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John R. Nolon

Elisabeth Haub School of Law at Pace University

Jessica A. Bacher

Elisabeth Haub School of Law at Pace University

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**Shielding Board Members:
Municipalities Should Protect Them From Suits**

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John R. Nolon and Jessica A. Bacher

[John Nolon is a Professor at Pace University School of Law, Counsel for the Land Use Law Center, and Visiting Professor at Yale's School of Forestry and Environmental Studies. Jessica Bacher is an Adjunct Professor at Pace University School of Law and a Staff Attorney for the Land Use Law Center.]

Abstract: Both individual land use board members and the municipal governments containing these boards are concerned with the liability of the boards, and of individual members from legal challenges stemming from their decisions. Legal actions against these boards, and the potential for subsequent liability of individual members could put significant financial burdens on municipalities and also discourage competent citizens from serving on these local land use boards. This commentary reviews the impact of two recent New York state cases, and their affect on state legislation concerning these topics.

In *Bower Associates v. Town of Pleasant Valley*, No. 2004-49 and *Home Depot, U.S.A. Inc. v. Dunn*, No. 2004-50, N.Y. LEXIS 1046 (N.Y. May 13, 2004), developers sought millions in damages under 42 U.S.C. § 1983 for the costs associated with allegedly arbitrary delays in the project review process. In a joint opinion, the Court of Appeals found no constitutional violations and dismissed both cases.

Home Depot filed its civil rights action against the Mayor and City Council members in their official and individual capacities seeking compensatory and punitive damages. The exposure of citizen members of land use review boards to this type of action raises serious concerns that can have negative ramifications for the land use system. At the Land Use Law Center at Pace Law School, we have trained hundreds of local land use officials and have heard this concern expressed repeatedly. These two cases provide an opportunity to review the extent of their vulnerability to such actions and the methods used by municipalities to protect them.

Bower Associates v. Town of Pleasant Valley

In *Bower Associates v. Town of Pleasant Valley*, the Town wrongfully denied Bower Associates, a housing developer, the requisite permits to build a

three home subdivision and an access road to this and another 189 unit subdivision in neighboring Poughkeepsie. Although Pleasant Valley cited environmental concerns related to the Poughkeepsie subdivision, the Appellate Division held that the Board's denial was arbitrary, the project met all conditions necessary for approval, and the denial was based on community pressure. Armed with the court's decision, Bower Associates commenced a civil rights action under 42 U.S.C. § 1983 seeking two million dollars in damages against the Town of Pleasant Valley and its Planning Board for denial of procedural and substantive due process, equal protection, and just compensation.

Home Depot, U.S.A. Inc. v. Dunn

In *Home Depot, U.S.A. Inc. v. Dunn*, Home Depot applied for site plan approval to develop a retail establishment in the Village of Port Chester. As an "interested agency" in the environmental review process, the neighboring City of Rye demanded four traffic-mitigating measures. In response, Port Chester made one of these measures, the widening of the Midland Avenue in Rye, a condition on the site plan approval. Because Midland Avenue is a county road within Rye, approvals from both Westchester County and Rye were necessary to comply with the condition. Thus, without Rye's approval, Home Depot could not proceed.

Rye refused to consent to the permit and Home Depot commenced a lawsuit to compel Rye to sign the permit and for damages from the Mayor and the City Council members under 42 U.S.C. § 1983. Home Depot sought fifty million dollars in compensatory damages and unspecified punitive damages, for the delay in construction. The court held that Rye's insistence on the traffic mitigation measure and then its refusal to approve the permit was arbitrary and capricious. During the proceedings, Home Depot's site plan approval expired. After a third environmental review, Port Chester approved the site plan without the condition to widen Midland Avenue. Home Depot's civil rights action for the arbitrary delay in this approval proceeded to the Court of Appeals.

Holding

In both cases, the Court of Appeals concluded that there was no constitutional violation and dismissed the developers' complaints. "The point is simply that 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." *Bower Associates v. Town of Pleasant Valley*, No. 2004-49, No. 2004-50, 2004 N.Y. LEXIS 1046, at *9-*10 (N.Y. May 13, 2004). According to the court, § 1983 "is not simply an additional vehicle for judicial review of land-use determination." *Id.*, at *9.

Substantive Due Process

“In the land-use context, 42 U.S.C. § 1983 protects against municipal actions that violate a property owner’s rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United State Constitution.” *Id.* (citing *Town of Orangetown v. Magee*, 665 N.E.2d 1061 (N.Y. 1996)). “Both cases ... center on alleged deprivation of substantive due process.” *Id.* Substantive due process cases are traditionally brought in federal court and in the context of land use have been addressed by the Court of Appeals only once, in *Town of Orangetown v. Magee*. In 1996, the Town of Orangetown sought to terminate the development of an industrial park which had been granted a building permit. As work on the large commercial project progressed, community opposition to the building became organized and political. The resistance was so serious that the Town Supervisor eventually directed the building inspector to revoke the developer’s permit. Although the Town presented a series of defenses for its actions, the Court of Appeals held that the revocation of the permit was only an effort to satisfy political concerns and therefore not legal. Such an action, taken without a reasonable basis in fact, is arbitrary and capricious and violates the developer’s due process rights and 42 U.S.C. § 1983. The developer in this case was awarded five million dollars, in addition to legal fees and expenses, for the illegal revocation of its building permit. See *Town of Orangetown*, 665 N.E.2d 1061.

In *Magee*, the Court of Appeals established a two-part test for substantive due process violations. Citing the Supreme Court’s decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972), the claimant must first demonstrate a legitimate claim of entitlement to the property right in question. “The key to determining the existence of a property interest is the extent to which the deciding authority may exercise discretion in reaching its decision, rather than the estimate of the likelihood of a certain decision.” *Penlyn Dev. Corp. v. Incorporated Village of Lloyd Harbor*, 51 F. Supp. 2d 255, 261 (E.D.N.Y. 1999) (citing *Crowley v. Courville*, 76 F. 3d 47, 52 (2d Cir. 1996)). Second, even when it is shown that a demonstrable property interest has been denied, the claimant must demonstrate that the “governmental action was wholly without legal justification.” *Bower Associates*, 2004 N.Y. LEXIS 1046, at *11.

The two-part test strikes an appropriate balance between the role of local governments in regulatory matters affecting the health, welfare and safety of their citizens, and the protection of constitutional rights at the very outer margins of municipal behavior. It represents an acknowledgment that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government. *Id.*, at *14

The Magees satisfied both of these requirements. They established that their right to develop the land had vested under state law: they had expended substantial sums on the project, obtained a valid permit to build, and had completed substantial construction on the land. In addition, they proved that the Town's actions were without legal justification and were motivated entirely by political concerns.

Bower Associates and Home Depot failed to establish either factor. Where the land use review board has discretion in approving or denying the application, entitlement can only be established when approval is "virtually assured." *Id.*, at *13. Neither Bower Associates nor Home Depot, unlike the Magees, could show that the boards' discretion to approve the actions had been so circumscribed as to create a clear entitlement to approval. A victory in an article 78 proceeding does not remove all further discretion from the board sufficiently to establish a constitutionally protected property interest. "As for the second element of the test, 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense.'" *Id.*, at *13 (quoting *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003)). The court found this egregious conduct lacking on the part of Rye and Pleasant Valley.

Individual Liability for Board Members

Home Depot filed its claim not only against the City, but also against the Mayor and the City Council members both personally and officially. Unlike the Bower Associates, Home Depot filed the civil rights action at the same time that it brought its article 78 action to compel Rye to sign the permit; not with its article 78 relief in hand. A few months before filing its claims, Home Depot sent a letter threatening the damages action unless Rye signed the county permit. An interoffice memorandum was cited to show that Home Depot saw the § 1983 action as leverage against Rye for settlement. *Id.*, at *6. Implicitly, the company thought that the threat of board member liability would give it leverage in forcing a positive decision on its application.

This type of action raises many concerns among local land use board members as to whether and to what extent they are liable for their board's actions in such cases. Further, they are anxious to know what their municipalities can do to protect them from any liability they may incur. A municipality can choose to defend and indemnify local officials, including board members, under § 18 of the New York State Public Officers Law. N.Y. PUB. OFF. LAW 18 (3)(a). When § 18 was proposed by the New York Law Revision Commission it stated that it would "be difficult for many public entities to attract and keep competent public officers and employees," particularly those employed by small municipalities "where the compensation is minimal or nonexistent." New York Law Revision Comm'n, Memorandum Relating to Indemnification and

Defense of Public Officers and Employees, 204th Assembly, Reg. Sess. (1981), (reprinted in 1981 N.Y. Laws 2314). The Commission further found that "government cannot effectively function without some assurance that its members will not be called upon to personally defend themselves against claims arising out of the daily operation of the government or to account in damages therefor." *Id.*

Under § 18, the municipality has the duty to provide for the defense against any "civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties." N.Y. PUB. OFF. LAW 18 (3)(a). The municipality is required to pay litigation expenses and reasonable attorneys' fees. In addition, § 18 provides that the municipality shall indemnify and save harmless officers for any judgment obtained or settlement that the municipality has approved in such actions. Section 18 does not authorize a municipality to indemnify a local official for punitive or exemplary damages.

A local government may supplement the provisions of § 18 and provide indemnification for punitive damages. N.Y. PUB. OFF. LAW 18(4)(C). The City of Rye provides its public officers with the full benefits of § 18. RYE, N.Y., CODE § 145-2. In addition, Rye specifically provides indemnification for punitive and exemplary damages in any civil action or proceeding in which it is alleged that the officer or employee has violated the civil rights of the claimant under Section 1981 and 1983 of the Civil Rights Act provided that the officer was "acting in good faith and within the scope of his public employment, powers and duties." RYE, N.Y., CODE § 145-3.

Conclusion

Local board members should investigate whether the benefits of § 18 and further protection from punitive damage awards have been made available by their municipalities through measures such as those adopted by the City of Rye. Municipalities, in order to recruit local land use board members and enable them to make sound decisions in the community's interest should afford such protections. Further, they should be certain that their municipal insurance policies cover the costs of the defense of actions and the payment of any judgments awarded.

In such cases, actions such as that brought by Home Depot will not be effective to force settlement out of fear of liability. On their part, local officials are advised to protect themselves from the anxiety of lawsuit and the cost of litigation by avoiding arbitrary actions in reviewing and approving land use applications.