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Damages Denied

Ruling Could Doom Claims in Land Use Cases

About a decade ago, after John and Patrick Magee and their company, Bradley Industrial Park Inc., had begun to develop property they owned in the upstate Town of Orangetown, organized resistance to the project developed within the community. The town supervisor subsequently directed the building inspector to revoke the Magees' building permit. Thereafter, the town amended its zoning code to preclude construction of commercial buildings on the Magees' land.

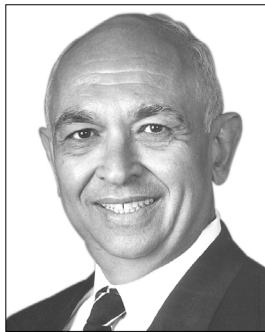
The dispute landed in court, where the Magees sought reinstatement of the permit and damages pursuant to 42 U.S.C. §1983, arguing that the town's actions had denied them substantive and procedural due process. The trial court found that the town had revoked the Magees' permit solely to satisfy political concerns. It reinstated the permit — and it also awarded the Magees more than \$5.1 million in damages. The Appellate Division affirmed, and the case reached the Court of Appeals.

After easily agreeing that the Magees were entitled to reinstatement of the building permit, the Court considered their civil rights claim for damages.

The Court observed that in the context of land use, due process assures property owners the right to be free from "arbitrary or irrational municipal actions" destructive of their property interest. It then determined that the building inspector's revocation of the Magees' building permit had been "arbitrary and capricious" because it had been "without legal justification and motivated entirely by political concerns." The Court declared that the remedy for a municipality's arbitrary and capricious action is "invalidation of the regulation and actual damages." It affirmed the damages award.¹

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ZONING AND LAND USE PLANNING



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'Arbitrary and Capricious'

Since the Court's decision in *Town of Orangetown*, developers and other property owner — as well as local government officials — have known exactly where they stand: Government action that is arbitrary and capricious may lead to a damages award.

Now, however, as a result of a recent unanimous decision by the Court of Appeals, in *Bower Associates v. Town of Pleasant Valley*,² that standard is anything but clear. The Court in *Bower Associates* decided that "arbitrary and capricious" in the zoning context is not equivalent to "arbitrary and capricious" in a constitutional context. As a practical matter, the Court's ruling throws into doubt the ability of any property owner to ever be awarded damages from a local government in a land use matter. By the same token, it effectively eliminates a key incentive for local officials to act according to the rule of law, especially when confronted with community opposition to a development.

The case involved two appeals. In the first, *Bower Associates*, a housing developer that owned 91 acres in the Town of Poughkeepsie and three adjacent acres in the Town of Pleasant Valley, sought approval to construct a subdivision of 134 detached single-family homes and 51 townhouses. Poughkeepsie approved the project conditioned on approval by Pleasant Valley of an access road partially within that town. The Pleasant Valley

Planning Board denied Bower's application, citing numerous environmental concerns. Bower brought an Article 78 proceeding.

Supreme Court directed approval of the subdivision plan, concluding that the planning board's actions were arbitrary in that its determination was not based on environmental concerns unique to the Bower subdivision. Rather, "the determination was driven largely by community pressure" because the subdivision (185 units) located in Poughkeepsie would provide no tax benefit to Pleasant Valley. The Appellate Division affirmed, agreeing that Bower had "met all the conditions needed for approval of its subdivision application."

Its relief in hand, Bower then commenced a civil rights action pursuant to 42 U.S.C. §1983 against the Town of Pleasant Valley and its planning board for \$2 million in damages, alleging among other things a denial of procedural and substantive due process. Supreme Court denied defendants' motion to dismiss, but the Appellate Division reversed, and the dispute reached the Court of Appeals.

The second appeal before the Court involved efforts by Home Depot USA Inc. to obtain site plan approval from the Village of Port Chester to develop a parcel for a retail establishment with an outdoor garden center and parking in Port Chester, at the border between Port Chester and the City of Rye.

As an "interested agency" in the environmental review process led by Port Chester, Rye demanded that four traffic-mitigating measures be imposed, among them the widening of Midland Avenue in Rye, and Port Chester made that demand a condition for its approval of the project. Because Midland Avenue is a county road within the City of Rye, the plans also required the county's approval, which in turn required the city's approval. Thus, without Rye's concurrence, Home Depot could not proceed.

After several executive sessions of the Rye City Council, and negotiations with Home Depot, the parties reached a tentative settlement, with Rye exacting a promise of a \$200,000 payment by Home Depot and additional traffic-mitigation measures. After community opposition was voiced, the Rye

City Council rejected the settlement and refused to consent to the issuance of the permit.

Home Depot thereafter commenced two suits: an article 78 proceeding to compel Rye to sign (and the County of Westchester to issue) the permit, and a civil rights action pursuant to 42 U.S.C. §1983 against the mayor and the city council members (both personally and officially) seeking \$50 million in compensatory damages and unspecified punitive damages for delaying construction.

In Home Depot's article 78 proceeding, Supreme Court held that Rye's insistence on additional mitigation measures and its refusal to approve the permit were arbitrary and capricious. The court annulled Rye's denial of the road-widening permit, and the Appellate Division affirmed. The project was constructed and the facility opened.

Meanwhile, Home Depot sought summary judgment in the 1983 action on its damages claim. The trial court granted Home Depot's motion with respect to liability on its substantive due process claim, holding that Home Depot had a "clear entitlement to defendants' approval of the permit" because the defendants' refusal to grant the permit lacked a rational basis, and that defendants' conduct was a gross abuse of governmental authority. The Appellate Division reversed and dismissed the complaint.

Court of Appeals Decision

In its appeal to the Court of Appeals, Bower Associates argued, in effect, that victory in an Article 78 proceeding — a finding that conduct was arbitrary, capricious and without rational basis, or an abuse of discretion, or even action beyond or outside a board's discretion — establishes a constitutionally protected property interest. The Court disagreed, simply stating that "[t]he law is otherwise."

Indeed, the Court ruled, in both the Bower Associates and the Home Depot situations, that the challenged conduct was not "constitutionally arbitrary." Although the Court acknowledged that the lower courts had concluded that the municipalities' actions in both cases were arbitrary, capricious and without rational basis in an Article 78 sense, the Court stated that what was lacking was "the egregious conduct that implicates federal constitutional law." The Court therefore ruled that both Bower Associates and Home Depot had failed to state a cause of action for a due process violation.³

The Court also rejected Home Depot's equal protection claim, on essentially the same grounds. The Court said that to succeed in this claim, Home Depot had to demonstrate that Rye had singled out its request for consent to the road-widening permit "with malevolent intent." What matters, the Court added, is impermissible motive: proof of action with intent to injure — that is, proof that Home Depot was singled out with an "evil eye and an

unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances."

Although Home Depot argued that it had been treated in a manner uniquely different from any other applicant and that Rye had withheld its signature from the county permit to impede construction, despite having executed other contemporaneous applications within hours or days, the Court found this to be insufficient. It also was not persuaded by the city manager's testimony that this was the first permit the city council had reviewed in executive session, declaring that the requisite showing of "improper motivation" was lacking. The Court added that even the community's "political" opposition to the high-traffic "superstore" at the city's border was not the equivalent of the "evil eye and evil hand" for constitutional equal protection purposes.

Conclusion

By ignoring its own words and analysis in *Magee*, and by raising the bar to such a point as to require a finding of "only the most egregious official conduct" that constitutes "a gross abuse of governmental authority" before substantive due process can be implicated, the Court of Appeals has staked out a position for itself in the line of cases that pre-date the U.S. Supreme Court's 1978 decision in *Monell v. New York City Dept. of Social Servs.*,⁴ when the sole remedy was invalidation of the unconstitutional law or action and did not include money damages. By so doing, in eight years it has in effect overruled its statement in *Magee* that "invalidation of the regulation and actual damages" is the remedy in these situations. This approach by the Court sends the message to the development community and the judicial system that damages are going to be very hard to obtain in New York, even for arbitrary and capricious actions by government. At the least, it is clear that basing a denial on "community opposition," or seeking to require a massive road change, does not qualify for damages — notwithstanding the Court's ruling just a few years ago in the *Magee* case.

Further, that the Court stated that the concept of equal protection "is trivialized when it is used to subject every decision (claimed to be arbitrary and capricious in the sense contemplated by principles of State administrative law) to constitutional review," suggests that these claims are effectively doomed, as well. Today, in the Court's view, even a community's "political" opposition to a high-traffic "superstore" is not the equivalent of the "evil eye and evil hand" for constitutional equal protection purposes. Simply put, the bar could not be set higher. Now, equal protection claims may only be upheld in cases such as *Forseth v. Vil. of Sussex*,⁵ where a village official demanded and received significant personal financial gain; *LaTrieste Rest. & Cabaret v. Vil. of Port*

Chester,⁶ where a village's enforcement tactics to prohibit proposed land-use included fines and arrests; *Brady v. Town of Colchester*,⁷ where a permit was denied because the owner leased space to an opposing political party; and *Gavlak v. Town of Somers*,⁸ where town officials acted to destroy a business after its owner refused to make a zoning official a partner in the business.

As a practical matter, the *Bower Associates* decision makes it extremely difficult, if not impossible, to obtain money damages in addition to the annulment of a permit denial. By choosing to establish this test, the Court has given local government little or no incentive when acting upon controversial land use projects (namely, those that face any community opposition) to "do the right thing." The message from this case is that developers who achieve success, ultimately, in Article 78 should be content with that and should proceed with construction, rather than attempt to prove and recover their damages from the public coffers.

The concept of arbitrary and capricious and irrational, meaning one thing in Article 78 actions and another in constitutional actions, it is submitted, does not withstand analysis. What the Court is really saying is that in constitutional analysis, not only must the actions be arbitrary and capricious and irrational, but the governmental conduct must be "egregious" in order to implicate federal constitutional law. Community opposition and pandering to local political groups does not rise to the level, in the Court of Appeals' view, of such conduct. The purpose of *Monell* and of its sequelae was to grant an economic remedy (i.e., exposing government to damages) to developers and landowners, in addition to invalidation, and to put government at risk, to some extent, for arbitrary and capricious land use decisions. This case is a giant step backward from that goal.

1. *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996).

2. 2004 WL 1064237.

3. The Court noted that Home Depot was "a contract vendee" and only had "conditional site plan approval for the property it hoped to buy." This gratuitous observation was made in the context of whether it had a "clear entitlement to Rye's signature." The contrast between an owner versus a contract vendee was never developed, but seems to have played a role in the decision.

4. 436 U.S. 658.

5. 199 F3d 363, 371 (7th Cir 2000).

6. 40 F3d 587 (2d Cir 1994).

7. 863 F2d 205 (2d Cir 1988).

8. 267 F Supp 2d 214 (D Conn 2003).