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Equal Protection

Claims Easier To Assert Than Under Due Process, Takings Clauses

By John M. Armentano

Landowners bringing litigation to challenge government actions have a number of constitutional options on which to rely, although each has its own drawbacks.

For example, plaintiffs may bring substantive due process claims against local municipalities.[1] Substantive due process law has been at the heart of numerous complaints since the United States Supreme Court's earliest zoning decisions in *Euclid v. Ambler Co.*[2] and *Nectow v. City of Cambridge*,[3] but property owners continue to face significant barriers to success in these lawsuits.[4]

By the same token, zoning decisions often are challenged under the "takings" clauses of the Fifth Amendment to the U.S. Constitution and Article I, Section 7 of the New York State Constitution. Yet despite years of U.S. Supreme Court decisions apparently in favor of property owners, as a practical matter these actions still face numerous hurdles — and this kind of claim essentially is now judged on a case-by-case basis.[5]

Given the difficulties associated with asserting due process and takings claims, property owners may begin to rely to a greater extent than before on a constitutional doctrine more usually associated with personal freedoms than with real estate: the equal protection clause of the Fourteenth Amendment, which commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Certainly, application of the equal protection doctrine to property owners is not new. A brief Per Curiam decision by the U.S. Supreme Court last year, however, is likely to make it even more important than it has been to date.

Permit Denied

One of the most common uses made of equal protection law by property owners — as a basis to challenge zoning decisions — can be seen from the decision by the U.S. Supreme Court a number of years ago in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*[6]

That case arose after Jan Hannah purchased a building in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC), for the operation of a group home for the mentally retarded. The city informed CLC that, under the zoning regulations applicable to the site, a special use permit, renewable annually, was required for the construction of "[h]ospitals for the insane or feebleminded." The city determined that the proposed group home should be classified as a "hospital for the feebleminded" and told CLC that a special use permit would be required for the group home. Then, after holding a public hearing on CLC's application, the city council voted to deny the special use permit.

CLC filed suit in a federal district court against the city and a number of its officials, alleging that the zoning ordinance was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents. Concluding that no

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fundamental right was implicated, and that mental retardation was neither a suspect nor a quasi-suspect classification, the district court employed the minimum level of judicial scrutiny applicable to equal protection claims. The district court deemed the ordinance, as written and applied, to be rationally related to the city's legitimate interests in "the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood," and the number of people to be housed in the home, and held it constitutional. The Court of Appeals for the Fifth Circuit reversed, and the case reached the Supreme Court.

A recent decision by the U.S. Supreme Court is likely to make equal protection claims more important than they have been to date.

In its decision, the Supreme Court examined whether, under equal protection jurisprudence, the city could require a special use permit for the CLC home because it would be a facility for the mentally retarded when other care and multiple-dwelling facilities were freely permitted. The Court acknowledged that the mentally retarded, as a group, were indeed different from others not sharing their misfortune, and said that in this respect they may be different from those who would occupy other facilities that would be permitted in the zone without a special permit. The Court said that this difference, however, was largely irrelevant unless the CLC home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.

The Court then found that the record did not reveal any rational basis for believing that the home posed any special threat to the city's legitimate interests. Indeed, it said, requiring the permit appeared to rest on "an irrational prejudice against the mentally retarded, including those who would occupy the . . . facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law." The Court then found the zoning ordinance invalid under the equal protection clause as applied to the CLC home.

Olech

The Court's decision in *City of Cleburne* applied equal protection law in the zoning context, and the Court's resolution of the dispute was not necessarily surprising.

More recently, the Court's decision in *Village of Willowbrook v. Olech*[7] appears to break new ground — and very well may transform "run-of-the-mill" zoning cases into constitutional cases involving the equal protection clause.

According to the complaint Grace Olech filed against the Village of Willowbrook, Illinois, she and her husband obtained their water from a well on their property. After the well broke down, they asked the village to connect their home to the municipal water system. The village agreed, but told the Olechs that they would have to grant the village not the customary 15-foot easement to enable servicing of the water main but a 33-foot easement to permit the village to widen the road on which they lived. The Olechs refused, and, after three months, the village relented, acceded to the smaller easement, and hooked up the water.

The complaint's equal protection claim alleged that the village's motivation for insisting on the nonstandard easement was the fact that the Olechs earlier had sued the village, and had obtained damages, for flood damage caused by the village's negligent installation and enlargement of culverts located near the Olechs' property. The complaint alleged that the lawsuit generated "substantial ill will" that caused the village to depart from its normal policy of demanding only a 15-foot easement in exchange for providing municipal water and instead to decide to pave over a portion of the Olechs' property.

The district judge granted the defendants' motion to dismiss, finding the complaint insufficient because it had not

alleged an "orchestrated campaign of official harassment" motivated by "sheer malice."

Legal Obligation

The Seventh Circuit reversed, observing that the village had a legal obligation to provide water to all of its residents, including the Olechs. Moreover, the court found that the complaint stated a claim for denial of equal protection of the laws based on its allegation that the village had refused to perform this obligation "for no reason other than a baseless hatred."

Under Olech, if a plaintiff asserts that the zoning authority failed to act rationally, such a claim may stand.

The Seventh Circuit conceded that it was troubled by the prospect of turning every squabble over municipal services into a federal constitutional case. However, it concluded that the contention that the cause of the differential treatment was a totally "illegitimate animus" toward Ms. Olech by the village was sufficient to avoid that problem. The thrust of the Seventh Circuit's decision was that the addition of this element to the essence of the claim was a sufficient basis to protect against every zoning case engendering a constitutional challenge.

The Supreme Court affirmed the Seventh Circuit's decision, but on a very different ground. The Court found that Ms. Olech's complaint should have been sustained because it alleged that she had been intentionally treated differently from others similarly situated and that there was no rational basis for the difference in treatment. In other words, it was sufficient for Ms. Olech's complaint to allege that the village's demand for a 33-foot easement was "irrational and wholly arbitrary." This alone was the gravaman of the equal protection claim. Importantly, the Court did not require any allegation of "subjective ill will" to state a claim for equal protection relief.

The Future

Can a local government's failure to abide by its zoning rules in treating one property owner differently from another lead to the filing of a viable equal protection claim in federal court? Under *Olech*, if the plaintiff asserts that the zoning authority failed to act rationally, such a claim may stand. This result, in fact, so concerned Supreme Court Justice Stephen Breyer that he wrote an opinion in *Olech* concurring in the result. Justice Breyer bemoaned the fact that this problem could have been avoided if the Court had found the key to the Olech's equal protection claim to be the allegation of "vindictive action," "illegitimate animus," or "ill will." The majority of the Court was not persuaded.

It remains to be seen just how widespread *Olech*-style equal protection claims become, and whether the Court will impose exhaustion of remedies, ripeness, or other burdens on *Olech*-style plaintiffs as currently exist for due process and takings claims. For now, though, the absence of such threshold hurdles makes this claim an attractive tool for landowners in a proper case.

From a municipal perspective, local governments need fear *Olech* only if they are "irrational and wholly arbitrary." Thus, it is critical for them to have a basis in the testimony or in the broader record, such as a final environmental impact statement, for whatever action they take (or refuse to take). This is true whether they act legislatively or in a quasi-judicial and administrative capacity, as occurs in variance and special permit proceedings.

NOTES:

1. See, e.g., Walz v. Town of Smithtown, 46 F.3d 162 (2d Cir. 1995).
2. 272 U.S. 365 (1926).
3. 277 U.S. 183 (1928).
4. See John M. Armentano, "Permit Denials," N.Y.L.J., Jan. 26, 2000, at 5.
5. See John M. Armentano, "Challenging 'Takings'," N.Y.L.J., July 25, 2001.
6. 473 U.S. 432 (1985).
7. 528 U.S. 562 (2000).