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Zoning--Equal Protection (Kennedy Park Homes Ass'n v. City of Lackawanna)

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Circuit's decisions and reasoning in *Dellapia* and *"Language of Love"* are in full concert with such state of the law.

ZONING — EQUAL PROTECTION

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect to use and occupation of private lands in urban communities.[89]

Inherent to the problem forseen by the Supreme Court in *Euclid v. Ambler Realty Co.*[90] is the difficult task of providing equal protection of the law to all citizens, and developing a viable community.[91] Current standards of equal protection demand a re-evaluation of zoning principles.[92] Discretionary powers of local governments have always created a deep concern about the constitutionality of zoning ordinances.[93]

Under this reasoning, it is significant that *Dellapia* did not involve an arbitrary postal inspection, but rather evidence obtained from the recipient. While Dellapia's prosecution would not, therefore, violate the *Jackson* rule, its vulnerability to a reasonable reading of *Stanley* would remain.

89 Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In this early case the Court approved a comprehensive zoning ordinance. The village of Euclid had adopted a zoning plan which was attacked as denying liberty and property without due process and denying equal protection of the law. It was considered a liberal and tolerant attitude compared to prior decisions of the period. *See* Ribble, *The Due Process Clause as a Limitation on Mutual Discretion in Zoning Legislation*, 16 VA. L. REV. 689, 699 (1930).

90 272 U.S. 365 (1926).

91 *See generally* Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 967 (1968). The difficulty lies in the relationship of economic and racial classes. Legislation which segregates economic classes by setting minimum building plots or minimum values of particular areas are subject to constitutional scrutiny as contradictory to traditional notions of equal protection. In Shelly v. Kramer, 334 U.S. 1, 20 (1943), the Court stated that "freedom from discrimination by the States in enjoyment of property rights" is imperative. When state action is inescapably adverse to the enjoyment of this right, the city must show a compelling government interest in order to overcome a finding of unconstitutionality. Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954); Adickes v. S.H. Kress & Co., 252 F. Supp. 140 (S.D.N.Y. 1966).

92 Different approaches to zoning have been used, all of which tend to discriminate economically and therefore racially:

(1) Minimum size building lots. See Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969). This article contains a discussion of the efficiency, desirability and possible alternatives of large lot zoning.

(2) Minimum floor space. See Note, *Zoning for Minimum Standards, The Wayne Township Case*, HARV. L. REV. 1051, 1057 (1953), for a discussion of the relationship of state police power (health, safety, morals and welfare) to citizens and certain zoning ordinances.

(3) Strict building codes which raise the cost of erection.

(4) Prohibition of multiple dwellings. See Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1062-68 (1963). *See also* Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317, 331 (1955).

93 In *Euclid*, a land owner questioned the constitutionality of a zoning ordinance

Furthermore, the clear division between state and private action has become blurred and in many instances what might be seen as a private or parochial development is labelled as state or state-supported action.[94] In establishing a denial of equal protection arising from municipal services furnished to white and black communities, it is not necessary to show actual intent or motive.[95] Last year, in *Kennedy Park Homes Ass'n v. City of Lackawanna*,[96] the city government was charged with denying equal protection of the law to minority groups of that city and violating the Civil Rights Act[97] and the Fair Housing Act of 1968.[98]

The court found the city to be not unlike many other urban communities. It was divided into three wards, the boundaries of which were defined in the city charter. The first ward contained 98.9 percent of the nonwhites living in Lackawanna. In contrast, the second ward

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which set minimum lot sizes, maximum heights and prohibited apartment houses. Although the court upheld the ordinance, it demanded that it not be arbitrary or unreasonable. 272 U.S. at 395. *See* Mandelker, *Delegation of Power and Its Function in Zoning Administration*, 1963 WASH. U.L.Q. 60.

94 *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), wherein the court explained

> [e]qual protection of the laws means more than merely the absence of governmental action designed to discriminate, . . . "we now firmly recognize the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willfull scheme."

395 F.2d at 931.

See also Jackson v. Goodwin, 400 F.2d 529 (5th Cir. 1968); United States *ex rel.* Seals v. Wirman, 304 F.2d 53, 65 (5th Cir. 1962). Both of these cases demonstrates the extent to which the court will go to discover the purpose to discriminate or intentional discrimination by state action. In *Seals* it was the systematic exclusion of Negroes from the grand and petit jury. In *Jackson* it was the action of prison officials who denied petitioners the right to receive Negro newspapers and magazines that was declared in violation of the prisoners' fourteenth amendment rights; See Comment, 45 MICH. L. REV. 733 (1947).

95 *See* Kennedy Park Homes Ass'n v. Lackawanna, 318 F. Supp. 669, 694 (2d Cir. 1970). The extensive testimony recorded by the lower court provided an excellent opportunity for this court to examine the complex problem and the effect of the city's actions on minority groups.

96 436 F.2d 108 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). *Compare* Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291, 295 (9th Cir. 1970) [hereinafter *SASSO*]. In this case a city-wide referendum on zoning changes was contested as being an arbitrary and unreasonable exercise of the zoning power. The court did not agree. It stated that the referendum was "far more than an expression of ambiguously founded neighborhood preference" and the court labelled the action as a "traditional right of direct legislation". *Id.* at 294. In Confederacion de la Raya Unida v. City of Morgan Hill, 324 F. Supp. 895, 897 (N.D. Cal. 1971), the court stated that it should not interfere except in the most extreme circumstances. In James v. Valtierra, 402 U.S. 137 (1971), the Supreme Court reversed a district court decision that a referendum on low-income housing violates the equal protection clause. The court felt that this procedure provides the community with a valid means to voice an opinion in the development of their community. The three dissenting judges felt that the California law, authorizing the referendum, singled out low-income persons and therefore presented a clear violation of equal protection guaranteed by the fourteenth amendment.

97 42 U.S.C. § 1983 (1970).

98 42 U.S.C. § 3601 *et. seq.* (1970).

had only one nonwhite and the third ward only 29. The first ward was described by the state planning studies[99] as containing very poor environmental and structual conditions not adaptable to residential housing. It was, therefore, proposed that new, low-density extensions into the third ward should begin. The proposal was met with concern over the overloaded sewer conditions, the need for new schools and the peoples' interest in protecting property values. The racial overtones were clear to the city government.[100] The Kennedy Park Homes Association then obtained a commitment from the Diocese of Buffalo to purchase a plot of land with a view to constructing a low-income housing development.

At this time, the Lackawanna Zoning Board of Appeals and the Planing and Development Board met and recommended a moratorium on all new subdivisions until the sewerage problem was solved.[101] It was also recommended that an area including the proposed low income Kennedy Park subdivision be held open to provide park and recreational facilities. Both recommendations were accepted, an ordinance was adopted, and Kennedy-Park Home Association and the Colored Peoples' Civic and Political Organization commenced this action. Although the moratorium ordinance was repealed, the Mayor refused to allow the subdivision to tie into the city's sewer system.

The court of appeals, agreeing with the lower court, held that the action of the city government and the entire situation in Lackawanna was clearly in violation of the equal protection clause and the rights guaranteed by Title VIII of the Civil Rights Act of 1968. Relying on *Burton v. Wilmington Parking Authority*[102] and *Reitman v. Mulkey*,[103]

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99 Actually three major studies were completed:
(1) The Model City application submitted by the City of Lackawanna to the Department of Housing and Urban Development; (2) The Master or Comprehensive Plan prepared by Patrick Kane of KRS Associates, Inc.; and (3) A study of Parks and Recreation for Lackawanna, prepared by the National Recreation and Parks Association. *See generally* Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305 (1955).

100 318 F. Supp. at 677. The first ward was considered by the Health Department as a "high risk area"; tuberculosis was twice as prevalent, and infant mortality was much higher than the other two sections. Crime rate was two and three times higher for adult and juvenile offenders respectively.

101 The sewerage problem was very real in Lackawanna as noted in the Council minutes over the prior decade. *Id.* at 680.

102 365 U.S. 715 (1961). *See* 6 L. Ed.2d 1302 (1961) for a complete discussion of the *Burton* case and race discrimination. In the *Burton* case, the Court had found the state of Delaware to be involved in racial discrimination when a parking building, owned and operated by the city, rented one of its store fronts to a restaurant that refused to serve food or drink to an individual solely because he was a Negro. For similar cases dealing with restaurants in city and federal airports, see Adams v. City of New Orleans, 208 F. Supp. 427 (E.D. La. 1967); Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960); Nash v. Air Terminal Services, 85 F. Supp. 545 (E.D. Va. 1949).

the court analyzed the plight of the first ward as a "specific authorization" and continuous encouragement of racial discrimination, if not almost complete racial segregation. The court was critical of the use of discretionary zoning powers.[104] They examined not only the immediate objective of the city's actions but also the ultimate effect and existing conditions in Lackawanna. Great weight was given to the trial court's determination. Viewing the man-made physical boundaries, the long history of containment of the first ward,[105] and finally the governmental acts concerning the Kennedy subdivision, the court had little difficulty in finding state-enforced discrimination.

In placing the responsibility on the state for providing decent living standards for all of its citizenry, the court continues to follow the trend set in recent decisions.[106] A state action will be subject to rigid scrutiny notwithstanding any constitutionally accepted purpose.[107] The gross disparity in providing municipal services,[108] as present in the *Kennedy* case, is clearly a denial of equal protection whether the disparity arises from intentional or purposeful discrimination.[109] The

103 387 U.S. 369 (1967). In the *Reitman* case, respondents sued under a California statute which forbade racial discrimination in all business establishments. *See also* Horan, *Law and Social Change: The Dynamics of the State Action Doctrine*, 17 J. PUB. L. 258, 281 (1968). CAL. CIV. CODE §§ 51, 52 (Deering 1960).

104 As a basis of comparison, the Supreme Court's reluctance in accepting zoning ordinances traces back as far as Welch v. Swasey, 214 U.S. 91 (1909). This early case held that a Massachusetts statute directly creating building heights in Boston didn't deny equal protection of the law to land owners. But in Eubank v. Richmond, 226 U.S. 137 (1912), the Court refused to uphold an ordinance establishing a minimum distance from building line to street line.

105 Lackawanna has only one bridge going into the first ward, and it is bounded on the west by the Bethlehem Steel Plant situated on Lake Erie and on the east by a series of railroad tracks. The Planning Consultant expressed it this way: "You have a tremendous pressure building up in your community on the part of the nonwhites to go across the bridge." 436 F.2d at 110.

106 *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), where the court stated that a city may not escape responsibility for placing its black citizens under a severe disadvantage which is unjustifiable. In the *SASSO* case, *supra* note 96, the court demanded that not only facilities be provided in conformity with the equal protection clause but also that they be provided as soon as they are provided for anyone else. *See generally* Oyma v. California, 332 U.S. 633 (1948); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

107 McLaughlin v. Florida, 379 U.S. 184 (1964). There the Court concluded that because of a strong public policy, state action in this area is subject to rigid scrutiny. *See also* Loving v. Virginia, 388 U.S. 1 (1967). In *Loving* the Court held that the equal protection clause demands that racial classifications be subjected to the most rigid scrutiny.

108 *See* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971). In *Hawkins* the court held that in order to establish a denial of equal protection arising from disparities in municipal services furnished to white and black communities it was not necessary that actual intent or motive be proved.

109 *Compare* Powell v. Power, 436 F.2d 84 (2d Cir. 1970). This case involved the voting rights of persons in a congressional primary. The court explained that uneven or erroneous application of an otherwise valid statute did not constitute a denial or equal protection unless it was intentional or purposeful discrimination.

courts continually strike out at subtle attempts to maintain a segregated society, even when it is camouflaged as a legitimate use of a city's police power. The trend is not to accept seemingly legitimate claims of city governments as valid on their face. The court on its own initiative searches into the depths of the problem to discover the true aim or effect of the zoning ordinance. When, as in *Kennedy*, the court discovers such a severe deficiency of equal protection, it will strike down the ordinance as unconstitutional.

SOVEREIGN IMMUNITY — ELEVENTH AMENDMENT[110]

The Second Circuit in *Matherson v. Long Island State Park Commission*[111] applied the landmark rule of *Ex parte Young*[112] that actions of a state officer may constitute a state action within the meaning of the fourteenth amendment and at the same time be of an individual character with respect to the eleventh amendment.[113] Thus, while the

110 In England the doctrine of sovereign immunity was based on the theory that the "King can do no wrong." But such an explanation has been specifically rejected in the United States. Langford v. United States, 101 U.S. 341, 343 (1879). Mr. Justice Holmes thought the doctrine to be based on "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polybank, 205 U.S. 349, 353, (1907). But this reasoning has now been discredited. For a jurisprudential criticism, see Borchard, *Governmental Responsibility in Tort, V*, 36 YALE L.J. 757 (1927). In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which led to the adoption of the eleventh amendment, a citizen of one state was permitted to maintain a suit against another state. The tenor of the opinion was that the idea of a sovereign has no place in a republican form of government. The states, however, concerned about being forced to pay huge war debts, were more interested in practice than theory, and, as a result, the eleventh amendment was shortly ratified. *See* Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 483-85 (1953).

111 442 F.2d 566 (2d Cir. 1971).

112 209 U.S. 123 (1908). United States v. Lee, 106 U.S. 196 (1882), established that federal officers were not protected by sovereign immunity where there is an unconstitutional deprivation of property. But on similar facts in Malone v. Bowdoin, 369 U.S. 643 (1962), the Court held that the doctrine was available. The Court there relied on Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), which is considered a modern-day extension of sovereign immunity. The rationale was that the Government should not be excessively interfered with in its ordinary duties. K. DAVIS, DAVIS ON ADMINISTRATIVE LAW 807-09 (1951); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 222-31 (1965). *See generally* Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484 *et seq.* (1962). *Larson* may be relevant to *Young* to the extent that it affects the concept of what constitutes an unconstitutional taking.

113 In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), the Court held that when an officer is acting under a law that is unconstitutional, he is not acting as an agent of the state and therefore the doctrine of sovereign immunity is not applicable. Prior to *Young*, however, a distinction had been made between an officer acting under a specified statute and an officer exercising discretionary powers under the general laws of the state. See Fitts v. McGhee, 172 U.S. 516 (1894); *In re* Ayers, 123 U.S. 443 (1887). *Cf.* Smyth v. Ames, 169 U.S. 466 (1898); Scott v. Donald, 165 U.S. 58 (1897); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894); Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Allen v. Baltimore & O.R.R., 114 U.S. 311 (1884); Poindexter v. Greenhow, 114 U.S. 270 (1884).