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Class-of-One Claimants Continue to Sue

Equal protection challenges to municipal land use determinations.

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THE MILLENNIUM USHERED IN a new theory of equal protection liability in civil rights cases in the land use field. Since 2000, real estate developers and municipalities alike have become familiar with a new species of equal protection charge, known to §1983 practitioners as the "class of one" claim. (42 U.S.C. §1983 provides a civil action for deprivation of any rights, privileges or immunities secured by the Constitution and laws.) On Oct. 6, 2009, in *Casciani v. Nesbitt*, District Judge David Larimer of the U.S. District Court for the Western District of New York issued the most recent decision in the field, in a case involving a homeowner's private helipad constructed in his backyard.[1]

The U.S. Supreme Court first acknowledged, albeit indirectly, that a single member of an otherwise unprotected class of persons might assert a viable claim under the Equal Protection Clause in 1923 in *Sioux City Bridge Co. v. Dakota County*.[2] It took another 77 years for the Court to acknowledge, directly, that viable "class of one" claims may be asserted under the Equal Protection Clause. That was in 2000, in *Village of Willowbrook v. Olech*,[3] where the Court expressly held that the number of individuals in a class is immaterial for equal protection analysis, and that a so-called "class of one" may have valid constitutional claims.

Though neither the Court nor the parties had used or adopted "class of one" terminology in *Sioux City Bridge* in 1923, three-quarters of a century later in *Olech* the Court comfortably relied on *Sioux City Bridge* to conclude that class-of-one claims were indeed valid. Citing only *Sioux City Bridge* and one other nearly identical case,[4] the Court in *Olech* stated that, "our [prior] cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[5]

The First Acknowledgement

Sioux City Bridge was a tax levy case in which the petitioning landowner had challenged the valuation of its property at full value for tax assessment purposes.[6]

The petitioner complained that other property owners in the same class enjoyed systematic assessments at less than full value.[7] The petitioner itself was not a member of any class or category traditionally recognized under the Equal Protection Clause, classes based on race, religion, ethnicity, gender and the like. Thus, there was no previously recognized basis upon which Sioux City Bridge Company could articulate a viable claim of unconstitutional disparate treatment under the Equal Protection Clause.

The Court nonetheless struck down the full-value assessment, explaining that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property *in the same class* contravenes the constitutional *right of one* taxed upon the full value of his property.'" (Citation omitted and emphasis added.)[8]

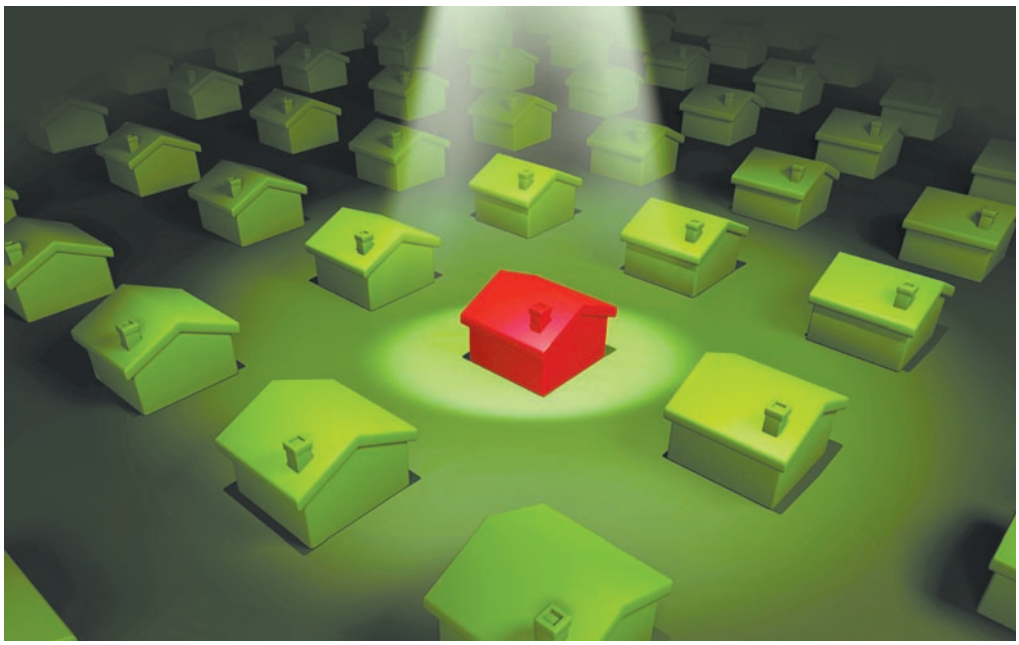
The 'Olech' Decision

The more modern Supreme Court decision in the evolutionary sequence, *Olech*, was not a tax-assessment case.

There, the plaintiff was a homeowner challenging the local municipality's requirement of a 33-foot easement to connect her property to the municipal water supply.[9] She claimed that the village routinely required only a 15-foot easement from other similarly situated property owners.[10] Plaintiff Olech did not allege that she was a member of a protected class. Instead she argued that the 33-foot easement demand was "irrational and wholly arbitrary," and that "the Village's demand was actually motivated by ill will resulting from the [plaintiff's] previous filing of an unrelated, successful lawsuit against the Village."[11] On this basis, she alleged a violation of the Equal Protection Clause as part of her §1983 suit.[12]

The district court dismissed Olech's suit under Federal Rule of Civil Procedure 12(b)(6) for failure to state a cognizable claim under the Equal Protection Clause. The U.S. Court of Appeals for the Seventh Circuit reversed, holding that a plaintiff could allege an equal protection violation by asserting that state action was motivated solely by a "spiteful effort to 'get him' for reasons wholly unrelated to any legitimate state objective."[13] The Supreme Court granted certiorari expressly to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the plaintiff does not allege membership in a class or a group.[14]

The Solicitor General in *Olech* made the predictable "floodgate" argument, warning that recognizing class-of-one claims would transform countless, ordinary violations of city or state law into constitutional battles, leading to a flood of federal land use litigation.[15] The Court was not daunted, and in a per curiam decision unanimously agreed with the Seventh Circuit, concluding that plaintiff Olech had indeed alleged a viable cause of



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action, based on her allegations that the village had connected all other property owners to the water supply using a mere 15-foot easement, and that the requirement of a 33-foot easement in her case was "irrational and wholly arbitrary."[16]

In the sole concurrence, Justice Stephen Breyer clarified that his support for plaintiff Olech was based on the fact that she was alleging "an extra factor," beyond merely "irrational and wholly arbitrary action." That extra factor was "vindictive action," "illegitimate animus," or simple "ill will."[17] The main decision, however, stated that the Court was "not reach[ing] the alternative theory of 'subjective ill will' relied on by th[e] [Circuit Court]."[18]

The Floodgates Did Open

As warned by the Solicitor General, *Olech* has, in fact, opened the proverbial floodgate, with class of one claims now a regular and even prevalent part of §1983 complaints in land use cases.[19]

Aggrieved developers who cannot otherwise raise equal protection claims as a member of one or another protected class based on race, gender or some other trait rely instead on class-of-one doctrine to create for themselves an equal protection, and §1983, foothold.[20] Federal courts around New York have been the forums for many of these new disputes and a growing body of class-of-one case law has resulted within the Second Circuit.

Today, as interpreted by the Second Circuit, an *Olech*-type class-of-one plaintiff must demonstrate the existence of persons in circumstances similar to his own who received more favorable treatment than the plaintiff for no rational reason.[21] Certain courts have added an additional element in light of the Supreme Court's more recent holding last year in *Engquist v. Oregon Dep't of Agriculture*.[22] Those courts have held that a class-of-one claimant also must plead that the difference in treatment resulted from non-discretionary state action.[23]

The reasoning offered is typically that the plaintiff in a class-of-one case uses "the existence of persons in similar circumstances who received more favorable treatment than the plaintiff…to provide an inference that the plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose, whether personal or otherwise, is all but certain."[24]

On its face, *Engquist* was an employment case, arising from a former state employee's claim that he had been laid off unconstitutionally in violation of the Equal Protection Clause during a reorganization of the Oregon Department of Agriculture.[25] The plaintiff raised an *Olech*-type class-of-one claim, which the Supreme Court then reviewed in consideration of the differences between the manner of the tax assessment decision at issue in *Olech* and the layoff decision under review in *Engquist*. In analyzing various types of state decision-making, the Court gave the following example of an action that, by its nature, involved discretion:

> Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.[26]

The Court in *Engquist* concluded that, at least for purposes of the case at hand, non-discretionary state action was an element that the plaintiff would need to allege.[27] That portion of *Engquist* has now been applied outside the employment context, including in land use cases, to require *Olech*-type plaintiffs to plead non-discretionary action in non-employment class-of-one claims.[28]

Most Recent Ruling

The district court's decision on Oct. 6, 2009 in *Casciani v. Nesbitt* is the most recent trial level federal case in New York involving a civil rights case based on municipal land regulation, and there, too, the additional *Engquist* element of non-discretionary state action was held to apply.[29]

In *Casciani*, the plaintiff had erected a 14-foot concrete pad on his residential property in the town of Webster, a suburb of Rochester.[30] The plaintiff owned a helicopter that he had, in the past, flown to and from the concrete pad at his home.[31] The plaintiff filed his §1983 claims after Webster passed a new law, seemingly targeted at him, which prohibited any private aircraft from taking off or landing within the town's borders.[32]

The district court applied *Engquist*, requiring that the plaintiff plead non-discretionary state action in order to allege a viable class-of-one claim. The court repeated the Supreme Court's observation that, "[t]here are some forms of state action…which by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments," and that "[i]n such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise."[33]

> The U.S. Supreme Court first acknowledged, albeit indirectly, that a **single member** of an **otherwise unprotected** class of persons might assert a viable claim under the **Equal Protection Clause**, in 1923.

The district court explained further that, "[a]lthough the Court in *Engquist* noted that '[t]his principle applies most clearly in the employment context,' numerous courts have applied *Engquist* to bar 'class of one' claims in connection with discretionary decisions made outside the government employee context."[34]

The court stated that "[p]rior to the enactment of the ordinance, there was no law [in Webster] that specifically addressed the operation of aircraft within Webster, other than a statute of general application[,] which prohibited the operation of an 'airport' within a town anywhere in the state without approval from the town's governing body."[35] The town of Webster therefore had a clean slate to work with, and how it chose to do so was held by the court to be discretionary:

> "There were no written criteria, then, for determining whether the operation of any particular aircraft within Webster constituted a problem that needed to be addressed, and any actions taken by the Town in that regard were entirely discretionary."[36]

The court further held that the town's actions taken toward enforcing the newly adopted ordinance were, as well, "necessarily discretionary,"[37] relying for its conclusion on the Supreme Court's traffic ticket example described in *Engquist*.[38]

Further decisions will follow, as district courts within and without New York steadily receive new class of one complaints. Ultimately, the Second Circuit, the sister circuit courts, and predictably the U.S. Supreme Court will be called upon to clarify further this evolving area of the law. Land use litigators must stay alert for those developments.

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1. *Casciani v. Nesbitt*, __F.Supp.2d__, No. 09-CV-6162L, 2009 WL 3172684 (Oct. 6, 2009 W.D.N.Y.).
2. 260 U.S. 441 (1923).
3. 528 U.S. 562 (2000).
4. *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336 (1989).
5. See *Willowbrook*, supra, 528 U.S. at 564 (citing *Sioux City Bridge Co.*, supra, 260 U.S. 441; and *Allegheny Pittsburgh Coal Co.*, supra, 488 U.S. 336).
6. 260 U.S. at 443.
7. 260 U.S. at 443.
8. 260 U.S. at 445 (citing *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352 (1918))
9. 528 U.S. at 563.
10. Id.
11. 528 U.S. at 563.
12. See 42 U.S.C. §1983 et cet.
13. 528 U.S. at 664 (citing 160 F.3d 386, 387 (7th Cir. 1998)).
14. 528 U.S. at 564 (citing 527 U.S. 1067 (1999)).
15. 528 U.S. at 565.
16. 528 U.S. at 565.
17. 528 U.S. at 565-566.
18. 528 U.S. at 565.
19. See, e.g., *SBT Holdings, LLC v. Town of Westminster*, 547 F.3d 28 (1st Cir. 2008); *Appel v. Spiridon*, 531 F.3d 138 (2nd Cir. 2008); *Young v. Township of Coolbaugh*, 276 Fed. Appx. 206 (3d Cir. 2008); *Herman v. Lackey*, 309 Fed. Appx. 778 (4th Cir. 2009); *Lindquist v. City of Pasadena*, 525 F.3d 383 (5th Cir. 2008); *Harris v. City of Circleville*, 583 F.3d 356 (6th Cir. 2009); *Hanes v. Zurick*, 578 F.3d 491 (7th Cir. 2009); *Flowers v. City of Minneapolis*, 558 F.3d 794 (8th Cir. 2009); *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009); *Douglas Asphalt Co. v. Qore Inc.*, 541 F.3d 1269 (11th Cir. 2008).
20. See id.
21. See *Neilson v. D'Angelis*, 409 F.3d 100, 105 (2d. Cir. 2005), overruled on other grounds by *Appel v. Spiridon*, 531 F.3d 138, 139-40 (2d Cir. 2008).
22. __U.S.__, 128 S.Ct. 2146 (2008).
23. Id. at 2154.
24. See *Neilson v. D'Angelis*, supra, 409 F.3d at 105.
25. Id. at 2146.
26. Id. at 2154.
27. Id.
28. See, e.g., *Tarantino v. City of Hornell*, 615 F.Supp.2d 102, 117 & n. 11 (applying *Engquist* to enforcement of town code provisions because of the degree of discretion involved); *Nasca v. Town of Brookhaven*, No. 05-CV-122, 2008 WL 4426906, at *11 n. 4 (E.D.N.Y. Sept. 25, 2008) ("to the extent plaintiff is challenging the discretionary decisions by the Town as to the enforcement of its permit laws and code provisions, *Engquist* suggests that 'class of one' challenges cannot be asserted as to such decisions"); *Sloup v. Loeffler*, No. 05-CV-1766, 2008 WL 3978208, at *17 (*Engquist* rule "would preclude a class of one claim" based on allegation that town's enforcement of town code provision requiring removal of any "menace to navigation" within town waters, "because such a determination is clearly discretionary"); *Occhionero v. City of Fresno*, No. 05-1184, 2008 WL 2690431, at *9 (E.D.Cal. July 3, 2008) (stating that court would "heed[] the warning of…the U.S. Supreme Court's observation in *Engquist* as to undermining discretion," and would not allow plaintiff to proceed on a "class-of-one equal protection claim…to permit second guessing of the City's code enforcement measures at issue here").
29. *Casciani v. Nesbitt*, __F.Supp.2d__, No. 09-CV-6162L, 2009 WL 3172684 (Oct. 6, 2009 W.D.N.Y.).
30. Id. at *1.
31. Id.
32. Id.
33. Id. at *24 (citing *Engquist*, supra, 128 S.Ct. at 2154).
34. See e.g., *Seymour's Boatyard Inc. v. Town of Huntington*, No. 08-CV-3248, 2009 WL 1514610, at *7 (S.D.N.Y. June 1, 2009); *Crippen v. Town of Hempstead*, No. 07-CV-3478, 2009 WL 803117, at *6 (E.D.N.Y. March 25, 2009); *Marino v. Shoreham-Wading River Central School Dist.*, No. 08-CV-0825, 2008 WL 5068639, at *7 (E.D.N.Y. Nov. 20, 2008).
35. 2009 WL 3172684 at *25.
36. Id.
37. Id.
38. See supra n. 25 and accompanying text.