



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 11 | Number 3

Article 6

1995

Arbitrary And Confiscatory Rezoning By New York State Local Governments: An Exercise Of Police Powers Or Discrimination?

George Likourezos

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Land Use Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Likourezos, George (1995) "Arbitrary And Confiscatory Rezoning By New York State Local Governments: An Exercise Of Police Powers Or Discrimination?," *Touro Law Review*: Vol. 11: No. 3, Article 6.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol11/iss3/6>

This Notes and Comments is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lrass@tourolaw.edu.

ARBITRARY AND CONFISCATORY REZONING BY NEW YORK STATE LOCAL GOVERNMENTS: AN EXERCISE OF POLICE POWERS OR DISCRIMINATION?

N.Y. CONST. art. IX, section 2(c) provides:

In addition to powers granted in the statute of local governments or in any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government.¹

INTRODUCTION

In *Village of Euclid v. Ambler Realty Co.*,² zoning received its “constitutional blessing from the United States Supreme Court as a constitutionally sound manifestation of a local government’s police power, and the hegemony of modern zoning began.”³ Following *Village of Euclid*, a local government’s decision to apply a particular zoning classification to a piece of land must be upheld against a substantive due process challenge unless it is “clearly arbitrary and unreasonable, having no substantial

1. N.Y. CONST. art. IX, § (2)(c).

2. 272 U.S. 365 (1926).

3. Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 60 (1993).

relation to the public health, safety, morals or general welfare.”⁴ A local government may enact zoning ordinances and apply zoning classifications to accomplish a great variety of public purposes.⁵

In the State of New York, the power to zone stems from the state legislature⁶ and the state constitution.⁷ The New York Court

4. *Village of Euclid*, 272 U.S. at 395; *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905).

5. *See, e.g., Berman v. Parker*, 348 U.S. 26 (1954). The Court stated: The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 33.

6. N.Y. TOWN LAW §§ 261-84 (McKinney 1987 & Supp. 1990). Section 261 provides:

For the purposes of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, and the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town.

Id.; N.Y. VILLAGE LAW §§ 7-700 to 7-742 (McKinney 1973 & Supp. 1990). The same broad powers are similarly shared by villages pursuant to the Village Law § 7-700, which provides:

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the board of trustees of a village is hereby empowered, by local law, to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot occupied, the size of yards, courts and other open spaces, the density of population, and the location of use of buildings, structures and land for trade, industry and other purposes.

Id.

7. N.Y. CONST. art. IX, § 2. Section 2(c) provides:

In addition to powers granted in the statute of local governments or in any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and,

of Appeals in 1987 acknowledged that zoning is a legislative function.⁸ Further, according to the court, municipalities in New York have “broad power . . . to implement land use controls to meet the increasing encroachments of urbanization on the quality of life.”⁹ However, municipalities are not obliged to state the

(ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government.

Id.

8. *Suffolk Hous. Servs. v. Town of Brookhaven*, 70 N.Y.2d 122, 130, 511 N.E.2d 67, 70, 517 N.Y.S.2d 924, 926 (1987). In *Brookhaven*, the court noted that “[z]oning . . . is an essentially legislative task, and it is therefore anomalous that courts should be required to perform the tasks of a regional planner.” *Id.*

9. *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 550-51, 540 N.E.2d 215, 217, 542 N.Y.S.2d 139, 141 (1989) (holding that due to their legislative nature, zoning ordinances “enjoy a strong presumption of constitutionality and if there is a reasonable relation between the end sought to be achieved and the means adopted to achieve it the regulation will be upheld”). See *Village of Belle Terre v. Borass*, 416 U.S. 1, 9 (1974) (stating that the police power vested in a local government “is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people”); *Curtiss-Wright Corp. v. Town of East Hampton*, 82 A.D.2d 551, 442 N.Y.S.2d 125 (2d Dep’t 1981). In *Curtiss-Wright*, the court stated:

[I]f the validity of the legislative classifications for zoning purposes are fairly debatable, they must be allowed to stand. . . . Here, two of the stated goals of the East Hampton land use plan are to maintain the natural and rural qualities of the land and control urbanization and to conserve and protect the town’s water supply. Maintenance of natural and rural qualities have long been recognized as legitimate governmental purposes.

Id. at 556, 442 N.Y.S.2d at 129.

specific public goals to be achieved by rezoning the piece of land.¹⁰

This Comment provides a general overview of the decisional law followed in New York State in adjudicating cases relating to land use regulations which are challenged as arbitrary and confiscatory, thereby effecting a "taking." Part I of this Comment discusses the relevant standard of review used by New York State courts to adjudicate such cases. In addition, the relevant evidentiary standard used by the courts in determining whether the local government gave forethought to the community's land use problems prior to the rezoning is also discussed.

Part II examines various cases where the United States Supreme Court or the New York State courts found that a rezoning regulation by a local government either constituted or did not constitute a "taking." This Part also discusses the remedy available to a party when the court finds the regulation has been arbitrary or has effected a "taking." Part III discusses when rezoning regulations are generally found to violate the Equal Protection Clause, thereby providing a remedy under section 1983.¹¹ In conclusion, this Comment summarizes the law currently followed in New York State in the adjudication of land use regulation which is challenged as arbitrary and confiscatory.

10. *See* *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 422 (2d Cir. 1983) (stating "the [F]ederal [C]onstitution does not require [the zoning plan] to contain a specific explanation for each prohibition against a particular land use").

11. 42 U.S.C. § 1983 (1988). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

I. STANDARDS OF JUDICIAL REVIEW

A. Relevant Standard of Review

The United States Supreme Court has articulated principles which provide the relevant standard of review in cases involving zoning and land use regulations which are challenged as arbitrary or as confiscatory. First, the Supreme Court in 1980 enunciated a two-part test in *Agins v. City of Tiburon*.¹² The two-part *Agins* test states that (1) government regulations must substantially advance legitimate governmental interests,¹³ and (2) must not deny an owner economically viable use of his land,¹⁴ or have the effect of substantially frustrating investment backed expectations.¹⁵ The New York Court of Appeals first applied the two-part *Agins* test in *Seawall Associates v. City of New York*.¹⁶

The second principle articulated by the Supreme Court is that the taking determination involves a balancing of public and private interests.¹⁷ For example, in *Village of Euclid*,¹⁸ the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property.¹⁹ Despite alleged diminution in value of the owner's land, the United States Supreme Court held that the zoning laws were facially constitutional;²⁰ they bore a substantial relationship

12. 447 U.S. 255 (1980) (stating that when governmental action is construed as a taking, the burden of an exercise of state power in the public interest is therefore on the public at large rather than upon the single owner).

13. *Id.* at 260.

14. *Id.*

15. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986).

16. 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989).

17. *Agins*, 447 U.S. at 261.

18. 272 U.S. 365 (1926).

19. *Id.* at 396.

20. *Id.* at 397.

to the public welfare, and their enactment inflicted no irreparable injury upon the landowner.²¹

A third principle in the "taking" analysis is the proportionality of private burden and public benefit.²² Finally, the Supreme Court has stated that "fairness and justice" should underlie all taking determinations.²³

B. Relevant Evidentiary Standard

In New York, similar to most jurisdictions, the long-standing rule is that amendments to a zoning regulation must be made in accordance with a comprehensive plan.²⁴ The purpose of such a statutory requirement is to ensure that the amendment is calculated to benefit the entire community, as well as to protect against arbitrary restrictions upon an individual's land use.²⁵ The concern is not "whether the zones, in themselves, are balanced communities, but whether the town itself, as provided by its zoning ordinances, will be a balanced and integrated community."²⁶

It is well-settled that "a municipality may not legitimately exercise its zoning power to effectuate socio-economic or racial

21. *Id.*

22. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 846, n.4 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226 (1986).

23. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

24. *Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 131, 527 N.E.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988) (stating that "[t]he power to zone is derived from the Legislature and must be exercised in the case of towns and villages in accord with a 'comprehensive plan'").

25. *Id.*

26. *Id.* at 133, 527 N.E.2d at 272, 531 N.Y.S.2d at 789 (quoting *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 109, 341 N.E.2d 236, 234, 378 N.Y.S.2d 672, 679 (1975)); *cf.* *Tilles Inv. Co. v. Town of Huntington*, 137 A.D.2d 118, 528 N.Y.S.2d 386 (2d Dep't 1988) (rejecting a challenge as a restrictive residential zoning ordinance where the owner claimed that the surrounding area had become commercial or industrial), *aff'd*, 74 N.Y.2d 885, 547 N.E.2d 90, 547 N.Y.S.2d 835 (1989).

discrimination.”²⁷ Thus, a zoning ordinance will be invalidated if it was “enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect.”²⁸ However, there is a strong presumption of constitutionality afforded zoning ordinances and amendments, and the burden rests upon the party attacking its validity.²⁹ The burden of proof must be met beyond a reasonable doubt.³⁰

Further, New York decisional law only mandates “comprehensiveness of planning . . . not slavish servitude to any particular comprehensive plan.”³¹ A court generally considers whether the planning preceded the rezoning; whether the local government gave forethought to the community’s land use problems; whether the amendment was consistent with those

27. *Suffolk Hous. Servs. v. Town of Brookhaven*, 70 N.Y.2d 122, 129, 511 N.E.2d 67, 69, 517 N.Y.S.2d 924, 926 (1987). See Allan Mallach, *Affordable Housing Forum*, 7 *TOURO L. REV.* 183, 188 (1990) (noting that a zoning ordinance “inherently discriminates against the provision of low cost or affordable housing” when that ordinance makes the development of multi-family housing harder to achieve).

28. *Kurzus, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338, 343, 414, N.E.2d 680, 682, 434 N.Y.S.2d 180, 182 (1980). See *Tilles Inv. Co.*, 74 N.Y.2d at 885, 547 N.E.2d at 90, 547 N.Y.S.2d at 835. The court stated that a town’s plan is presumed to be constitutional, and a challenge to an upzoning to residential will not rebut the constitutionality of the ordinance if the new classification is fairly questionable. *Id.* at 888, 547 N.E.2d at 91, 547 N.Y.S.2d at 836.

29. See *Asian Ams.*, 72 N.Y.2d at 131, 527 N.E.2d at 270, 531 N.Y.S.2d at 787; see also *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 550-51, 540 N.E.2d 215, 217, 542 N.Y.S.2d 139, 141 (1989) (stating that legislative acts must have a reasonable relation to the governmental interest sought to be achieved).

30. See *supra* note 29 and accompanying text.

31. *Tilles Inv. Co.*, 74 N.Y.2d at 887, 547 N.E.2d at 91, 547 N.Y.S.2d at 837 (quoting *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 188, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 136 (1973)).

problems; and whether the amendment was consistent with the comprehensive plan.³²

If the court finds that the amendments were made in a piecemeal fashion or by “irrational *ad hocery*,” it will not be sustained.³³ However, application of a zoning classification upon property does not result in the vested right to have the property classified this way indefinitely.³⁴ Along the same lines, a plaintiff does not have an automatic right to have his parcel zoned to maximize its value or to permit its most appropriate use where an ordinance is otherwise constitutional.³⁵

In *Udell v. Haas*,³⁶ the New York Court of Appeals detailed some of the evidence and questions which New York courts must consider in determining whether the local government gave consideration to the public welfare prior to the rezoning amendment or regulation. First, the *Udell* court emphasized the question of whether the local government made a careful and deliberate review of the present and reasonably foreseeable needs of the community and whether the local government adopted a general development policy or comprehensive plan for the community as a whole.³⁷ *Udell* held that where local officials

32. See, e.g., *id.*; *Caviglia*, 73 N.Y.2d at 550-55, 540 N.E.2d at 217-20, 542 N.Y.S.2d at 141-44. In *Caviglia*, the court found that the ordinance was created only after an exhaustive study was done on the community. Furthermore, the court found that the underlying data of the study “supported its conclusion that the presence of [adult entertainment or sex businesses] had a deleterious effect on the quality of life in the communities” of Islip and that it was adopted along with a comprehensive plan for the purpose of the development of Islip as a whole. *Id.* at 552, 540 N.E.2d at 218, 542 N.Y.S.2d at 142.

33. *Randolph v. Town of Brookhaven*, 37 N.Y.2d 544, 547, 387 N.E.2d 763, 765, 375 N.Y.S.2d 315, 318 (1975) (quoting *Town of Bedford*, 33 N.Y.2d at 188, 78, 306 N.E.2d at 159, 351 N.Y.S.2d at 136 (1973)).

34. *McGowan v. Cohalan*, 41 N.Y.2d 434, 438, 361 N.E.2d 1025, 1028, 393 N.Y.S.2d 376, 379 (1977) (holding that local zoning officials, absent arbitrariness, are the proper authorities for assessing public interest).

35. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962).

36. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

37. *Id.* at 470, 235 N.E.2d at 901, 288 N.Y.S.2d at 894.

adopt a zoning amendment to deal with various problems that have arisen but “give no consideration to alternatives which might minimize the adverse effects of a change on particular landowners . . . closer judicial scrutiny is required to determine whether the amendment conforms to the comprehensive plan.”³⁸

Second, the court stated that all of the relevant evidence must be examined in order to determine if the ordinance was enacted pursuant to a “comprehensive plan,” which includes an analysis of the ordinance in terms of consistency and rationality.³⁹ Third, the court explained that the requirement that the rezoning be in accord with a comprehensive plan, is necessary to ensure that the needs of the community at large are taken into consideration.⁴⁰ The court stated that the “thought behind the requirement is that consideration must be given to the needs of the community as a whole.”⁴¹

The New York Court of Appeals, in *Asian Americans for Equality v. Koch*, reaffirmed the *Udell* requirement, holding that in order to determine the sufficiency of the plaintiffs’ claim, it must be shown that the municipality failed to follow a comprehensive and well-considered plan.⁴² The court stated that a “court may satisfy itself that the municipality has a well-

38. *Id.*

39. *Id.* at 471, 235 N.E.2d at 901, 288 N.Y.S.2d at 895. In addition, the court noted that “[w]hile these elements are important, the ‘comprehensive plan’ that the rezoning should not conflict with the fundamental land use policies and development plans of the community.” *Id.* at 472, 235 N.E.2d at 902, 288 N.Y.S.2d at 895-96.

40. *Id.* at 469, 235 N.E.2d at 900, 288 N.Y.S.2d at 893. The court stated that “in exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community.” *Id.* (citing *DeSena v. Gulde*, 24 A.D.2d 165, 265 N.Y.S.2d 239 (2d Dep’t 1965)).

41. *Id.*

42. *Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988).

considered plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies."⁴³ Therefore, presently, when a zoning ordinance is amended, a New York court decides whether it accords with a well-considered plan "by determining whether the original plan required the amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole as opposed to benefiting individuals or a group of individuals."⁴⁴

II. WHEN DOES A REZONING CONSTITUTE A TAKING?

A. Regulation Goes Too Far

The Supreme Court has long held that a land use regulation constitutes a "taking" when it "does not substantially advance legitimate state interests,"⁴⁵ or "denies an owner economically

43. *Id.* at 131, 527 N.E.2d at 269, 531 N.Y.S.2d at 792 (1988) (citing *Udell*, 21 N.Y.2d at 470-72, 235 N.E.2d at 901-02, 288 N.Y.S.2d at 894-95).

44. *Id.* See *Los-Green, Inc. v. Weber*, 156 A.D.2d 994, 548 N.Y.S.2d 832 (4th Dep't 1989). The *Weber* court annulled a rezoning as arbitrary and not in accordance with a comprehensive plan by finding that prior to the rezoning of the subject parcel, no report or recommendations were made that such parcel be rezoned. *Id.* at 994, 548 N.Y.S.2d at 833. The court concluded: "In sum, the record contains no evidence that the Town Board considered a specific comprehensive plan in rezoning the subject parcel, and Supreme Court correctly concluded that determination was arbitrary and capricious." *Id.* at 995, 548 N.Y.S.2d at 833.

45. *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978); *Seawall Assocs. v. City of N.Y.*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989).

viable use of his land.”⁴⁶ This rule is followed by the New York State courts.⁴⁷ Consequently, to state a claim that a plaintiff’s property has been taken, the complaint must allege that the zoning regulations do not substantially advance legitimate governmental interests or that they deny an owner economically viable use of its land.⁴⁸ In regard to the latter claim, the proper test in New York is whether a reasonable return on the property can presently be received by the owner.⁴⁹

B. Refusal to Process a Site Plan Application

Where a municipality has delayed issuance of a sought-after permit, or has hindered an applicant from obtaining the permit he or she seeks, established law mandates application of the law as it existed at the time the application for the permit was made.⁵⁰

46. *Penn Cent. Transp. Co.*, 438 U.S. at 138. See *Nollan*, 483 U.S. at 834; *Agins*, 447 U.S. at 260; *Seawall Assocs.*, 74 N.Y.2d at 107, 542 N.E.2d at 1065, 544 N.Y.S.2d at 549.

47. See, e.g., *Fred F. French Inv. Co. v. City of N.Y.*, 39 N.Y.2d 587, 596, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 10 (1976) (stating that zoning ordinances are unreasonable if they destroy, or effectively destroy, the economic value of property by denying the owner any reasonable money-making or other private use of the property by declaring such use unsuitable).

48. See *supra* notes 45-46 and accompanying text.

49. *McGowan v. Cohalan*, 41 N.Y.2d 434, 436, 361 N.E.2d 1025, 1027, 393 N.Y.S.2d 376, 378 (1976).

50. See *Dubow v. Ross*, 254 A.D. 706, 3 N.Y.S.2d 862 (2d Dep’t 1938). The Appellate Division, Second Department stated:

If it be found that public officials charged with the duty of issuing permits willfully withheld and refused to issue one to petitioner, and, in addition, misled and hindered him, to the end that if they had acted with reasonable promptness his permit would have been granted and he could have conducted the business so as to acquire a vested right prior to the amendment of the zoning ordinance, we are of the opinion that he would be entitled to the relief which he seeks.

Id. at 707, 3 N.Y.S.2d at 863-64; see also *Pittsford Plaza Assocs. v. Spiegel*, 66 N.Y.2d 717, 487 N.E.2d 902, 496 N.Y.S.2d 992 (1985) (stating that where a site plan application is denied, judicial review is limited to whether denial

This principle, first set forth by the Appellate Division, Second Department in *Dubow v. Ross*,⁵¹ has been reaffirmed by the Second Department,⁵² as well as by the New York Court of Appeals.⁵³

In *Dean Tarry Corp. v. Friedlander*,⁵⁴ the United States Court of Appeals for the Second Circuit explicitly rejected the notion that site plan approval is a mere formality. There, the court held that the plaintiff lacked a cognizable property right in having its plan approved because it was within the discretion of the planning board to reject plaintiff's site plan due to the plan's effect on the welfare and safety of the public.⁵⁵

More recently, the Second Circuit in *RRI Realty Corp. v. Incorporated Village of Southampton*⁵⁶ noted that, "the degree of scrutiny appropriate for federal courts . . . is less rigorous than that applied by state courts in determining whether such decision-making [by local governmental agencies] is arbitrary for purposes of violating state zoning law."⁵⁷ The court concluded that plaintiff had not been improperly denied a building permit because plaintiff failed to establish entitlement sufficient to constitute a property interest.⁵⁸

was arbitrary, capricious, or unsupported by substantial evidence); *Our Lady of Good Counsel Roman Catholic Church and Sch. v. Ball*, 38 N.Y.2d 780, 345 N.E.2d 338, 381 N.Y.S.2d 866 (1975) (holding that applicant who satisfied requirements for permit should not be penalized where unexplained delay by city agency occurred prior to amendment of statute).

51. *Dubow*, 254 A.D. at 706, 3 N.Y.S.2d at 862.

52. *James A. Klein Enters., Inc. v. Braatz*, 51 A.D.2d 1021, 381 N.Y.S.2d 304 (2d Dep't 1976).

53. *Our Lady of Good Counsel Roman Catholic Church and Sch. v. Ball*, 38 N.Y.2d 780, 345 N.E.2d 338, 381 N.Y.S.2d 866 (1975).

54. 826 F.2d 210 (2d Cir. 1987).

55. *Id.* at 213.

56. 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989).

57. *Id.* at 914 n.1.

58. *Id.* at 912.

C. Limited Imposition to Develop

In *Penn Central Transportation Co. v. City of New York*,⁵⁹ the Supreme Court established that a limited imposition on a plaintiff's right to develop the parcel that he owns does not constitute a "taking."⁶⁰ In that case, the Supreme Court ratified New York City's prohibition on the construction of a fifty-three story building on top of the Grand Central Station in the face of the City's claim that another tower would interfere with the comprehensive plan for preserving the landmark station.⁶¹

The Court implied that a "taking" does not occur where the regulation advances some public interest and falls short of destroying all economically viable use.⁶² Similarly, in *Agins v. City of Tiburon*,⁶³ the Court addressed a rezoning which preserved open space and limited residential development. In declining to find a "taking," the Court held that the ordinance did

59. 438 U.S. 104 (1978).

60. *Id.* at 130. The Supreme Court stated:

[T]he submission that appellants may establish a "taking" simply by showing that they have been denied that ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Id. at 130-31. See *Andrus v. Allard*, 444 U.S. 51 (1979). The Court stated that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66.

61. *Penn Cent. Transp. Co.*, 438 U.S. at 116-17.

62. *Id.*

63. 447 U.S. 255 (1980).

not prevent appellant from pursuing reasonable investment expectations; nor did it eliminate fundamental ownership.⁶⁴

Six years later, in *MacDonald, Sommer & Frates v. County of Yolo*,⁶⁵ the Supreme Court, in following the reasoning set forth in *Agins*, held that a municipality's refusal to permit a single intensive development desired by a property owner did not constitute a "taking," and it did not preclude less intensive development by the property owner.⁶⁶

In addition, the Second Circuit again rejected arguments that an alleged reduction in the return on an investment supports a "taking" claim. First, in *Sadowsky v. City of New York*,⁶⁷ the court stated that a "taking" will not necessarily be found even where the economic impact on the property owner is prohibited from the "most profitable or beneficial" use of his property.⁶⁸ In this regard, the crucial inquiry is not whether remaining use of the property would be profitable, but whether the property is sufficiently desirable to permit the sale of the property to another for that use.⁶⁹

Second, in *Park Avenue Town Associates v. City of New York*,⁷⁰ property owners alleged that the rezoning amounted to an unconstitutional "taking" because it deprived them of a

64. See *id.* at 262; see also *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (holding that refusal to permit intensive development as desired by property owner did not prevent less intensive development by landowner).

65. 477 U.S. 340 (1986).

66. *Id.* at 353. The Court held:

A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action.

Id. at 347.

67. 732 F.2d 312 (2d Cir. 1984).

68. *Id.* at 317.

69. *Id.* at 318.

70. 746 F.2d 135 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985).

“reasonable return” on their investment, as well as destroyed the economic value of the property.⁷¹ The court stated that a “loss of a profit—much less [a] loss of a reasonable return—alone [did not] constitute a taking.”⁷² Therefore, the court affirmed summary judgment in favor of the defendants.⁷³

Similarly, in *Pompa Construction Corp. v. City of Saratoga Springs*,⁷⁴ in applying the *Agins* formulation, the court emphasized that the key inquiry in determining whether a restriction of one’s property is so economically burdensome as to constitute a “taking,” is not whether the regulation allows the landowner to operate the property as “a profitable enterprise” but whether others “might be interested in purchasing all or part of the land” for permitted uses.⁷⁵

71. *Id.* at 137.

72. *Id.* at 139.

73. *Id.* at 141.

74. 706 F.2d 418 (2d Cir. 1983) (stating that key question regarding site of religious worship is whether it might be resold to religious groups, not whether place of worship in question could be profitable for plaintiffs).

75. *Id.* at 424.

D. Remedy For Property Deprivation

Monetary relief is the appropriate remedy to compensate a landowner where a regulation deprived him or her of all reasonable economic use of his property, even if that deprivation was temporary.⁷⁶ Such relief is also recoverable when the court finds that the regulation has effected a "taking."⁷⁷

III. VIOLATION OF THE EQUAL PROTECTION CLAUSE

A. Denial of Equal Protection

A violation of the Equal Protection Clause of the Fourteenth Amendment imposes liability on the municipality responsible for such violation.⁷⁸ In *Monell v. New York City Department of Social Services*,⁷⁹ the Supreme Court held that municipal entities are proper section 1983 defendants, and can be held liable for municipal policy made by its lawmakers absent immunity.⁸⁰ In

76. See *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 318 (1987) (holding that the Constitution requires compensation for temporary and permanent takings); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987). In *Wheeler*, a landowner who suffered a temporary regulatory "taking" was held to be entitled to "the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair value with the restriction." *Id.* at 271.

77. *First English Evangelical*, 482 U.S. at 318.

78. *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988) (holding that municipality is not immune from liability where found to have arbitrarily violated complainants' Fourteenth Amendment rights).

79. 436 U.S. 658 (1978).

80. *Id.* at 701.

addition, local officials are also subject to liability under section 1983 in their individual capacity.⁸¹

Pursuant to section 1983, a municipality is subject to liability if it was the municipality's "official policy" that led to plaintiff's injury.⁸² Accordingly, a municipality may be held liable under section 1983 for even a single decision by its properly constituted legislative body, because even a single decision by such a body constitutes an act or official government policy.⁸³

Relief under section 1983 is available if the action complained of involved a denial of equal protection, and the violation of the constitutional right is complete when the action took place.⁸⁴ In New York, pursuant to article 78,⁸⁵ an individual may initiate an

81. *City of Newport v. Fact Concepts, Inc.*, 453 U.S. 247 (1981) (holding that city officials are liable in their individual capacity pursuant to § 1983 for the cancellation of respondents' license).

82. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989) (stating that a municipality is not liable pursuant to § 1983 unless it was the "policy" or "custom" of the municipality that led to the constitutional violation); *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988). The court stated that a municipality is liable, provided that the alleged action "unconstitutional[ly] implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated [by the local governmental body] and [such policy statement, ordinance, regulation or officially adopted decision] caused the constitutional violation." *Id.* at 1303 (citing *Monell*, 436 U.S. at 690).

83. *See, e.g., St. Louis v. Praprotnick*, 485 U.S. 112 (1988) (stating that municipality is not liable unless plaintiff proves existence of an unconstitutional policy enacted by officials with the authority to make such policy); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986) (holding that municipality will be liable under § 1983 only for acts it officially ordered or sanctioned).

84. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (holding that plaintiff is entitled to relief where deprivation of protected property interest was finalized).

85. N.Y. CIV. PRAC. L. & R. art. 78 (McKinney 1981). Section 7803 provides that:

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

action in state court and seek traditional common law and statutory remedies available under state law under section 1983. The availability of these state remedies, however, does not preclude a remedy under the Federal Constitution.⁸⁶

To state an equal protection claim in a land use case, a plaintiff must allege that the local government treated the plaintiff's property differently than other property similarly situated, and that the different treatment had no rational relation to a legitimate state interest.⁸⁷ In a land use case, a complaint brought pursuant to section 1983, must allege the use of excessive and unreasonable regulation by the local New York State agency. In addition, it must allege that a "person" has deprived the plaintiff of a federal constitutional right, and that the person who deprived the plaintiff of that right acted under "color" of state law.⁸⁸

Under the equal protection standard of judicial review of a rezoning restriction, the New York State courts will invalidate

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Id.

86. *See generally Monell*, 436 U.S. 658.

87. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (holding that complainants who were deprived of special use permit for proposed group home for mentally retarded, were denied equal protection because mental retardation had no rational relation to denial of permit); *New Orleans v. Dukes*, 427 U.S. 297 (1976) (stating that city could have rationally chosen to eliminate newer businesses and instead retain older established businesses); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (holding that state may regulate interstate commerce of only certain products where the regulated products could be injurious to health).

88. *See, e.g., Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (stating that a complaint pursuant to § 1983 must allege that state officials were acting under color of state law).

the rezoning if it is arbitrary and does not bear a rational or substantial relationship to a legitimate governmental interest.⁸⁹ In New York, a plaintiff need not establish confiscation in order to prove discrimination.⁹⁰ Furthermore, if the zoning of plaintiff's property is found to have been discriminatory, plaintiff is then permitted to have a change in zoning in order to remedy that discrimination.⁹¹

B. Remedy For An Equal Protection Violation

A remedy for denial of equal protection is available in zoning cases, particularly where the purpose of the rezoning was not to implement a comprehensive plan, but to carry out the wishes of a small vocal minority of individuals.⁹² Where a lawsuit is brought directly under the Constitution, on the ground that the local regulatory action asserted under the police power is excessive and constitutes a "taking" under the Fifth and Fourteenth Amendments of the United States Constitution, money damages can be recovered.⁹³ But where the action is brought under section 1983, money damages can be recovered merely upon proof of a deprivation of rights under color of state law, such as in the

89. *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956) (stating that the concept of exclusive zoning must be examined only within the realm of regional needs and practical considerations).

90. *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

91. *See, e.g., Jurgens v. Town of Huntington*, 53 A.D.2d 661, 384 N.Y.S.2d 870 (2d Dep't 1976); *Vigilant Investors Corp. v. Town of Hempstead*, 34 A.D.2d 990, 312 N.Y.S.2d 1022 (2d Dep't 1970).

92. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (stating that a decision on a project based merely on the negative attitudes of neighbors is a violation of equal protection).

93. *Wilson v. Garcia*, 471 U.S. 261 (1985) (holding that monetary damages are proper where plaintiff was deprived of his civil rights by physically abusive police officer).

excessive use of police power in regulating land use, without the necessity of proving action which amounts to a "taking."⁹⁴

In addition, individuals whose federal constitutional or statutory rights are abridged may secure injunctive relief,⁹⁵ and attorneys' fees.⁹⁶ In 1980, the Supreme Court made it clear that the attorney's fee statute,⁹⁷ which pertains to section 1983 claims, is equally applicable in federal and state court section 1983 actions.⁹⁸

CONCLUSION

An amendment to a zoning regulation in New York will be found to constitute a "taking" when the amendment was not in accordance with a well-considered plan and the land use regulation does not substantially advance legitimate state interests, or when it denies an owner economically viable use of his land.⁹⁹ To determine whether a zoning ordinance or amendment is consistent with a well-considered plan, courts in New York consider whether the original plan was required for the amendment, the community's change and growth, and whether the amendment is calculated to benefit the community as a whole, as opposed to benefiting individuals or a group of individuals.¹⁰⁰ Monetary relief is the usual remedy where the

94. *See, e.g.,* First English Evangelical Church of Glendale v. County of L.A., 482 U.S. 304 (1987) (holding that compensation is mandatory where challenged regulation had been excessive).

95. *Burnett v. Grattan*, 468 U.S. 42, 55 (1984).

96. *Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Texas Teacher Ass'n v. Garland Sch. Dist.*, 489 U.S. 782 (1989); *Felder v. Casey*, 487 U.S. 131 (1988).

97. 42 U.S.C. § 1988 (1988). Section 1988 provides in pertinent part: "(b) In any action or proceeding to enforce a provision of sections . . . 1981-1983 . . . the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

98. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980).

99. *See supra* notes 44-48 and accompanying text.

100. *See supra* notes 37-41 and accompanying text.

land use regulation is determined to have been arbitrary or confiscatory.¹⁰¹

George Likourezos

101. *See supra* notes 76-77 and accompanying text.

