LAND USE ACTIONS UNDER SECTION 1983 OF THE FEDERAL CIVIL RIGHTS ACT

A Presentation to the Seventh Annual Land Use Conference
Rocky Mountain Land Use Institute
March 13, 1998
Denver, Colorado
Daniel R. Mandelker
Stamper Professor of Law
Washington University in St. Louis

§ 1.01 LAND USE ACTIONS UNDER SECTION 1983 OF THE FEDERAL CIVIL RIGHTS ACT.*

§ 1.02 Scope of the Statute.

Section 1983 of the federal Civil Rights Act of 1871 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 authorizes a cause of action for the violation of any constitutional right, including substantive due process and equal protection violations.

Section 1983 assumed new importance in land use cases after the U.S. Supreme Court held, in Monell v. Department of Social Serv.,[1] that municipalities can be sued under § 1983. Section 1983 is not available in unconsented actions against the state.[2] The Civil Rights Attorney's Fees Award Act [3] authorizes prevailing plaintiffs and defendants to recover attorney's fees in § 1983 actions.

The Supreme Court has held that property rights are one of the "rights" protected by § 1983.[4] Landowners do not usually have difficulty showing that they have property rights protected under § 1983,[5] especially when they claim that a land use regulation unconstitutionally restricts the use of their property.[6]

An intent to violate the constitution is not required for liability under § 1983,[7] but procedural due process liability attaches only for intentional and not for negligent deprivations.[8]

§ 1.03 Land Use Cases Not Actionable Under § 1983.

Although the § 1983 remedy is available for any violation of the federal constitution, some lower federal courts hold that a cause of action does not lie under § 1983 even though the plaintiffs claimed that a land use decision violated the constitution. In most of these cases, the municipality denied the plaintiff a land use permit or other land use approval and the plaintiff made a substantive due process claim. Creative Env'ts, Inc. v. Estabrook [9] is a leading case. The plaintiff claimed a municipality violated the due process clause when it rejected the plaintiff's subdivision application to protect the municipality's "basic character." The state statute did not authorize this reason for rejection. The court held that the plaintiff's claim was too typical of a "run of the mill" land use dispute to give rise to a due process violation and that a conventional planning dispute does not implicate the federal constitution. The court indicated it would hold differently in cases of "egregious" behavior or where there was a "gross abuse of power, invidious discrimination, or fundamentally unfair procedures." *Creative Environments* has been followed in several other circuits.[10]

§ 1.04 Color of Law, Policy, and Custom.

Section 1983 makes a violation of the constitution actionable only if carried out under "color of any statute, ordinance, regulation, custom, or usage" of a governmental entity. The "color of law" requirement is similar to the "state action" requirement the courts apply in fourteenth amendment cases and usually is not troublesome in § 1983 land use litigation.[11]

Monell refused to adopt a respondeat superior theory of municipal liability under § 1983. It interpreted the "custom and usage" requirement in § 1983 to mean that local governments are liable only for actions that are "official policy" or "visited pursuant to a governmental custom," but did not fully explain these terms. The custom or usage requirement is not a problem in most land use cases because a governmental body, such as the legislative body, usually is responsible for the governmental action.[12] More difficult problems arise in § 1983 cases that challenge the action of a zoning official.

There must be an act by a municipal policymaker to establish municipal liability. The Supreme Court had earlier defined a policy as a deliberate choice to follow a course of action from among various alternatives.[13] In Pembaur v. City of Cincinnati, [14] a plurality held a policy includes unwritten as well as formal plans of action, and that a single action is enough to establish policy. The plurality then narrowed municipal liability by holding municipal liability can attach only for an "official policy" made by an authorized decision maker. A majority of the Court found an official policy in a state statute that clearly delegated to a county prosecutor the authority to order a break-in to carry out arrests, but a majority could not agree on a further elaboration of the official policy requirement. Several land use cases applied *Pembaur*. [15]

City of St. Louis v. Praprotnik,[16] a public employee discharge case decided after *Pembaur*, was again a plurality decision. The plurality confirmed a statement in *Pembaur* that the identification of policymaking officials is a matter of state law. It was "confident" that state or local law "will always direct a court to some official or body that has the responsibility for making law or setting policy." The plurality added that an official's action is not final policy when it is constrained by "policies not of his making" or subject to review by authorized policymakers unless these policymakers ratify his decision.

The lack of a majority in *Pembaur* and *Praprotnik*[17] and ambiguities in these decisions, have made it difficult for courts to determine when a "custom or policy" exists in land use cases. A court is likely to find a custom or policy when a local agency with final authority, such as a Board of Adjustment[18] or legislative body,[19] has affirmed an official decision. When an official decision is appealable but has not been appealed, courts are likely to reach a contrary decision.[20]

§ 1.05 Causation.

The Supreme Court's holding that courts should interpret § 1983 against a "background of tort liability" [21] means that a plaintiff must show that a constitutional violation was "caused" by an official action. The causation requirement is not a problem in most land use cases because a legislative or administrative body is usually responsible for the constitutional deprivation.[22] Causation problems can arise if it is not clear whether the municipal conduct caused the constitutional deprivation. Westborough

Mall, Inc. v. City of Cape Girardeau (I) [23] is an example. The court held that the plaintiff's inability to build its shopping center was caused by financial problems and not the city's reversion of its commercial zoning, not the plaintiff's poor business skills.

§ 1.06 Exhaustion and Adequacy of State Remedies.

The Supreme Court does not require exhaustion of administrative remedies in § 1983 actions.[24] This rule is qualified by Parratt v. Taylor.[25] *Parratt* held that the plaintiff could not bring a § 1983 procedural due process action in federal court for the negligent loss of a hobby kit by prison officials because post-deprivation state tort remedies provided an adequate remedy. The Court held that a state need not provide a pre-deprivation hearing when a loss is caused by "a random and unauthorized act by a state employee" because the state cannot "predict precisely" in these cases when a loss will occur. Negligence claims are no longer actionable under § 1983, but the *Parratt* holding on post-deprivation state remedies is still good law in procedural due process cases.

The Court qualified *Parratt* in Logan v. Zimmerman Brush Co.[26] A state court dismissed the plaintiff's fair employment practice claim before a state agency because the agency did not convene a hearing in the required statutory time period. The Court held that the plaintiff's right to use the state statutory procedures was protected by the due process clause. He did not have to use post-deprivation state tort remedies because the deprivation was caused by the "state system itself." The plaintiff challenged the "established state procedure," not the state agency's error.

The *Parratt-Logan* distinction is difficult to apply in land use cases. In a zoning variance case, for example, a procedural due process violation is both a "random and unauthorized" act by the zoning board that triggers *Parratt* and an application of "established state procedure" that triggers *Logan.* One court applied *Parratt* to dismiss a § 1983 case in which the plaintiff sued a municipality after it issued a stop construction order.[27] The order was issued because the zoning enforcement officer made a mistake when he issued the building permit. The court held that a post- deprivation state remedy was adequate because the "alleged default" was like the negligent loss in *Parratt.* The court held that *Logan* rather than *Parratt* applied in a similar case because it held that "the effect on plaintiff of the established state procedures" created the constitutional deprivation.[28]

The Supreme Court substantially qualified *Parratt* in Zinermon v. Burch [29] and held that the *Parratt* rule applies only to procedural due process claims. Plaintiff in *Zinermon* brought a § 1983 action in which he claims a procedural due process violation based on his claim that his admission to a state mental health facility was not voluntary. The Court held that the *Parratt* bar is not absolute. Instead, a court must apply a balancing test in which it first identifies the risk involved and then evaluates the effectiveness of predeprivation safeguards in relationship to the risk identified. The Court held that the risk in *Parratt* was predictable, the state could have provided predeprivation process and state officials had the authority to make this process available.

Zinermon should mean that *Parratt* should not bar most land use cases in which procedural due process claims are made. The risk of a procedural deprivation is predictable in the decision-making process, and adequate procedures are authorized. One court held that *Zinermon* does not change the *Parratt* rules,[30] and courts have also held a predeprivation hearing was not required when adequate postdeprivation procedures were available.[31] Other cases relied on *Zinermon to hold a predeprivation hearing should have been provided,*[32] or have held a predeprivation hearing was required because the plaintiff was challenging an established procedure or policy.[33]

§ 1.07 Immunities.

§ 1.08 Legislative Bodies.

Although § 1983 does not expressly provide for immunities of any kind, the Supreme Court has implied the common law immunities the courts recognized when Congress enacted the statute. In Tenney v. Brandhove,[34] the Supreme Court held that state legislators are absolutely immune from liability under § 1983 because absolute immunity confers a benefit to the "public good":

The [legislative] privilege would be of little value if ... [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of judgment against them based upon a jury's speculation as to motives ... Self-discipline and the voters must be the ultimate reliance for discouraging or correcting ... [legislative] abuses.[35]

In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,[36] the Court extended the absolute immunity of state legislators to members of a bi-state regional planning agency. It noted that alternative remedies were available, including a suit against the regional planning agency. The Court limited legislative immunity to officials "acting in a field where legislators traditionally have power to act" who did not usurp judicial or executive authority. It reserved decision on whether local legislators also enjoyed absolute immunity, although Justice Marshall's dissent argued that the Court's holding on absolute state legislative immunity applied to local legislative bodies. A case now before the Supreme Court may decide this question.

The Supreme Court relied on these cases to hold that local legislators are entitled to absolute immunity in § 1983 cases in Bogan v. Scott-Harris.[36.1] In Bogan, a city administrator pre-pared termi-nation charges against a temporary employee after she received a complaint that the employee had made racial and ethnic slurs. The council held a hearing on the charges and later accepted a settlement under which the employee was suspended without pay for 60 days. The mayor later reduce this punishment.

While the charges against the employee were pending, the mayor prepared a budget proposal that included reducing a number of city positions, including the position of the agency administrator who had brought the charges against the temporary employee. When the council adopted the budget, the administrator filed suit.

The Court first relied on historic precedent by finding it was the "pervasive view" at common law, at the time § 1983 was adopted, that local legislators were absolutely immune from liability. The Court also found policy reasons for adopting absolute immunity. It held that judicial interference, distorted by the fear of personal liability, should not be allowed to inhibit the exercise of legislative discretion. At the local level, the Court noted, the time and energy necessary to defend against a lawsuit were of particular concern because part-time legislators are common. In addition, deterrents to legislative abuse are greater at the local, than at other levels, of government, because municipalities are liable for constitutional violations. Finally, as at other government levels, there is the electoral check on governmental abuse.

The lower federal courts had held that members of local legislative bodies are absolutely immune from § 1983 liability in land use cases. Gorman Towers, Inc. v. Bogoslavsky [37] is a leading case. Because land use decisions have an important effect on property, the court held that legislators should be allowed to act for the public good on land use issues without facing the "specter" of personal liability. It noted that effective checks on unconstitutional conduct are available against local legislators, including judicial review, control by the electorate, and suits against local governments.

Courts usually hold the adoption and amendment of zoning ordinances is a legislative act,[38] but do not grant absolute immunity when a legislative body acts in an administrative capacity. In Altaire Bldrs., Inc. v. Village of Horseheads,[39] the court held that a local legislative body did not act legislatively when it refused to approve a planned unit development. It held that approval of the development did not require a zoning amendment and that the only issue was whether it complied with the approval criteria contained in the ordinance.[40]

Haskell v. Washington Twp. [41] provides a test for determining whether a zoning action is legislative or administrative that turns on the purpose of the action. The court held that an action by a governing body is legislative if its purpose is to establish general policy, but administrative if it singles out specific individuals and treats them differently from others. The court added that even if an action was legislative, it would not be protected if it was in bad faith, corrupt or in furtherance of a personal rather than a public interest.

§ 1.09 Land Use Agencies and Officials.

Land use agencies and officials are absolutely immune from liability under § 1983 if they exercise adjudicatory functions, but otherwise they have only a qualified good faith immunity. Absolute immunity is based on a Supreme Court case, Butz v. Economou.[42] The Court conferred absolute immunity on federal officials who initiated an adjudicatory proceeding against the plaintiff. The Court held that there may be "exceptional situations where it is demonstrated that absolute [executive] immunity is essential for the conduct of the public business." Adjudication by agencies is "functionally comparable" to adjudication by judges and should enjoy the absolute immunity judges enjoy.

The absolute immunity established by *Butz* should apply when land use agencies exercise adjudicatory functions.[43] The courts have refused to extend absolute immunity to the review procedures of a planning board and a board of adjustment.[44] They have granted only a qualified good faith immunity to executive actions in the enforcement and implementation of land use regulation.[45] However, a planning commission was given absolute immunity when it recommended legislative action to a local governing body.[46]

Land use agencies and officials that have qualified good faith immunity are subject to immunity rules adopted by the Supreme Court, although the Court has not considered the immunity question in a land use case. The Court first adopted a two-part test that required both subjective and objective good faith.[47] It dropped the subjective part of the test in Harlow v. Fitzgerald [48] and restated the objective good faith test as a more protective formula:

[G]overnment officials performing discretionary functions generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[49]

The Court also held that an official's conduct must meet a standard of "objective legal reasonableness."

Davis v. Scherer [50] elaborated the *Harlow rule.* The Court held that a mere violation of a state statute or regulation, standing alone, is not enough to defeat good faith immunity. Immunity is unavailable only if the defendant violated a clearly established constitutional right. The land use cases have applied *Harlow.*[51]

The Supreme Court further clarified official immunity in Anderson v. Creighton. [52] Plaintiff claimed that police officers had conducted a warrantless search. The Court held that even though the courts had previously recognized a constitutional right to be protected from a warrantless search without probable cause, the question was whether it was unconstitutional in this case under all the circumstances. This fact-specific inquiry requires the courts to determine whether a reasonable officer could have believed that a warrantless search was constitutional in light of the clearly established law and the available facts. Because so many land use actions brought under § 1983 are fact-specific, *Creighton* should lead to an expansion of official immunity in land use § 1983 actions.

The courts have found that land use agencies and officials have acted in good faith when no clearly established right was violated.[53] The courts have denied good faith immunity in cases in which zoning officials arbitrarily withheld building permits or arbitrarily enforced a zoning ordinance.[54] Some of these cases are post-*Creighton* but did not make the fact-specific inquiry required by that decision.

§ 1.10 Local Governments.

Owen v. City of Independence [55] held that municipalities are not immune from liability in a § 1983 action. A police chief brought an action claiming he was terminated by the city without the procedural due process required by the federal constitution. The Court held there was no general municipal immunity at the time Congress enacted § 1983, either for proprietary as distinguished from governmental activities or for discretionary as distinguished from ministerial actions. It did not limit its decision to procedural due process violations but held that it applied to all "constitutional violations":

[A] municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the reasonableness of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.[56]

Although *Owen* held that municipalities are not immune under § 1983, it does not impose absolute liability. As the statement just quoted indicates, plaintiffs must still show a violation of the federal Constitution.

§ 1.11 Damages.

Section 1983 provides that parties sued under the statute "shall be liable to the party injured in an action at law." This provision authorizes an award of compensatory damages. The Supreme Court has held that the common law of torts provides an analogy for damages in § 1983 cases but requires careful adaptation when a constitutional right does not have a tort analogy.[57] Punitive damages are not available against local governments [58]. Courts may award punitive damages against local officials,[59] but the facts have not usually justified an award of punitive damages in land use cases.[60]

In Carey v. Piphus,[61] the Supreme Court rejected a claim that a court should presume damages when a plaintiff proves a procedural due process violation. Elementary and secondary school students brought a § 1983 action claiming they were denied procedural due process when they were temporarily suspended. The Court held that the defendant was liable only for nominal, not compensatory, damages because there was no proof that the students would not have been suspended if procedural due process requirements had been observed. Carey also applies to substantive due process violations.[62] This case means that damages are not available in a land use case unless the due process violation affected the outcome of the decision.

The Supreme Court has held that compensation is payable in land use cases for temporary takings in an inverse condemnation action brought directly under the federal constitution. The Court did not indicate whether a plaintiff could recover compensation for a taking under § 1983, but compensation should be available in a § 1983 action as well.[63]

Damages are available in a § 1983 action for constitutional violations other than violations of the taking clause. Justice Brennan noted, for example, that substantive due process violations not actionable under the taking clause are actionable under § 1983.[64] Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist. (II) [65] indicates the possibilities for compensatory damage awards in § 1983 cases. A developer suffered losses when the district delayed a residential project that was to be open to minorities by refusing to supply water. The court awarded compensatory damages equal to the difference between the cost of connecting to the district and the cost the developer incurred to drill individual wells. It denied damages for the developer's inability to use its assets while the project was delayed. The developer did not provide evidence on the applicable interest rate and did not show that the appreciation in the value of its property was less than what interest on its assets would have earned.[66]

Sources:

S. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of 1983 (3d ed. 1991)

M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (2d ed. 1991)

Gerhardt, The *Monell* Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983, 62 S. Cal. L. Rev. 539 (1989)

Note, Qualifying Immunity in Section 1983 & *Bivens* Actions, 71 Tex. L. Rev. 123 (1992)

* Adapted from D. Mandelker, Land Use Law, Fourth Edition (4th Ed. 1997)

Endnotes:

[1] 436 U.S. 658 (1978).

[2] Quern v. Jordan, 440 U.S. 332 (1979).

[3] 42 U.S.C. § 1988.

[4] Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).

[5] McCulloch v. City of Glasgow, 620 F.2d 47 (5th Cir. 1980).

[6] *See also* §§ 2.36, 2.38 (whether landowner must have entitlement to property in due process cases).

[7] Monroe v. Pape, 365 U.S. 167 (1961).

[8] Daniels v. Williams, 474 U.S. 327 (1986) (negligent deprivations not covered); Hudson v. Palmer, 468 U.S. 517 (1984) (intentional deprivations covered).

[9] 680 F.2d 822 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982). *Accord* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988); Burrell v. City of Kankakee, 815 F.2d 1127 (7th Cir. 1987) (rezoning); Hynes v. Pasco County, 801 F.2d 1269 (11th Cir. 1986) (revocation of building permit); Smith v. City of Picayune, 795 F.2d 482 (5th Cir. 1986) (rezoning).

[10] Gardner v. City of Baltimore Mayor & City Council, 959 F.2d 63 (4th Cir. 1992); Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988); Hynes v. Pasco County, 801 F.2d 1269 (11th Cir. 1986); Smith v. City of Picayune, 795 F.2d 482 (5th Cir. 1986).

[11] *But see* Fantasy Book Shop v. City of Boston, 531 F. Supp. 821 (D. Mass. 1982).

[12] Video Int'l Prods., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075 (5th Cir. 1988) (board of adjustment), *cert. denied,* 490 U.S. 1047, 491 U.S. 106 (1989); Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (governing body); Altaire Bldrs., Inc. v. Village of Horseheads, 551 F. Supp. 1066 (W.D.N.Y. 1982).

[13] City of Oklahoma v. Tuttle, 471 U.S. 808 (1985) (municipalities not liable for random acts by low-level city employees).

[14] 475 U.S. 469 (1986).

[15] 805 F.2d 81 (2d Cir. 1986). Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872 (9th Cir. 1987), *cert. denied,* 488 U.S. 827 (1988); Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986). *See also* Coogan v. City of Wixom, 820 F.2d 170 (6th Cir. 1987).

[16] 485 U.S. 112 (1988).

[17] *But see* Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) (majority apparently adopted *Praprotnik standard).*

[18] Bannum, Inc. v. City of Ft. Lauderdale, 901 F.2d 989 (11th Cir. 1990). *See also* Burkhart Advertising, Inc. v. City of Auburn, 786 F. Supp. 721 (N.D. Ind. 1991) (mayor signed ordinance).

[19] Browning-Ferris Indus., Inc. v. City of Maryland Heights, 747 F. Supp. 1340 (E.D. Mo. 1990) (council ratification); Lutheran Day Care v. Snohomish Cty., 829 P.2d 746 (Wash. 1992) (council denial of conditional use).

[20] Kawaoka v. City of Arryo Grande, 17 F.3d 1227 (9th Cir. 1994) (racially discriminatory statements); Arroyo Vista Partners v. County of Santa Barbara, 732 F. Supp. 1046 (C.D. Cal. 1990) (ward courtesy system); Carr v. Town of Dewey Beach, 730 F. Supp. 591 (D. Del. 1990).

[21] Monroe v. Pape, 365 U.S. 167, 187 (1961).

[22] Bannum v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992) (inability to comply with zoning ordinance caused recision of contract); Bateson v. Geisse, 857 F./2d 1300 (9th Cir. 1988) (wrongful withholding of building permit); Schneider v. City of Ramsey, 800 F. Supp. 815 (D. Minn. 1992) (plaintiff voluntarily closed bookstore rather than face prosecution).

[23] Westborough Mall, Inc. v. City of Cape Girardeau (IV), 953 F.2d 345 (8th Cir.), *cert. denied,* 505 U.S. 1222 (1991). *See also Muckway v. Craft, 789 F.2d 517 (7th Cir.1986) (refusal to enforce zoning ordinance); Roma Constr. Co. v. Russo, 906 F. Supp.78 (D. R.I. 1995) (bribe); B. Street Commons, Inc. v. Board of County Comm'rs, 835 F. Supp. 1266 (D. Colo. 1993) (ill- considered business acts).*

[24] Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982). *See* Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983).

[25] 451 U.S. 527 (1981). *See* Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986). *See also* § 2.20.

[26] 455 U.S. 422 (1982).

[27] Albery v. Reddig, 718 F.2d 245 (7th Cir. 1983). *Accord* Lake Naciemento Ranch Co. v. County of San Luis Obispo, 841 F.2d 772 (9th Cir. 1987) (bias in decision making), *cert. denied,* 488 U.S. 827 (1988); Rymer v. Douglas County, 764 F.2d 796 (11th Cir. 1985) (error in issuing building permit); G.M. Eng'rs & Assocs., Inc. v. West Bloomfield Township, 922 F.2d 328 (6th Cir. 1990).

[28] Vari-Build, Inc. v. City of Reno, 596 F. Supp. 673 (D. Nev. 1984). *Accord* Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986).

[29] 494 U.S. 113 (1990).

[30] New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474 (7th Cir. 1990).

[31] DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592 (3d Cir.), *cert. denied,* 116 S. Ct. 352 (1995); Boudwin v. Great Bend Township, 921 F. Supp. 1326 (M.D. Pa. 1996).

[32] Lanmar Corp. v. Rendine, 811 F. Supp. 47 (D.R.I. 1993).

[33] Macene v. MJW, Inc., 951 F.2d 700 (6th Cir. 1991); Independent Coin Payphone Ass'n, Inc. v. City of Chicago, 863 F. Supp. 744 (N.D. Ill. 1994); Koncelik v. Town of East Hampton, 781 F. Supp. 152 (E.D.N.Y. 1991).

[34] 341 U.S. 367 (1951).

[35] *Id.* at 377-78.

[36] 440 U.S. 391 (1979).

[36.1] 118 S. Ct. 966 (1998).

[37] 626 F.2d 607 (8th Cir. 1980) (downzoning). *Accord* Orange Lake Assocs. v. Kirkpatrick, 21 F.3d 1214 (2d Cir. 1994); Shoultes v. Laidlaw, 886 F.2d 114 (6th Cir. 1989); Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989); Culebras Enters. Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987); Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980).

[38] Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994); 2BD Ltd. Partnership v. County Comm'rs, 896 F. Supp. 528 (D. Md. 1995). *See also Brown v. Crawford County, 960 F.2d 1002 (11th Cir. 1992).*

[39] 551 F. Supp. 1066 (W.D.N.Y. 1982). *Accord* Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (11th Cir. 1993) (no immunity for denial of site plan), *cert. denied, 511 U.S. 1018 (1994); Crymos v. DeKalb County, 923 F.2d 482 (11th Cir. 1991) (permit denial); Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (permit withheld); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) (building permit application). But see* § 8.33 (suggesting absolute immunity if function adjudicatory).

[40] Held administrative: Crymos v. DeKalb County, 923 P.2d 482 (11th Cir. 1991) (permit denial); Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) (building permit application).

[41] 864 F.2d 1266 (6th Cir. 1988) (remanding to determine whether adoption of zoning ordinance administrative).

[42] 438 U.S. 478 (1978).

[43] Bass v. Attardi, 868 F.2d 45 (3d Cir. 1989).

[44] Cutting v. Mazzey, 724 F.2d 259 (1st Cir. 1984); Rodriguez v. Village of Larchmont, 608 F. Supp. 467 (S.D.N.Y. 1985).

[45] Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) (refusal to issue occupancy certificates); Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 638 F. Supp. 126 (D. Nev. 1986) (implementation of regional plan).

[46] Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979). *See also* Shoultes v. Laidlaw, 886 F.2d 114 (6th Cir. 1989) (city attorney brought civil injunction to enforce zoning ordinance); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981) (mayor vetoed rezoning), *cert. denied, 455 U.S. 907 (1982).*

[47] Scheuer v. Rhodes, 416 U.S. 232 (1974). *See also* Pierson v. Ray, 386 U.S. 547 (1967).

[48] 457 U.S. 800 (1982).

[49] *Id.* at 818.

[50] 468 U.S. 183 (1984).

[51] Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) (licensing scheme for signs); Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994) (right to develop not clearly established); Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994) (qualified immunity in facial attack on sign restrictions); Culebras Enters. Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987) (moratorium); Kaplan v. Clear Lake City Water Auth., 794 F.2d 1059 (5th Cir. 1986) (refusal to provide water and sewer service); Negin v. City of Mentor, 601 F. Supp. 1502 (N.D. Ohio 1985).

[52] 483 U.S. 635 (1987), noted in The Supreme Court: 1986 Term: Leading Cases, 101 Harv. L. Rev. 101, 220 (1987).

[53] Zahra v. Town of Southold, 48 F.3d 674, 686 (2d Cir. 1995) (building permit revoked); Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994); Walnut Properties, Inc. v. City of Whittier (II), 861 F.2d 1102 (9th Cir. 1988) (adult business zoning); Culebras Enters. Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987); Kaplan v. Clear Lake City Water Auth., 794 F./2d 1059 (5th Cir. 1986).

[54] Blanche Road Corp. v. Bensalem Township, 57 F.3d 253 (3d Cir. 1995); Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988); Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (because "contours" of substantive due process clear); TLC Dev., Inc. v. Town of Branford, 855 F. Supp. 555 (D. Conn. 1994) (denial of site plan).

[55] 445 U.S. 622 (1980).

[56] *Id.* at 649.

[57] Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986); Carey v. Piphus, 435 U.S. 247 (1978).

[58] City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

[59] Smith v. Wade, 461 U.S. 30 (1983).

[60] Johansen v. City of Bartlesville, 862 F.2d 1423 (10th Cir. 1988); Creekside Assocs. v. City of Wood Dale, 684 F. Supp. 201 (N.D. Ill. 1988).

[61] 435 U.S. 247 (1978).

[62] Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986).

[63] Wheeler v. City of Pleasant Grove (II), 833 F.2d 267 (11th Cir. 1987).

[64] San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 n.23 (1981) (dissenting opinion).

[65] 648 F.2d 761 (1st Cir. 1981). *See also* Wheeler v. City of Pleasant Grove (II), 833 F.2d 267 (11th Cir. 1987) (taking); Cordeco Dev. Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir.), *cert. denied,* 429 U.S. 978 (1976).

[66] *See also* Herrington v. County of Sonoma, 790 F. Supp. 909 (N.D. Cal. 1991) (specifying measure of damages for refusal to approve subdivision), *aff'd, 12 F.3d 901 (9th Cir. 1993).*

Questions/comments? Email mandelker@wulaw.wustl.edu. Technical problems? Email Karl Eck.