



FOCUS ON REAL ESTATE

Court defines standards applicable to due process and equal protection claims in land use disputes

It has never been easy being an advocate for private property rights. But the task is becoming increasingly more difficult in light of recent New York Court of Appeals decisions.

In 2002, the Court issued a trilogy of decisions clarifying the legal standard applicable to judicial challenges to land-use determinations brought under Article 78 of the CPLR. *Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190 (2002); *Ifrah v. Utschig*, 98 N.Y.2d 304 (2002); and *P.M.S. Assets, Ltd. v. Zoning Board of Appeals of the Town of Pleasantville*, 98 N.Y.2d 683 (2002). In each of these cases, the Court reversed appellate rulings in favor of the property owners and instead sided with the determinations of the local government which denied the property owners' applications for land-use approvals. In each case, the Court admonished the lower courts to be deferential to land-use determinations issued by local governments and not to substitute their judgments for those of the local governments simply because they would have reached a different conclusion based on the facts of the case.

In May of this year, the Court decided two (2) more significant land-use cases in *Bower Associates v. Town of Pleasant Valley* and *Home Depot, U.S.A., Inc. v. Dunn*, 2 N.Y.3d 617 (2004). In these cases, the Court considered what role the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution play in restricting the actions of local governments when making local land use determinations.

In both of these cases, property owners were denied valuable land use approvals by local governments. The property owners commenced Article 78 proceedings against the local governments seeking to annul the determinations on the grounds that they were arbitrary and capricious. In each case, the property owners prevailed and were able to proceed with their development projects, but only after much delay and expense.

Not content with merely overturning the denials of their projects under Article 78, the property owners also sued the local governments for money damages arising from the denials. They based their claims on the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and on the federal civil rights statute 42 U.S.C. § 1983. The due process and equal protection clauses provide that no state (or local government of the state) shall "deprive any person of life, liberty and property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 42 U.S.C. § 1983 permits individuals deprived of their constitutional rights to sue government for money damages. Both property



Jon A. Ward

owners essentially contended that the local governments' arbitrary and capricious treatment of their applications for land use permits violated their due process rights and, the case of Home Depot, that the selective and unfair treatment of its application as compared to similarly situated applications that were quickly approved by the local government constituted unequal treatment under the law in violation of their equal protection rights.

The facts

Before addressing the Court's ruling on these claims, some factual context is required. In the first case, *Bower Associates v. Town of Pleasant Valley*, a residential real-estate developer owned a large tract of land that was partially in the Town of Poughkeepsie and partially in the Town of Pleasant Valley. The Town of Poughkeepsie granted the developer approval of a subdivision for 134 single family dwellings and 55 town homes, but the approval was conditioned on the developer also obtaining approval from the Town of Pleasant Valley of an access road through the portion of the property owned by the developer in the Town of Pleasant Valley. Pleasant Valley denied the application citing environmental concerns related to the overall subdivision.

The developer commenced an Article 78 proceeding against the Planning Board seeking to annul the determination. Both the Supreme Court and Appellate Division found that the developer had met the criteria for subdivision approval and annulled the denial on the grounds that it was arbitrary and capricious. The developer then commenced a federal civil rights action against Pleasant Valley alleging, among other things, that by denying its application, Pleasant Valley had denied its civil rights to due process of the law guaranteed under the United States Constitution. The developer sought \$2 million in damages.

In the second case, *Home Depot, U.S.A. v. Dunn*, Home Depot sought to construct a 101,467 square foot store on 8.3 acres in the Village of Port Chester and on the border with the neighboring City of Rye. Although approved by Port Chester, the project could not proceed without a sign-off from Rye on a county permit for certain road-widening improvements on a county road that ran through Rye. Rye refused to sign the permit without certain additional traffic mitigation concessions from Home Depot. The parties ultimately negotiated a tentative compromise pursuant to which Home Depot agreed to pay Rye \$200,000 and to implement certain additional traffic mitigation measures, and the City agreed to sign off on the permit. The agreement ultimately collapsed under the weight of community opposition to the store. Home Depot then commenced two (2) suits against Rye, one under Article 78 of the CPLR to compel Rye to sign off on the permit, and the other for \$50 million in damages arising from Rye's alleged violation of Home Depot's rights under the due process and equal protection clauses of the United States Constitution. Home Depot prevailed in the Article 78 proceeding, with both the Supreme Court and Appellate Division finding that Rye's refusal to sign off on the permit was arbitrary and capricious, and continued to prosecute its second suit for damages for deprivation of its federal civil rights.

The Court of Appeals ruling

Both property owners' civil rights claims winded their way through the judicial process until they both reached the

Court of Appeals at the same time. The Court of Appeals decided both cases in one decision, finding that in both cases the civil rights claims were without merit. In so doing, the Court established extremely difficult, if not impossible, legal standards for establishing violations of constitutional rights in land use disputes.

At the outset, the Court of Appeals set the tone for the decision, noting that the federal courts have repeatedly dismissed Section 1983 claims in the land use context on the grounds that the courts do not function as zoning boards of appeal. The Court also stated that a “denial of a permit – even an arbitrary denial redressable by an Article 78 or other state law proceeding – is not tantamount to a constitutional violation under 42 U.S.C. § 1983; significantly more is required.” (emphasis added). The Court then explained what constituted “significantly more.” With regard to due process, the Court stated that a property owner must satisfy a two prong test. First, the property owner must establish that it has a “cognizable property interest, meaning a vested property interest” in the requested permit; and second it must show that the “governmental action was wholly without legal justification.”

With regard to the first prong of the test, the Court of Appeals held that a property owner seeking a permit must show a “clear entitlement” to the requested permit under state law in order to have a “vested property right” protected under the due process clause of the constitution. A “clear entitlement” only exists when there is either a “certainty or a very strong likelihood” that the requested permit would have been granted. If the local government reviewing the permit application has “discretion” in approving or denying the permit under state law, then a “clear entitlement” to the permit can only exist “when that discretion is so narrowly circumscribed that approval of a proper application is virtually assured.”

Expanding on the second prong of the test, the Court held that only the most “egregious” official conduct can be said to be wholly without legal merit in the constitutional sense. According to the Court, governmental action based on community opposition is not unconstitutionally arbitrary if the opposition is based on legitimate state interests such as traffic, safety, crime, community pride or noise. Examples of “egregious” conduct cited by the Court included a property owner being compelled to dedicate a portion of his property to local government in exchange for a ministerial permit to hook-up to public water, and a government moratorium on rental housing to exclude minorities.

Applying these standards to the facts of both of these cases, the Court found

that the property owners’ due process claims failed both parts of the two prong test. The Court found that in both cases the property owners did not establish that they had “vested property rights” in the that they were seeking. The local governments were granted discretion under state law to approve or deny the requested permits and that discretion had not been so circumscribed as to create a “clear entitlement” to the requested permits. The Court also found that the local governments’ denial of the permits lacked the “egregious” type of conduct that implicates federal constitutional law.

The Court then focused its attention on Home Depot’s equal protection claim. At the outset, the Court noted that the essence of equal protection is that similarly situated persons must be treated alike under the law. However, in addition to establishing selective treatment, in order to prevail on an equal protection claim, a claimant must also show that such selective treatment was “based on such impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.” Since Home Depot had not alleged selective treatment based on race, religion, or punishment for the exercise of constitutional rights, the Court found that Home Depot had to show that Rye singled out its permit application with “malevolent intent” and with an “evil eye and evil hand” to injure Home Depot. Examples of such conduct cited by the Court included cases where a village official demanded and received personal financial gain in exchange for a land use approval; a village resorted to using fines and its arrest powers to intimidate an applicant for a land use approval; a land use permit was denied because the applicant leased space to an opposing political party; and town officials sought to destroy an applicant’s business after he refused to make the town official a partner in his business.

Applying these standards to Home Depot’s equal protection claim, the Court found that Rye had not treated Home Depot differently from similarly situated applicants seeking the same permit. Although Home Depot cited several examples of applicants for the same permit whose applications had been approved by Rye within a few days, the Court found factual distinctions between those applications and Home Depot’s application. Thus, in the Court’s eyes, Home Depot’s application was not similar to the other applications cited by Home Depot. The Court then found that even if Home Depot could show selective treatment in relation to similar application, it could not establish that Rye had a malevolent intent to injure it. The Court found that the com-

munity’s political opposition to the high-traffic store at the city’s border was not the equivalent of the “evil eye and evil hand” necessary to establish an equal protection claim.

Conclusion

In the final analysis, the Court of Appeals has all but shut the door on due process and equal protection claims in land use disputes. Virtually all but the most simplistic land use applications involve the exercise of some form of discretion by local government in deciding whether to approve them or not. Thus establishing a “clear entitlement” to an approval under the due process clause will be all but impossible under most circumstances. In addition, establishing “egregious” governmental conduct seems equally difficult. Governmental action based on political opposition to a project, even if largely baseless, apparently will not suffice to satisfy this criteria. Only the most outrageous conduct would appear to qualify.

The same conclusion applies to equal protection claims. Establishing selective treatment under the equal protection clause in most circumstances will be very difficult, since no two (2) land use applications are factually identical. Furthermore, even if a property owner could somehow clear the “selective enforcement” hurdle, only in the most rare of circumstances will a property owner be able to show that a local government’s conduct was engaged in with “malevolent intent” to injure or with an “evil eye and evil hand.”

With the due process and equal protection standards set so high by the Court of Appeals, and with similarly tough decisions having been previously rendered under the takings clause of the Fifth Amendment to the United States Constitution, few if any constitutional restraints now exist on the broad discretion afforded local governments in making land-use determinations.

Although the current circumstances are bleak for property rights advocates, all is not completely lost. The Court of Appeals is not the final authority on how the due process and equal protection clauses will be interpreted in land use disputes. That final authority ultimately rests with the United States Supreme Court, and it has not yet ruled on these issues. All eyes are now on the Supreme Court.

Jon A. Ward is a partner in the firm **Sahn Ward & Baker, PLLC** and his practice is devoted to representing the firm’s clients in all aspects of civil litigation in state and federal trial and appellate courts with primary emphasis on disputes involving zoning, land use planning, environmental issues, real property and commercial matters. He earned his undergraduate degree from Yale University and his law degree from The University of Notre Dame (J.D., Magna Cum Laude). www.sahnwardbaker.com.