those are really hard anyway, and they also get qualified immunity. And, and so good luck with that.

A

Adam Shelton 19:08

Yes, that kind of structure is why Congress instituted the FTCA in the 1940s is because they wanted people to have remedies against the government itself, as well as remedies against individual employees through torts, regular torts acts originally. You could sue a federal employee in state court for a state tort law damage action. You can't do that anymore. Whether that's right is kind of a whole different discussion. But that's kind of how it operated when Congress enacted the FTCA as they wanted individuals to have a remedy against the government itself. And later on post Bivens they actually expanded the torts you could sue the government for because they wanted individuals, if you look at legislative history, for whatever legislative history is worth, they definitely wanted individuals to be able to sue the government as well as individual employees when, you know, their constitutional rights were violated, when those violations also happen to constitute your typical state tort law violations.

A

Anthony Sanders 20:14

Well, Congress, if you are listening, you could fix a lot of these things through just passing a new law. But I know that that might not be because we talked about it here on Short Circuit. But another thing that can be fixed is for a town to make it easy to build homes, so people can have a place to live. That also is easier said than done, especially when private parties have their own power to block those homes from being built. Diana, tell us some more on, well, actually happy news in the end of the particular opinion, but unhappy about what happened to this particular person who just wanted to build some homes.

D

Diana Simpson 20:58

Well, potentially happy in as much as they get to fight another day. Doesn't necessarily mean they'll win.

A

Anthony Sanders 21:03

Happy for the lawyers, right?

D

Diana Simpson 21:04

There you go. That's, you know, the opposite of Shakespeare, that makes everybody happy,

right? So this case, it's out of the Sixth Circuit. It's a case called Rice v. Village of Johnstown. And the Rice family owns an 80-acre farm in Monroe Township, Ohio, which is a rural area kind of just outside of Columbus. And fun fact, that was the birthplace of Ulysses S Grant. And so the Rice family wanted to turn the property into a housing development, but they faced two main obstacles. First was that the property was zoned agricultural and R1 and the proposed development would be too dense for that zoning, and two, the development needed access to municipal services. So sewer water, that sort of thing. And only the neighboring Village of Johnstown could provide that. So the Rice family came up with this plan to have the farm annexed into Johnstown and then zoned as a planned unit development or a PUD. And so they spent 18 months and hundreds of thousands of dollars pursuing this plan. And so the zoning process is kind of one aspect of this. And so to get zoned as a PUD in Johnstown, you need to get both preliminary approval from the Planning and Zoning Commission and then get final approval from the Village Council. The real hurdle here is the Planning and Zoning Commission, because their decision is a necessary first step for the Village Council to even consider it. But that decision is neither appealable nor reviewable. And the Village Council had never denied a plan once Planning and Zoning had approved it. And so the Planning and Zoning Commission consists of five private individuals that have been appointed by the Village Council for four-year terms. And so these people really are just kind of regular members of the public that get to exercise this pretty intense authority in the village. And so the Rice family submitted a concept plan and then they went back and forth all year for approval. Basically, with the Planning and Zoning Commission, they had gotten a bunch of positive feedback as they were doing this. They were optimistic that when they submitted the formal application along with their \$26,000 application fee that it was gonna get approved. Unfortunately for them, Planning and Zoning Commission denied it, finding that it did not advance the general welfare of Johnstown. Now, I've litigated a few zoning cases over my career, I have no idea what that means. And I don't think that anybody has any idea what that means beyond I know it when I see it, or I feel like it. Nevertheless, that was what they cited. Because P&Z's approval was necessary to move to the next stage in front of the Village Council, that was the end of the zoning application, it was kaput. But this is only one part of the plan, right, because they also needed this annexation process to go forward. And so both of these kind of went along at the same time. And of course, the annexation process also involves multiple steps. And so Johnstown first agreed to provide the necessary municipal services, which is big, I mean, that was obviously needed for all of this. And then the Licking County commissioners approved the annexation, and then the Village Council voted against it after the P&Z Commission rejected the zoning application. So now they've gotten denied on two fronts. And so the Rice family ended up suing the village of Johnstown in federal court in the Southern District of Ohio, arguing that the zoning ordinance unlawfully delegated standard lists and final legislative authority to the Planning and Zoning Commission, which resulted in their due process denial under both the Ohio and US Constitutions. So, an important point is that since all of this happened to the Rice family the ordinance has been changed. And it now states that the Planning and Zoning Commission shall issue a preliminary recommendation to the Village Council, which itself makes the final zoning decision. And so the Rice family sought a declaration, they sought an injunction, and they sought damages, both compensatory and nominal for this preliminary application. And so the lower court determined that the Rice family lacked standing because of this ordinance change and kicked them out. So now we're up on appeal at the Sixth Circuit. And so I want to talk for a minute about what this claim is because I think, one, this is something that Anthony is probably very excited about, but, two, is just also a very interesting aspect of this case. And so, you know,



More exciting than 4/20.

D

Diana Simpson 25:41

And that's saying something for lots of folks. So what is this claim? Well, it's not the federal nondelegation claim, because that's a restriction on Congress's ability to delegate its Article One authority, and we don't have any of that here. We have a municipal delegation of authority. Okay, but it can't be a state nondelegation theory, because such a claim doesn't arise under federal law and you couldn't be in federal court based on it. Okay, so is it the third type of nondelegation claim? It is. And so this originates out of a pair of little known SCOTUS cases as kind of a species of procedural due process. And so is this from 1912 and 1928, way back in the day. And so the first one is Eubank, the other one is Roberge. And so both of these involve city ordinances that the Court said violated due process because they allowed neighbors to have this standard list control that they could exercise over the ability of their neighbors to use property the way that they saw fit. And so in Eubank, it was about determining setbacks, neighbors got to veto how much your setback was on your property. And in Roberge, it was about construction of a group home was conditioned on the written consent of the neighbors. And so in both of these cases, the court was very concerned, one, that there was no standards and, two, that people would withhold consent for kind of selfish and arbitrary reasons, which, you know, I think is legitimate. I think we still see that all the time today. But the Sixth Circuit kind of goes through all of this, it goes through the case law and it distills out what it says is the key features of this line of cases, this Eubank line of cases. And so it's a due process violation. Nearly all of these cases involve the delegation of legislative authority to a private party. And that private party aspect is key, because only one of them and that's from the D.C. Circuit, involve a semi-government agency, and that was Amtrak. But then the other features are that the delegee acted with little or no guidance, and that there's particular concern about their self-interest. So after going through all this, the court determines that the Rice family has standing to pursue their claim. They were subjected to review by the Planning and Zoning Commission. They went through it and they were denied their process due, according to them. And so Johnstown had argued that there was no injury because the land was in Monroe Township so the village ordinance doesn't apply to them. Which is just silly. Because they went through this entire process, they spent a gazillion dollars on this process. And they went to all these meetings, and everyone present thought that it applied, and they actually applied it to the Rice family. So to later say, Oh, it didn't apply to them, is just a little hollow, I think. And so the court rejects that. And they say, look, annexation was not a prerequisite to the zoning application. You know, the Rice family went through both of these. Johnstown applied to the zoning ordinance to the Rice family, there's injury. And so the declaratory and injunctive claims are moot because the ordinance has since been amended to kind of eliminate this nondelegation issue. But the damages claims are not moot. And so the family had sought, you know, relief, both in terms of nominal damages and compensatory damages for all the costs spent going through this process. And so the Sixth Circuit says, All right, you live to fight another day, let's send you back down to the lower court to figure out if you can win on the merits of this claim. And so the Rice family rejoices. Alas, there is a dissent. And it is a feisty dissent, although perhaps all dissents are a little feisty. This one seems a little feistier than some. And the dissent is just very unhappy. They say that there is no protected property or liberty interest in getting the land rezoned. They reject completely the notion that a claim can go forward against a regulatory body without evidence that there was self-interest compromising that body and that again that the family had no standing because their property is now and was then in Monroe Township. And so this this quote that they have in the dissent is

I'll end with this but it says, "in the end plaintiffs' injury in fact depends on too many ifs. If Johnstown had told plaintiffs to file a petition to annex before rezoning, if Johnstown's Village Council had not let their petition to annex lapse, if none of the interested parties appealed their petition, and if the state courts had affirmed approval of plaintiffs' annexation petition, then the challenge rezoning procedure would have applied to plaintiffs. This is a great example of the old saw, if we had some ham, we could have a ham sandwich if we had some bread." So to me, that just seems a little too cynical for all of this because regardless of what perhaps they should have done, and regardless of what steps they foresaw, the fact remains that Johnstown applied the zoning ordinance to the Rice family and said, No, we're not going to rezone it the way that you want, we're also not going to annex you, and also just go away in a way that that at least gives them the ability to litigate this in court.

A

Adam Shelton 31:18

And what I found, just, you know, really surprising about this case, is just how silly this whole procedure was in the first place. Why the town ever thought that delegating the authority, like, kind of the final authority of zoning, to a non-elected board that wasn't responsible to anybody else was a good idea. I'm not entirely sure why.

D

Diana Simpson 31:44

It's super common. There are municipalities all over the place, and we litigate against them, where they have this kind of authority. And so some of them have, you know, they have some kind of approval process they have to go through with the actual elected officials. Whether it's legitimate or not, I don't know. But some of them don't. It's just you're nominated. And that's it. And then you can appeal from there. And so that's different from this, but, like, this whole idea is super common that you just have neighbors deciding what other neighbors could do with their property under the guise of a commission.

A

Adam Shelton 32:16

Right, which is just so shocking to me that, like, it's so clearly unconstitutional. And it clearly violates due process. Every time we have one of these cases, it shocks me that, like, there wasn't some lawyer advising them say, No, this is clearly unconstitutional. But again, you're right. It happens all the time, everywhere. I'm just shocked every time that happens all the time everywhere, because it seems just so blatantly unconstitutional. Aside from the fact that, you know, that it's this hard to be able to build homes, especially now, when we hear daily about how there's a housing shortage and there's not enough homes for people, that it took just even this long for them to even go through the process to get denied, and then go through the actual federal court litigation, and homes are still not being built on that land. And from just a public policy perspective, like it would be very helpful to have homes being built right now when there is a shortage of homes kind of out there. And there's having to spend years kind of going through all this red tape.

A

Anthony Sanders 33:24

Yeah, it's an overused phrase, but the it's true here, there is a lot going on in this case that we

Yeah, it's an overused phrase, but the it's true here, there is a lot going on in this case that we could spend a lot of time talking about. The thing that I guess was most struck by in reading both the majority and the dissent was how what the dissent really did, I think, was the confusing the standing with the merits, which is funny because the dissent says over and over again, I understand standing is different than the merits. And so you know, whether or not say this procedural due process claim would work out or not, is not before the court. But I'm just going to give you some background about how I think it's not going to work out and then back ends that into the standing analysis even though she says one doesn't have to do of the other. I think really what happened there was just didn't think this this claim would work out. I'm putting putting the whole ham sandwich stuff aside. Which also, you know, we deal with all the time at IJ in our cases that you can't sue about this thing that you're saying is wrong because there's this other thing that might happen. That meant you couldn't have this case. But of course the other thing you can't even get to happen until you get the first thing sorted out, which is how standing law often works, because it seemed like , you know, if they were able to win on this claim and said, well, in the end, you should have had our plan approved, it would be easier to get the annexation part done, if you have that out of the way. But you can't even go there in the first place is, you know, what the district court said because of that. On the on the claim itself, I get where you guys are coming from that it seems totally unconstitutional. And yet it happens all the time. I think when they actually go to the merits, though, it is going to be a harder case, because they give us this veneer of a board, right? Like we don't know where these five neighbors are from. They're just, you know, they're people in the town, they're given this power on a board. I mean, that they had veto power is is kind of crazy. And then you couldn't even appeal that. Like, is it true that you couldn't appeal that to the state courts?

D

Diana Simpson 36:02

You couldn't appeal the Planning and Zoning Commission's decision, you could only appeal the Village Council's decision, but the Village Council won't issue a decision if Planning and Zoning Commission doesn't approve it.

A

Anthony Sanders 36:13

So it's just stuck in like limbo, like you couldn't go to the state courts and get a writ of something or other.

D

Diana Simpson 36:19

You could probably file some creative motion or writ in court. Do whatever you want, right? But there's not a procedure in place.

A

Anthony Sanders 36:30

So that I think that is pretty nuts. And maybe they'll have a shot at that if it was just everyone who lives within a hundred yards of you gets an absolute veto if they want on you building it. I think that's like at the core of these old cases. But how cities creatively like create these boards

and then say, Oh, they're just like city officials, then it gets a little tougher. And I'm betting that's kind of what the dissent is getting at in what she's writing is, you know, this isn't gonna end well for them. But I may be misconstruing some of what their legal theory is.

D

Diana Simpson 37:12

Maybe. One of the things that I think is actually kind of concerning about their ability to win, and I don't know the answer to this, but like, what kind of standards the P&Z Commission looks at, because they denied it for finding that it didn't advance the general welfare of Johnstown. My guess is there is an ordinance that lists like five or six factors that they have to find in order to determine that it can be rezoned. And if they don't find one of them, then they lose. And so they are standards of some sort, and they're often this kind of, it's not going to add extra costs to the town to do it. Or if it is, it's not disproportionate with the benefit, or, you know, it's not going to add danger to the town. And you're not talking about like a fireworks factory or something like that. And so they are standards. But what does it mean to say that something doesn't advance the general welfare? Like, is there any standard there? Or is it just because I said so? And that's the problem that I think we have with a lot of the zoning decisions anyways. It often ends up being because I said so but papered over with process, so that they can say, well, we gave them a chance, just reasonable minds disagreed. And that's not the goal of a federal decision, to overturn that.

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Adam Shelton 38:28

I think what will be kind of really interesting to see as this case goes forward is who is part of this kind of planning board? Is it just other city officials who are just kind of appointed to do it? Or are they other people who work for development companies who just happen to live in the city? Is there kind of like that other view of it, where the board members are interested, personally, in kind of the outcome of whether or not this property gets rezoned and annexed? I'm sure they were aware of the process that was going on and knew that if they didn't rezone it it was going to get annexed. So you know, I think that it'll be interesting to see like who these board members actually are in the city.

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Anthony Sanders 39:19

Yeah and that all too often is the case in planning these local planning commissions, that you know, who's gonna want to serve on a board like that? I mean, I think us on this podcast today, we would probably not be too interested in serving on a local board even though you're trying to do the best for your city. But if you have a construction company that's competing against those homes or you happen to live right by where those homes would be and you would like it better if you didn't have more people around you, then you might be interested for all the wrong reasons in serving on one of these boards. Lastly, one other thing that this case rose in my mind is, not knowing anything more, it seems like this is a perfectly legit development that would add homes to the community and would be great. What it raises, though, and I'm wondering about some other facts going on, is that they want to change the zoning because their township doesn't allow it. And, you know, I don't even think it should have zoning that would prevent this from being done. But the other thing is they want to hook up to the sewer and water that the city has, which raises the question of who's going to pay for that sewer and

water, and then who's going to pay for the upkeep of that sewer and water, you know, in the next 30-50 years, because you have to keep up those kinds of developments after they're made. And so the whole land use pattern going on here, whether it's adding to the cost of the city in the long run, whether the city would be better off maybe allowing this but forcing the developer to pay for their own sewer and water, which we should do in a lot of development in this country, and our friends over at the group Strong Towns often talk about this. We had their president, Chuck Marohn on a couple years ago about how development patterns often grow and liabilities of cities grow, that instead of doing things like infills and allowing duplexes in neighborhoods and having greater density which can pay for itself, instead of having exurban development like I suspect some of this is. None of that gets to your property rights and your ability to exercise your property rights and how it's bad to prevent that but it might get to some of the priorities that cities have in what kind of developments that they do allow when they do allow development. And if they just allowed all kinds of development, and you pay for that development, maybe we'd be better off. But I'll get off my development soapbox now and thank our guests Diana and Adam for coming on. Please check out the brief that Adam was a part. We'll put a link up in the show notes. And everyone enjoy, you're probably listening to this after 4/20. So I hope you enjoyed that day. I hope you enjoy the day when you're listening to this podcast. And for everyone else, I asked you to get engaged.