THE NEW EQUAL PROTECTION CLAUSE AND THE SINGLING OUT PROHIBITION

Prof. Jan G. Laitos
University of Denver College of Law

Historically, the equal protection clause has rarely been used by property owners challenging actions by government denying, conditioning, or delaying development plans. This reluctance to use equal protection is due to the judiciary's reluctance to strike down government land use decisions on the basis of a clause that seems better suited to matters involving race and gender discrimination, or violation of fundamental rights, such as the right to vote or travel. The right to develop land for a profit is not a fundamental right. When land use and property issues are attached to an equal protection claim, courts employ rational basis review and defer to the land policy decisions of state and local governments.

Another problem facing property owners who rely on equal protection is that courts often require evidence that the plaintiff was treated differently from others similarly situated. This standard is often difficult to satisfy because there are usually some factual differences between the plaintiff's land and plans for that land, and other property owners. When a reviewing court looks at whether the plaintiff was in fact treated differently from other, similarly situated property owners, there are no such "similarly situated" owners to be found, and the plaintiff fails to meet its burden of proof.

The unavailability of equal protection has been a true disadvantage for aggrieved property owners. The gravamen of the harm is in many cases the plaintiff's subjective assumption that its land use proposal has been selectively dismissed by a mean-spirited government, which has decided to "pick on" the plaintiff because the relevant officials are hostile to either the owner-plaintiff, or its land plan. These facts, if proven, certainly suggest the viability of an equal protection. Moreover, an equal protection claim has the terrific advantage of end running two requirements that too many times cripple takings claims—the need for a defined property interest, and ripeness.

At the turn of the 20th century (*i.e.,* between 1999 and 2000), several courts at all levels of government seemed to indicate a new receptiveness to equal protection challenges in a land use context. The United States Supreme Court weighed in with *Village of Willowbrook v. Olech*, 120 S.Ct. 1073 (2000). In *Olech*, the Court, in a *per curiam* opinion, concluded that a landowner could assert a valid equal protection claim by demonstrating that the plaintiff had become a "class of one." To do so, the plaintiff must allege that the plaintiff has been intentionally treated differently from others similarly situated, and that there is no rational basis for the differences in treatment.[1] The *Olech* opinion also decided that a claim for relief under traditional equal protection could

[1] *See* Village of Willowbrook v. Olech, 120 S.Ct. 1073, 1074 (2000).

be stated if the plaintiff could show that the local government's actions were "irrational and wholly arbitrary."[2] This language suggests that the Court might be willing to entertain a substantive due process-like argument in the context of an equal protection claim, since rationality is demanded by substantive due process.[3]

Despite the high threshold that must be met when a "rational basis" analysis is employed, two state courts have recently reversed the dismissal of equal protection claims in the land use context.[4] The Supreme Court of Wisconsin concluded that where a town and county rezoned the plaintiffs' property to an agricultural classification, evidence in the record indicated that the rezoning may not have met the rational basis test.[5] The court noted that the record indicated the rezoning was inconsistent with the "highest and best use" of the property, and that numerous other properties in the town and county that were more suitable for the agricultural classification had not been rezoned.[6] Similarly, where a county resolution required landowners to remove stock gaps from land adjacent to county roads, the Court of Appeals of Tennessee concluded that sufficient evidence existed in the record to support an equal protection claim.[7] The court found that evidence in the record indicated that certain roads where stock gaps continued to pose a public danger had nevertheless been removed from the county road list, thereby exempting similarly situated landowners from the stock-gap removal policy.[8]

The Seventh Circuit Court of Appeals has tested equal protection requirements according to whether the government entity-defendant was motivated by spite and ill-will towards the plaintiff. The Seventh Circuit permits land use claims to be brought under equal protection when based on "the malicious conduct of a governmental agent, in other words, conduct that evidences a 'spiteful effort to get him for reasons wholly unrelated to any legitimate state objective.'"[9] In case after case that Circuit has concluded that a viable equal protection claim can be stated in a land use context, particularly when "sheer malice" against the plaintiff can be demonstrated.[10] Other federal courts have lately agreed that an equal protection claim may be established based on "selective enforcement," or a "singling out," where the disparate treatment is alleged to be motivated by an arbitrary or malicious or bad faith intent to injure the property owner.[11]

---

[2] *Id*. at 1075.
[3] *See* D. Merriam, *Good and Evil in the Village of Willowbrook: The Story of the* Olech *Case*, 23 ZONING & PLAN. L. REP. , May 2000, at 33, 34.
[4] *See* Thorp v. Town of Lebanon, 612 N.W.2d 59 (Wis. 2000); Sanders v. Lincoln County, C.A. No. 01A01-9902-CH-00111, 1999 Tenn. App. LEXIS 610.
[5] *See Thorp*, 612 N.W.2d at 73.
[6] *See id.*
[7] *See Sanders*, 1999 Tenn. App. LEXIS 610 at 36.
[8] *See id.* at 39, 40.
[9] Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000).
[10] *See* Hager v. City of West Peoria, 84 F.3d 865 (7th Cir. 2000); Esmail v. Macrane, 53 F.3d 176 (7th Cir. 2000); Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir. 1988).
[11] *See* Lisa's Party City, Inc. v. Town of Henrietta, 185 F.3d 12 (2d Cir. 1999); Vertical Broadcasting, Inc. v. Town of Southampton, 84 F. Supp. 2d 379 (E.D.N.Y. 2000);

One state supreme court has gone even further, by refusing to condition an equal protection claim on the plaintiff proving treatment that is different from other, similarly situated parties.[12] The court instead looked at whether the rules and requirements imposed on the plaintiff were also imposed on others. If not, then that fact suggested that the plaintiff had been treated selectively, where the selective treatment was malicious, with the intent to injure the plaintiff.[13]

One federal court has held that when vindictive and selective enforcement of municipal zoning and property ordinances is alleged, the plaintiff may bring a claim under a "vindictive prosecution" theory.[14] To succeed on a "vindictive prosecution" claim, a plaintiff must show "(1) the exercise of a protected right; (2) the prosecutor's 'stake' in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and . . . (4) that the prosecution was initiated with the intent to punish the plaintiff for exercise of the protected right."[15] The court characterized the "protected right" in *Leach v. Manning* as the First Amendment right "to publicly criticize local government officials without fear of reprisal, in the form of selective enforcement of local law against the speaker."[16] Thus, when vindictive and selective treatment of a property owner is alleged, a vindictive prosecution theory may be an alternative to an equal protection claim.

These cases, from the United States Supreme Court, the federal courts, and state courts, may be a signal to state and local governments that the judiciary will not necessarily defer to government if the facts are sufficiently egregious. And the equal protection clause may be a tool that is now available to property owners in the right case. Selective treatment, malicious conduct, "a class of one"—all these tests have in some way been ratified by a number of courts.

Anderson v. City of Chicago, 90 F. Supp. 2d 926 (N.D.Ill. 1999). In *Khodara Environmental, Inc. v. Beckman*, 91 F. Supp. 2d 827 (W.D.Pa. 1999), a statute precluding construction of a landfill violated equal protection when it did not rationally advance a state goal, and when it was so narrow it applied only to the developer-plaintiff. *Albiero v. City of Kankakee*, 91 F. Supp. 2d 1208 (C.D.Ill. 2000) may limit equal protection claims based on animus. The court there decided that if the government would have taken the complained-of action anyway, even if it did not have animus, the existence of animus does not give rise to a constitutional violation.

Bad faith and improper motive in a land use context can also give rise to a successful substantive due process claim, especially in the Third Circuit. *See*, e.g., Woodwind Estates v. Gretkowski, 205 F. 3d 118 (3d. Cir. 2000); Deblasio v. Zoning Bd.of Adjustment, 53 F. 3d 592 (3d Cir. 1995); Midnight Sessions v. City of Philadelphia, 945 F. 2d 667 (3d Cir. 1991). *See also,* United States Cellular Corp. v. Board of Adjustment, 589 N.W. 2d 712 (Iowa 1999).

[12] *See* Thomas v. City of West Haven, 734 A.2d 535 (Conn. 1999).

[13] J. Cooke, *Equal Protection is Given New Terrain*, 22 NAT'L L.J., Oct. 11, 1999, at B7.

[14] *See* Leach v. Manning, 105 F. Supp. 2d 707 (E.D.Mich. 2000).

[15] *Id.* at 716.

[16] *Id.* at 715.

Even in cases where equal protection claims have failed in the land use context, the courts have acknowledged that equal protection claims can succeed if certain criteria are met.[17] The Fifth Circuit Court of Appeals has tested equal protection requirements according to whether the alleged selective treatment occurred due to "improper considerations" or "improper motives."[18] The Fifth Circuit permits land use claims to be brought under equal protection when selective treatment is based on "improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right."[19] However, the Fifth Circuit has concluded that if a governmental entity's selective treatment of an individual is motivated by public opposition to the individual, then the selective treatment would not constitute an equal protection violation, unless the public opposition itself was based on "improper considerations."[20]

The United States district courts for the Eastern District of New York have recognized the viability of land use equal protection claims, but have limited the success of such claims by requiring that plaintiffs identify similarly situated parties and demonstrate that disparate treatment occurred.[21] In *Economic Opportunity Comm'n v. County of Nassau*, the plaintiff asserted that the *Olech* decision did not require the identification of similarly situated individuals to prevail on an equal protection claim.[22] The *Nassau* court disagreed, stating that despite the reference to a "class of one" in *Olech*, "it is quite clear that the plaintiff there had identified other similarly situated individuals who were afforded more favorable treatment."[23]

Where equal protection claims in a land use context have failed, such claims can nonetheless possibly be successful if certain criteria are met. If similarly situated parties receiving selective treatment can be identified, and "improper considerations" have motivated the selective treatment, a landowner might succeed by relying on equal protection.

---

[17] *See* Albiero v. City of Kankakee, 91 F. Supp. 2d 1208, 1213 (C.D.Ill. 2000); Scott v. City of Seattle, 99 F. Supp. 2d 1263, 1271 (W.D.Wash. 1999).
[18] *See* Bryan v. City of Madison, 213 F.3d 267, 277 (5th Cir. 2000).
[19] *Id.*
[20] *See id.* The Fifth Circuit Court of Appeals stated that "responding to the voice of the public is expected and is not, standing alone, a malevolent motive for selective enforcement purposes." *Id.* The Court did not, however, address the myriad difficulties inherent in a "public opposition" test: how will a court determine the true motive of public opposition? If only a minority of the opposition is motivated by "improper considerations," is that sufficient to support an equal protection claim? How much public opposition is necessary to justify selective enforcement by a governmental entity – five, fifty, or five hundred signatures on a petition?
[21] *See* Economic Opportunity Comm'n v. County of Nassau, 106 F. Supp. 2d 433, 439 (E.D.N.Y. 2000); Coney Island Resorts, Inc. v. Giuliani, 103 F. Supp. 2d 645, 657 (E.D.N.Y. 2000).
[22] *See Nassau*, 106 F. Supp. 2d at 441.
[23] *Id.*