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COMMENTS

ZONING OUT DUE PROCESS RIGHTS: *W.J.F. REALTY CORP. V. TOWN OF SOUTHAMPTON*

Every day, property owners and developers across the nation call on municipalities to pass judgment on a dizzying array of applications for permits and variances—including connecting sewer lines, opening dance clubs, constructing heliports and breaking ground on subdivisions.¹ In every instance, the municipality must interpret and apply its zoning regulations and building and housing codes to the specific application in a uniform, non-arbitrary, and rational manner.² Failure to do so may result in liability for both equal protection and due process violations.³ As the New York State Supreme Court's decision in *W.J.F. Realty Corp. v. Town of Southampton*⁴ illustrated, how-

¹ See, e.g., *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990) (concerning heliport permit); *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197 (2d Cir. 1987) (regarding sewage disposal rates); *Zaintz v. City of Albuquerque*, 739 F. Supp. 1462 (D.N.M. 1990) (concerning dance hall permit); *W.J.F. Realty Corp. v. Town of Southampton*, N.Y. L.J., Dec. 16, 1997, at 29 (concerning application for subdivision), *rev'd* 1999 WL 343779, at *1 (N.Y. App. Div. May 24, 1999).

² See *HBP Assocs. v. Marsh*, 893 F. Supp. 271, 279 (S.D.N.Y. 1995) (stating in a case challenging a nine year moratorium on new sewer line hook-ups that "all persons similarly situated should be treated alike" and that governmental "authority [may not be] arbitrary, capricious or unreasonable . . . [but] must be shown to bear a rational relationship to a legitimate governmental objective") (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)).

³ See *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 999 (1st Cir. 1983) (holding owner's due process rights were violated by municipality's zoning changes, which were specific to plaintiff and led to freezing of plaintiff's property for fourteen years); *HBP Assocs.*, 893 F. Supp. at 279 (holding land owners' equal protection claims were valid with respect to an impermissible government moratorium on sewer line hook-ups).

⁴ N.Y. L.J., Dec. 16, 1997, at 29, *rev'd*, 1999 WL 343779, at *1. On appeal, the appellate division recognized the validity of equal protection causes of action in land use cases; it merely held that plaintiffs failed to establish their claim by legally suf-

ever, it is far easier for an aggrieved applicant in the Second Circuit to succeed on equal protection rather than due process grounds.⁵

The Second Circuit, in stark contrast to other circuits,⁶ requires that the plaintiff have a protected property interest in the benefit sought from the government, e.g., the zoning permit or variance at issue, to succeed on a due process violation claim.⁷ It can be virtually impossible, however, for an applicant to obtain a property interest in a permit or variance because the municipality has discretion to grant such permission.⁸ The court in *W.J.F.*

ficient evidence. See *W.J.F. Realty*, 1999 WL 343779, at *2. Hereinafter, the subsequent history of this case is omitted; the lower court and appellate decisions are referred to individually. The court referred to in the text is the New York State Supreme Court whose decision is the focus of this Comment.

⁵ See *id.* at 30; see also Stewart M. Wiener, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467, 1475 (1996) (stating that in the Second Circuit “[i]f an authority has discretion to deny the permit, there can be no ‘legitimate claim of entitlement’” and thus no due process violation) (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995)).

⁶ The Third Circuit has held that property ownership is a protected property interest worthy of due process protection. See *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 601 (3d Cir. 1995) (stating that “one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership”). The Tenth Circuit has held that a property owner has a protected property interest to be free from “fraudulent, arbitrary or capricious [zoning] action.” *Zuintz*, 739 F. Supp. at 1468; see also *Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990) (“Loss of use and enjoyment of . . . land deprived [the owner of] a property interest [which was] entitled to constitutional procedural due process . . .”).

⁷ See *Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) (reasoning “deprivation of a procedural right to be heard . . . is not actionable when there is no protected right at stake”); *RR Village Ass’n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir. 1987) (stating that a plaintiff must have a state created property right to proceed with a procedural due process claim). The Second Circuit utilizes a “strict entitlement test . . . which requires a plaintiff to demonstrate a ‘legitimate claim of entitlement’ to a benefit in order to establish a constitutionally protected property interest.” Wiener, *supra* note 5, at 1475 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The authority to deny an applicant’s permit can destroy any possibility that an applicant’s claim of entitlement will vest. See *id.* (citing *Zahra*, 48 F.3d at 681); see also *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996).

⁸ See *Gagliardi*, 18 F.3d at 193 (reflecting that if the “official action [is] discretionary, one’s interest in a favorable decision does not rise to the level of a property right entitled to procedural due process protection”) (quoting *RR Village Ass’n*, 826 F.2d at 1201–02); see also *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29 (holding that the defendant town had discretion to grant or deny a subdivision application, thus, *W.J.F. Realty* lacked the requisite property right necessary to succeed on the procedural due process claim); *Zahra*, 48 F.3d at 681–82 (refusing to recognize a constitutionally protected property interest in mere procedures for obtaining permits,

Realty held that because the plaintiffs lacked a "constitutionally protected property interest" in a favorable decision on their subdivision application, they were unable to establish such a due process violation.⁹ Therefore, as *W.J.F. Realty* demonstrates, such discretion can provide municipalities with blanket protection in the Second Circuit from due process claims, even when, as here, the municipality abuses its discretion by selectively treating the applicant differently based upon impermissible considerations.¹⁰

It is submitted that the *W.J.F. Realty* holding, while in keeping with the approach adopted by the Second Circuit,¹¹ is seriously flawed and sets a dangerous precedent. This holding provides municipalities sweeping immunity from due process violations through self-legislated discretion to grant or deny a particular application.

In Part I of this Comment, a brief background of the parties, the property, and the subject case will be presented. Part II will establish that the court properly held that the Town violated *W.J.F. Realty's* equal protection rights when it denied their application for an exemption from an environmental impact statement study. Thus, the court's decision should be affirmed on appeal.¹² Part III will argue that the court erred when it failed to find a violation of *W.J.F. Realty's* procedural and substantive due process rights. The court stated that the Town acted within its power when it refused to grant final approval of plaintiffs' subdivision permit application and when it denied plaintiffs' application for an exemption from the environmental impact

certificates, variances, and others).

⁹ *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. The appellate division refused to consider, inter alia, the supreme court's decision rejecting plaintiffs' due process cause of action. See *W.J.F. Realty*, 1999 WL 343779, at *1 (N.Y. App. Div. May 24, 1999).

¹⁰ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. With respect to a building moratorium, the Town was held liable for equal protection violations because it treated *W.J.F. Realty* differently than other landowners similarly situated. Despite the Town's impermissible actions, the court did not waiver in its approach to the due process claim and cited the lack of a protected property interest. See *id.*

¹¹ See, e.g., *Gagliardi*, 18 F.3d at 193 (stating that the plaintiffs lack property interest and, therefore, do not have procedural due process claim); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) (applying the entitlement test); *RR Village Assocs.*, 826 F.2d at 1201-02 (same).

¹² This case is presently on appeal before the New York State Appellate Division, Second Department, under docket No. 98-00965.

statement moratorium. Part III, however, will assert that plaintiffs, in fact, did have a protected property interest worthy of due process protection because they were "virtually assured" of receiving the benefit at issue. Finally, Part IV of this Comment will argue that the Second Circuit's strict entitlement test should be discarded in favor of the more equitable approach applied by other circuits.

I. BACKGROUND

Plaintiffs¹³ owned a 272.5 acre tract of undeveloped land located in the environmentally-sensitive Pine Barrens region of Suffolk County, New York.¹⁴ In 1985, W.J.F. Realty, seeking to develop the property, filed a subdivision application that the Town failed to approve within a reasonable time.¹⁵ W.J.F. Realty alleged that the Town's inaction on the subdivision application violated their due process rights in that the property was impermissibly frozen through a series of building moratoriums without providing notice and an opportunity to be heard.¹⁶ Con-

¹³ The plaintiffs were co-owners of the parcel. W.J.F. Realty Corporation, Inc., owned a majority undivided interest in the property. Walter Fried, a prominent New York attorney and a founding partner of Fried, Frank, Harris, Shriver & Jacobson, is president and a shareholder of the corporation. Reed Rubin, a stockbroker with Tucker Anthony Inc., owned the remaining undivided interest in the property. Mr. Rubin was not a shareholder of W.J.F. Realty, but rather he was a co-owner in his individual capacity. See Matthew Goldstein, *Developers Win Damages of \$7 Million, Award Assessed Against Town of Southampton*, N.Y. L.J., Dec. 15, 1997, at 1. For purposes of this Comment, the plaintiffs will often be referred to collectively as "W.J.F. Realty."

¹⁴ See *Refusal to Grant Exemption from Moratorium Constitutes Violation of Equal Protection Clause*, 12 N.Y. REAL EST. L. REP. 3 (1998) [hereinafter *Refusal*]; Mitchell Freedman, *Costly Order for Southampton: Must Pay Landowners \$13M for Halting Development*, NEWSDAY, Dec. 10, 1997, at A8.

¹⁵ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997 at 29.

¹⁶ See *id.* Plaintiffs received preliminary approval of their subdivision application in 1986. In 1987, the Town issued a negative declaration which relieved W.J.F. Realty from having to prepare a lengthy environmental impact statement. The Town found that the subdivision "would not have a significant effect on the environment." *Id.* at 30. The Town, however, "began to backtrack" and in 1989 enacted the first in a series of moratoriums on building in the pine barrens area of the town where plaintiffs' property was located. Goldstein, *supra* note 13, at 1; *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30. The series of moratoriums was lifted in June 1995 and the Town approved plaintiffs' subdivision after radically altering it in September of 1995. See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. The Town only approved plaintiffs' subdivision request on September 7, 1995, after the moratoriums had been declared "excessive and unconstitutionally void" as to duration and an

sequently, W.J.F. Realty brought suit against the Town of Southampton alleging, inter alia, that the Town deprived them of their equal protection and procedural and substantive due process rights.¹⁷

W.J.F. Realty premised their equal protection violation claim on the grounds that once the Town enacted the series of moratoriums and began to conduct a "western generic environmental impact statement" ("WGEIS"), the Town denied W.J.F. Realty an exemption from the WGEIS study for impermissible reasons, while granting exemptions to other similarly-situated property owners.¹⁸ W.J.F. Realty argued that the Town "sterilized" their property when, in an effort to preserve the property using state funds, the defendant denied the exemption application.¹⁹

"invalid exercise of regulatory power" in an August 1995 separate action seeking, inter alia, declaratory judgment. Plaintiffs-Respondents Brief at 45, *W.J.F. Realty v. Town of Southampton*, N.Y. L.J., Dec. 16, 1997, at 29 (No. 98-00965); see also *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30. On appeal, the New York Appellate Division, Second Department, dismissed as moot *W.J.F. Realty's* summary judgment action which sought to have the moratorium declared unconstitutional because the Town had lifted the moratorium. See *W.J.F. Realty Corp. v. Town of Southampton*, 659 N.Y.S.2d 81, 82 (App. Div. 1997). Thus, the trial court's finding of unconstitutionality was still valid with respect to plaintiffs' remaining causes of action, including the due process and equal protection claims discussed herein. See Brief of Plaintiffs-Respondents at 45, *W.J.F. Realty v. Town of Southampton*, N.Y. L.J., Dec. 16, 1997, at 29.

¹⁷ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. Plaintiffs leveled 11 causes of action against the Town, succeeding only on the ninth—the equal protection claim. See *id.*

¹⁸ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. W.J.F. Realty filed the exemption application on April 12, 1993. If approved, the Town would have been able to consider plaintiffs' still pending subdivision application before the WGEIS was completed. See *id.* at 30. The exemption application was denied on December 14, 1993. A Town Board member testified at trial that "he ordinarily would have voted to grant the exemption, [but] he was informed by another Board member prior to the vote that 'the money to purchase the property would be forthcoming shortly [from the Department of Transportation]' and [thus he] voted to deny the exemption." *Id.*

¹⁹ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29; see also *Refusal*, *supra* note 14, at 3 ("[T]he town board's decision to take into account the possibility that funding would be available for purchasing landowners' land was an impermissible denial of landowners' equal protection rights."). William Esseks, the attorney for the plaintiffs, said, "government cannot hold up development [of land] with the expectation that money will be found to acquire it, . . . to preserve property, [the government] should go out and buy it, not [legally] sterilize it." Freedman, *supra* note 14, at A8; see also Scott E. Mollen, *Developers Awarded \$7 Million Damages Against Town*, N.Y. L.J., Jan. 21, 1998, at 5 ("[T]own officials appeared to 'drag their feet'

The court held that the Town of Southampton violated W.J.F. Realty's Fourteenth Amendment equal protection rights, because it treated W.J.F. Realty differently than other similarly-situated property owners who sought exemptions from the WGEIS moratorium.²⁰ The court found that the Town's underlying objective was to "freeze" the property until such time as state funds were available to the Town to buy the property for preservation.²¹ As a result, the court awarded plaintiffs \$7.1 million.²²

while they began moving toward declaring the land to be environmentally sensitive and searched for financing to acquire the property").

²⁰ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. The plaintiffs had to prove, beyond a reasonable doubt, that "(1) they were selectively treated when compared with others similarly situated and (2) such treatment was based on impermissible considerations." *Id.* at 30 (citing *A.B.C. Home Furnishings v. Town of East Hampton, Inc.*, 947 F. Supp. 635, 646 (E.D.N.Y. 1996)); see also *W.J.F. Realty v. Town of Southampton*, 1999 WL 343779, at *2 (N.Y. App. Div. May 24, 1999) (same). The court held that the Town violated the plaintiffs' equal protection rights when it denied their WGEIS exemption application, and stated that the Town "clearly treated [that plaintiff] differently as compared to other applicants for exemptions from the WGEIS when members of the Town Board denied their application because funding to purchase their property was expected to be made available from the Department of Transportation." *Id.* The court further found that the Town's denial of plaintiffs' exemption application was "based on the impermissible consideration of facilitating the acquisition of [W.J.F. Realty's] property in violation of [its] constitutionally protected right to equal protection." *Id.* Other exemption applications submitted by "similarly situated applicants for projects in the same area" were granted. Michael B. Gerrard, *A Review of 1997 SEQRA Cases*, N.Y. L.J., May 22, 1998, at 3. The appellate division reversed the lower court by holding that the court "failed to consider whether the plaintiffs' property was similarly situated to other properties granted an exemption from the Town moratorium." *W.J.F. Realty*, 1999 WL 343779, at *2. The appellate court further stated that "not one of the other properties for which an exemption was granted is comparable to the plaintiffs' in any meaningful way." As such, the appellate division held that plaintiffs failed to establish an equal protection violation. See *id.*

²¹ See *supra* note 19 and accompanying text. The appellate division, however, held that the lower court erred in finding an equal protection violation because plaintiffs' property was not similarly situated in "any meaningful way" to others exempted from the WGEIS moratorium. *W.J.F. Realty*, 1999 WL 343779, at *2. Clearly, the appellate division substituted its own judgment for that of the supreme court when it decided what qualified as "similar." The supreme court, writing in general terms, based its holding on the "credible testimony of the witnesses and the exhibits introduced at trial" in finding that plaintiffs were "clearly treated differently as compared to other applicants for exemptions from the WGEIS." *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29 (emphasis added); see also *infra* note 62. Seventeen exemption applications were filed, 5 of which were for properties located in the same protected zone as plaintiffs' property, and all were approved but plaintiffs'. *Id.* The appellate division, however, without defining "similar," stated that the record was devoid of any properties which were similar and which were granted an exemption from the moratorium. See *W.J.F. Realty*, 1999 WL 343779, at *2; Michael

While finding the Town liable for equal protection violations, the court rejected plaintiffs' procedural and substantive due process violation causes of action.²³ The court held that because W.J.F. Realty lacked a "constitutionally protected property interest" in a favorable decision with respect to the subdivision application, plaintiffs were unable to establish such a violation.²⁴

Rikon, *The Pine Barrens Land Grab*, N.Y. L.J., June 23, 1999, at 3. The Appellate Division "provided no definitive standard in which one could objectively make such a comparison." *Id.* In addition, "remarkably absent from the appellate division's decision is any mention of the fact that the primary reason [the Town did] not grant[] [plaintiffs] an exemption from the moratorium was that the Town intended to acquire . . . the land." Rikon, *supra*. As such, the Town's denial of plaintiffs' exemption application, because it wanted to "acquire the property and need[ed] time to obtain acquisition funds, [was] an impermissible consideration," which violated plaintiffs' equal protection rights. *Id.*; see also *supra* note 17. Not only was plaintiffs' application the only one not approved, but the Town used the approval process as a "safety valve" when the moratorium came under attack. *Infra* note 62; see also *infra* note 70.

²² See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. The court began with an award of \$8,195,000.00 based upon the "essentially un rebutted" testimony of W.J.F. Realty's witness. It then deducted \$1,356,000.00, which represented the unrefunded amount plaintiffs received from a buyer during the moratorium period, who did not proceed to closing. The court then added \$325,499.54 to the award, which represented taxes paid by plaintiffs during the excessive moratorium, for a final figure of \$7,164,499.54. In addition, the court awarded 9% prejudgment interest and reasonable attorneys' fees. See *id.* The total damages may exceed \$13 million. See Freedman, *supra* note 14, at A8 (reporting that the final award should total between \$13.6 and \$14.1 million). The town of Southampton appealed this judgment and plaintiffs cross appealed with respect to the deduction of \$1,356,000.00 from the same. Plaintiffs also cross appealed the supreme court's rejection of their due process claims, among others. The appellate division, however, stated that the plaintiffs' notice of cross appeal was limited to the deduction in their award and so refused to consider any of their other issues. See *W.J.F. Realty*, 1999 WL 343779, at *1.

²³ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. Plaintiffs' due process causes of action were based upon the Town's lengthy series of moratoriums which effectively prevented the Town from making a decision as to the plaintiffs' subdivision application. Not until the court, in a separate action, held that the moratoriums were "excessive as to duration" did the Town act on the application. Even then, the Town did not approve W.J.F. Realty's application as submitted, instead altering it significantly and in a manner unacceptable to the plaintiffs. Further, final approval of the subdivision application was contingent upon plaintiffs being granted an exemption from the WGEIS study. As noted, the defendant denied the exemption application in violation of W.J.F. Realty's equal protection rights. See *id.* at 29.

²⁴ *Id.* at 30. The court stated that procedural due process requires that a property owner whose rights are individually affected by governmental action be given notice of the action and an opportunity to be heard at a meaningful time and in a meaningful manner. See *id.* (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-47 (1985)). Further, the court held that with respect to property regulations, no protected property interest arises unless there is "an entitlement to the

The court reasoned that when municipalities, and other regulators, have discretion in granting government entitlements and benefits, no property right exists in those entitlements unless conferral is "virtually assure[d]."²⁵ Therefore, because the Town had discretion under its own laws to grant or deny plaintiffs' subdivision application, the court concluded that plaintiffs' "interest in a favorable decision [did] not rise to the level of a property right entitled to procedural due process protection."²⁶ As for plaintiffs' substantive due process claim, the court summarily rejected it for the same reasons.²⁷

The court in *W.J.F. Realty* went a long way toward protecting the rights of property owners from the overreaching and unconstitutional actions of a well-intentioned, albeit misguided, municipality. Undoubtedly, the location of W.J.F. Realty's property, within the environmentally-sensitive Pine Barrens region of Suffolk County, made it a valuable parcel for preservation.²⁸

relief sought." *Id.* (citing *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192-93 (2d Cir. 1994)).

²⁵ *Id.* (holding that "[a]n entitlement to a benefit . . . arises 'only when the discretion of the issuing agency is narrowly circumscribed' as to virtually assure conferral of the benefit") (citing *Gagliardi*, 18 F.3d at 192).

²⁶ *Id.* The court reasoned that because the Town had wide discretion under its own laws to grant or deny plaintiffs' subdivision application, W.J.F. Realty could not rely on its application being approved, and therefore W.J.F. Realty had no property right to a favorable decision. *See id.* (citing *RR Village Ass'n Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir. 1987)).

²⁷ *See id.* (holding that in order to "support a substantive due process claim, a party must first establish the existence of a property interest in the benefit issue which would be entitled to constitutional protection"). Thus, having already found that plaintiffs lacked such interest, the court rejected this cause of action without a discussion of the merits of the allegation.

²⁸ *See id.* (stating the property was home to dwarf pines and was beneficial in its undeveloped state for groundwater protection). The property was "dotted with dwarf pine trees and used as [a] nesting ground for the endangered northern harrier, or marsh hawk." Goldstein, *supra* note 13, at 2; *see also* Mollen, *supra* note 19, at 5 (describing the environmental significance of the property). The marsh hawk is native to this region, "frequent[ing] open or marshy regions, and feed[ing] on frogs, snakes and other lower vertebrates." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 1385 (1993). Interestingly, whether the property ever was home to the harrier hawk is subject to debate. The only "evidence" of the presence of the hawk was in the form of an unsolicited letter written by a wildlife biologist to the Town in 1987. The Town made no mention of this letter, or the possibility that such hawks nested on plaintiffs' property, in its preliminary approval of plaintiffs' subdivision application. *See W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30. Despite that, "the preservation of the Pine Barrens is a commendable effort. However, . . . do[ing] so at the expense of the property owners

Regardless, however, of the merits of preserving plaintiffs' property from development, the Town did not have the right to treat W.J.F. Realty differently than other property owners similarly situated.²⁹ Therefore, the court properly held that the Town violated the equal protection rights of W.J.F. Realty. Although the court correctly found an equal protection violation, it steadfastly refused to hold that the Town violated the plaintiffs' procedural and substantive due process rights.³⁰

II. W.J.F. REALTY'S EQUAL PROTECTION RIGHTS

The Fourteenth Amendment of the United States Constitution guarantees that no person shall be denied equal protection of the law.³¹ The Supreme Court, in *City of Cleburne v. Cleburne Living Center, Inc.*,³² explained that the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."³³ In applying the Equal Protection Clause, absent a fundamental right or a suspect classification, the "rational basis test" is the proper measure of whether a party's equal protection rights have been violated.³⁴

would be unconstitutional." Rikon, *supra* note 21.

²⁹ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30.

³⁰ See *id.* at 30.

³¹ See U.S. CONST. amend. XIV; *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29 ("The Fourteenth Amendment of the United States Constitution and Article I § 11 of the State Constitution guarantee that no person shall be denied equal protection of the law."); see also *Hill v. Texas*, 316 U.S. 400, 406 (1942) (acknowledging that all states must respect equal protection of the laws); Joseph M. Pellicciotti, *The Constitutional Guarantee of Equal Protection in Canada and the United States: A Comparative Analysis of the Standards for Determining the Validity of Governmental Action*, 5 TULSA J. COMP. & INT'L L. 1, 1 (1997) ("The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution . . . prohibit[s] American government from denying persons the equal protection of the laws.").

³² 473 U.S. 432 (1985).

³³ *Id.* at 439; see also *Alexander v. Whitman*, 114 F.3d 1392, 1406 (3d Cir. 1997); *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995) ("The equal protection clause directs state actors to treat similarly-situated people alike."); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 68 (1998) ("The Supreme Court regularly articulates [a] theory of equality in its equal protection jurisprudence . . ."); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 679 (1997) (stating that the equal protection doctrine requires federal and state officials to have a valid reason for treating similarly situated individuals differently).

³⁴ See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (stating that the rational basis test requires that state action "be rationally related to a legitimate state interest"); see also *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating, with re-

In *W.J.F. Realty*, the court held that the Town denied W.J.F. Realty's application for an exemption from the WGEIS study so as to prevent its development while the Town sought funds to purchase the property.³⁵ Meanwhile, the Town approved the exemption applications of property owners similarly situated.³⁶ Thus, the court found the Town violated W.J.F. Realty's Fourteenth Amendment equal protection rights when it treated plaintiffs differently than others similarly situated, and that the Town based such treatment upon impermissible considerations.³⁷ The court found that the Town denied the plaintiffs' application "because funding to purchase their property was expected to be made available from the Department of Transportation."³⁸ Thus, the "Town Board's decision was based on the impermissible consideration of facilitating the acquisition . . . in violation of [the plaintiffs'] constitutionally protected right to equal protection."³⁹

The *W.J.F. Realty* court relied exclusively on *A.B.C. Home Furnishings v. Town of East Hampton*, a case from the Southern District of New York.⁴⁰ *A.B.C. Home Furnishings* held that a plaintiff establishes an equal protection violation when a defendant's "selective treatment was based on impermissible considerations, such as race, religion, [or] intent to inhibit or punish the exercise of constitutional rights."⁴¹ The impermissible considerations enumerated are not exhaustive, as evidenced by the

spect to equal protection claims, that "[a]t a minimum, a statutory classification must be rationally related to a legitimate governmental purpose"); Robert J. Hoperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework, and a Synthesis*, 51 WASH. U. J. URB. & CONTEMP. L. 1, 33 (1997) (noting that economic and social legislation are subject to minimal rational basis scrutiny).

³⁵ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29.

³⁶ See *id.*

³⁷ See *id.* The court, in two brief paragraphs, cited only one case—*A.B.C. Home Furnishings, Inc. v. Town of Southampton*, 947 F. Supp. 635 (E.D.N.Y. 1996)—as authority for its holding. See *id.*

³⁸ *Id.*

³⁹ *Id.* In reversing the lower court, the appellate division stated that the "credible evidence adduced at trial does not support the plaintiffs' contention that the Town's conduct was not in furtherance of legitimate governmental objectives." *W.J.F. Realty*, 1999 WL 343779, at *2. Members of the Town board, however, indicated during trial that they *would* have approved the plaintiffs' exemption application had they not been told funding was being made available for its purchase in the near future. See Rikon, *supra* note 21.

⁴⁰ 947 F. Supp. 635 (E.D.N.Y. 1996).

⁴¹ *Id.* at 646.

court's use of "such as." Regardless, the Town of Southampton's actions fit easily under the language "intent to inhibit . . . the exercise of constitutional rights," since the Town denied plaintiffs' WGEIS exemption application so as to halt any possibility of development while it searched for funds to buy the property.⁴²

The *W.J.F. Realty* court soundly decided that the Town violated plaintiffs' equal protection rights. In *Pashcow v. Town of Babylon*,⁴³ the court held that whenever "persons engaged in the same business are subject to different restrictions or are given different privileges under the same conditions" such laws are violative of equal protection.⁴⁴ Further, in *Lockary v. Kayfetz*,⁴⁵ a case involving a challenge to a moratorium prohibiting new water hook-ups, the Ninth Circuit stated that a law "needs only some rational relation to a legitimate state interest."⁴⁶ The court went on to say, however, that the "rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary."⁴⁷ Moreover, the Supreme Court has made it

⁴² See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29; see also *Refusal*, *supra* note 14, at 3 ("[T]he town board's decision to take into account the possibility that funding would be available for purchasing [W.J.F. Realty's] land was an impermissible denial of landowner's equal protection rights.").

⁴³ 410 N.Y.S.2d 192 (S. Ct. 1976).

⁴⁴ *Id.* at 194; see also *Truax v. Corrigan*, 257 U.S. 312, 334 (1921) (stating that equal protection and security should be given to all under like circumstances in the enjoyment of their rights and "all persons should be equally entitled to pursue their happiness and acquire and enjoy property"); *Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) (holding that an equal protection violation claim requires plaintiff to "allege that similarly situated persons have been treated differently"); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 61 (2d Cir. 1985) (stating that it is "essential" that plaintiff allege others were treated differently than plaintiff).

⁴⁵ 917 F.2d 1150 (9th Cir. 1990).

⁴⁶ *Id.* at 1155 (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976)).

⁴⁷ *Id.* (citing *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409 (9th Cir. 1989)); see also *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *Armenadariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996) ("It is well established that a city may not enforce its zoning and land use regulations arbitrarily."); *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995) (stating that "[i]f the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy"); *Susan Haskins Ford Burns, Land Use*, 21 ENVTL. L. 1257, 1268 (1991) ("[T]he minimal requirements of the rational relation test cannot be met when the state action is malicious, irrational or arbitrary.").

clear that there is a "right to be free of arbitrary or irrational zoning actions."⁴⁸ In *W.J.F. Realty*, the court found that the Town denied W.J.F. Realty's exemption application from the WGEIS moratorium in an attempt to purchase that property with state money at a later date.⁴⁹ In this regard, the Town's actions were arbitrary and lacked any rational relation to a legitimate governmental interest.⁵⁰

III. PROCEDURAL AND SUBSTANTIVE DUE PROCESS

A. Procedural Due Process

The Supreme Court has held that procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.⁵¹ Furthermore, when a property regulation is enacted that alters the allowable uses of a specific property and affects the owner thereof on an individual basis, "individual notice" must be given.⁵² A property right worthy of procedural due process protection, however, does not stem

⁴⁸ *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977).

⁴⁹ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29.

⁵⁰ See e.g., *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1426 (9th Cir. 1996). The Ninth Circuit, without upholding or reversing on the issue, repeated the district court's jury charge that plaintiff must prevail if his "property [was] similarly situated, [he] received different treatment from the City, [and] no rational basis accounted for the differential treatment." *Id.*; see also Leon Friedman, *Substantive Scope of Liability Under Section 1983*, in *CIVIL RIGHTS LITIGATION 1983*, at 59, 75 (PLI Litig. & Admin. Practice Course Handbook Series No. 568, 1997) (stating that if "government treats similarly situated applicants for special use permits differently, [there] may be [an] equal protection violation").

⁵¹ See *Londoner v. Denver*, 210 U.S. 373, 386 (1908); *Tonie M. Franzese-Damron, United States v. James Daniel Good Real Property: Pre-Hearing Seizure of Real Property in Civil Forfeiture Cases 1994* DET. C.L. REV. 1293, 1301 (1994) ("The . . . prevailing general rule [is] that absent exigent circumstances procedural due process requires notice and a meaningful opportunity to be heard."); Robert Heckel, *The Manoa Valley Era*, 19 U. HAW. L. REV. 449, 461 (1997) ("To defeat a procedural due process claim, a governmental entity need only show that notice and an opportunity to be heard at a meaningful time and in a meaningful manner were provided before the deprivation of . . . a significant property interest.").

⁵² See *Schroeder v. City of New York*, 371 U.S. 208, 214 (1962) (requiring individual notice to property owners affected by the diversion of a portion of a river); *Walker v. City of Hutchinson*, 352 U.S. 112, 117 (1956) (requiring individual notice of condemnation proceedings to landowner of subject property); *Harris v. County of Riverside*, 904 F.2d 497, 505 (9th Cir. 1990) ("Individual notice is required . . . because the County specifically changed the zoning of [the] land . . .").

from the U.S. Constitution, rather, it is created by state and local law.⁵³ In the Second Circuit, “[w]here a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit . . . [unless] ‘the discretion of the issuing agency is narrowly circumscribed’ as to virtually assure conferral of the benefit.”⁵⁴

W.J.F. Realty alleged that the Town deprived it of its procedural due process rights by denying the 1985 subdivision application and the 1993 exemption application from the WGEIS moratorium.⁵⁵ Because the Town’s underlying objective was to prevent W.J.F. Realty from ever developing its property, so that it could be preserved, plaintiffs argued they should have been given notice and an opportunity to be heard.⁵⁶ In applying the

⁵³ See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests . . . are not created by the Constitution [but] are created . . . by existing rules . . . that stem from . . . state law.”); Eric Will Orts, *Tenants’ Rights in Police Power Condemnation Under State Statutes and Procedural Due Process*, 23 U. MICH. J.L. REFORM 105, 133 (1989) (discussing the reluctance to look beyond state law for protections of the due process guarantee); Wiener, *supra* note 5, at 1472.

⁵⁴ *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29 (citing *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994)); see also *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) (“Since the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise, the question of whether an applicant has a property interest will normally be a matter of law for the court.”).

⁵⁵ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. Interestingly, the court characterized the action the Town took on plaintiffs’ subdivision application as a “denial.” See *id.* The Town, in fact, approved the application, but only after the passage of more than ten years (plaintiffs filed their application in April 1985 and the Town approved it in September 1995), and only after the court in a separate action declared the Town’s development moratorium, which encompassed plaintiffs’ property, “excessive as to their duration.” *Id.* at 30. The Town’s suspect passage of plaintiffs’ application may have been an effort to mitigate damages in this suit, which had already been filed.

⁵⁶ See *id.* (“The Town Board’s decision was based on impermissible consideration of facilitating the acquisition of plaintiffs’ property . . .”). Furthermore, the “hold on Plaintiffs’ property was unilaterally imposed by the Town . . . without providing Plaintiffs with either notice or an opportunity to be heard. No hearing was ever provided to Plaintiff with respect to the hold.” Brief for Plaintiff-Respondent at 60, *W.J.F. Realty v. Town of Southampton*, N.Y. L.J., Dec. 16, 1997, at 29 (No. 98-00965). In *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990), the court held that where a County knew a zoning change “exceptionally affected” plaintiff on an individual basis by severely altering “the permitted uses . . . of real property” plaintiff was entitled to individual notice. *Id.* at 504 (citation omitted). Similarly, the Town altered plaintiffs’ property rights by denying them any and all use of the property via its series of moratoriums with the underlying goal of acquiring the property for preservation. See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29. As such,

Second Circuit's "strict entitlement test,"⁵⁷ with respect to procedural due process, however, the court in *W.J.F. Realty* dispensed with this cause of action after virtually no examination of the underlying facts and circumstances.⁵⁸ The court held that because the Town had discretion under its own laws to grant or deny plaintiffs' various applications,⁵⁹ *W.J.F. Realty's* "interest in a favorable decision [did] not rise to the level of a property right entitled to procedural due process protection."⁶⁰ Thus, because *W.J.F. Realty* lacked a "constitutionally protected property interest," the court found that plaintiffs could not establish a procedural due process violation.⁶¹

It is submitted that the court's procedural due process decision was flawed with respect to plaintiffs' application for an exemption from the WGEIS moratorium, because plaintiffs possessed a protected property right in the benefit to be conferred by the Town. Recall that the court, in awarding equal protection damages to plaintiffs, held that the Town treated *W.J.F. Realty* differently from others similarly situated.⁶² With plaintiffs being the lone exception, the Town approved every application submitted for an exemption from the WGEIS moratorium.⁶³ According

the Town deprived plaintiffs of their due process rights by not providing any notice or right to be heard.

⁵⁷ See *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995); *Gagliardi*, 18 F.3d at 192 (defining the "strict entitlement test" as "a constitutionally protected property interest in land use regulation aris[ing] only if there is an entitlement to the relief sought by the property owner.") The Fourth and Sixth Circuits also adhere to this test. See Wiener, *supra* note 5, at 1475.

⁵⁸ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29 (citations omitted); see also Wiener, *supra* note 5, at 1482 (noting a Second Circuit decision involving the denial of a public water hook-up in which the court stated its "analysis [must] focus[] on whether the [plaintiffs'] demonstrated a 'clear entitlement to the approval' of the permit, specifically considering the degree of discretion possessed by the granting authority").

⁵⁹ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30. The court held that section 60.6 and former section 324-8B of the Southampton Town Code "conferred wide discretion" to grant or deny subdivision applications and exemptions from the WGEIS moratorium, respectively. *Id.*

⁶⁰ *Id.* (quoting *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir. 1987)).

⁶¹ *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30 (citing *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994)).

⁶² See *id.*

⁶³ See Brief for Plaintiffs-Respondents' at 41, *W.J.F. Realty Corp. v. Town of Southampton*, (No. 98-00965) ("Of the seventeen exemption applications filed with the Town, five of which were for property located within the 'core area' of the mora-

to the court:

[P]laintiffs were clearly treated differently as compared to other applicants for exemptions from WGEIS when members of the Town Board denied their application because funding to purchase their property was expected to be made available from [New York State]. The Town Board's decision was based on the impermissible consideration of facilitating the acquisition of plaintiffs' property in violation of their constitutionally protected right to equal protection⁶⁴

It appears that the only reason plaintiffs' WGEIS moratorium exemption application was denied was for an unconstitutional undertaking—to "facilitat[e] the acquisition of plaintiffs' property."⁶⁵ The Town was in no way exercising legal discretion under their own local laws in denying plaintiffs their exemption. Indeed, the Town acted in contravention to the Constitution in denying the application.⁶⁶ If not for the Town's unconstitutional actions, plaintiffs' WGEIS exemption application would have been granted.⁶⁷ In the Second Circuit, when a local government possesses discretion to grant or deny a government benefit, a plaintiff cannot obtain entitlement to the benefit, worthy of due process protection, unless conferral of such benefit upon plaintiff is "virtually assure[d]."⁶⁸ Prior to the Town's decision, plaintiffs were "virtually assured"—as was every other applicant—of having the WGEIS exemption application granted.⁶⁹ Thus, because the court concluded plaintiffs' equal protection rights were violated when the Town treated them differently than others similarly situated, it is axiomatic that plaintiffs also would have been granted a moratorium exemption had the Town not acted impermissibly.⁷⁰ Regardless, because W.J.F. Realty was

torium, [as was plaintiffs' property,] each and every application was granted, excluding, of course, Plaintiffs' application. . . . Plaintiffs' application was the lone application denied by Appellants."); see also *supra* note 20 (discussing selective treatment).

⁶⁴ *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29.

⁶⁵ *Id.*

⁶⁶ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30.

⁶⁷ See *id.* (the court held that plaintiffs proved beyond a reasonable doubt that they were treated differently than those similarly situated); see also *supra* note 63 and accompanying text.

⁶⁸ See *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994); *W.J.F. Realty*, N.Y. L.J., Dec 16, 1998, at 30.

⁶⁹ *W.J.F. Realty*, N.Y. L.J., Dec 16, 1998, at 30.

⁷⁰ In fact, Southampton Town Councilman Douglas Penny testified that approv-

"virtually assured" of having their exemption application granted, the court should have recognized that plaintiffs had a constitutionally-protected property interest. Moreover, the court should have held that the Town violated W.J.F. Realty's procedural due process rights when it failed to provide plaintiffs with notice and an opportunity to be heard.⁷¹

With respect to plaintiffs' subdivision application, the Town effectively deprived plaintiffs of any opportunity to acquire a vested property right in the permit⁷² by refusing to act on the application for ten years.⁷³ Meanwhile, the Town simultaneously insulated itself from due process liability.⁷⁴ The Second Circuit's "strict entitlement test," which this court applied, seemingly only serves to encourage zoning boards and the like to act in the same manner as Southampton did.⁷⁵ The Town, because it had discre-

ing exemption applications acted as a "safety valve" for the Town in that the moratorium was in legal jeopardy. Brief for Plaintiffs-Respondents at 42, *W.J.F. Realty Corp. v. Town of Southampton*, N.Y. L.J., Dec. 16, 1997, at 29 (No. 98-00965). Penny voted against plaintiffs' application after being told by the town supervisor that money was soon to be available to purchase and preserve plaintiffs' property. *See id.*

⁷¹ *See generally Gagliardi*, 18 F.3d at 191; *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir. 1987) (stating that due process requires individual notice when a person's "legally protected interests are directly affected" and an "opportunity to be heard . . . before any deprivation of property occurs"). Even if the Town's discretion in granting or denying plaintiffs' exemption application was not "narrowly circumscribed" by its own laws, it seemingly was by its own acts. This is evidenced by the fact that the Town approved every application before it except for plaintiffs'. In fact, approval was virtually automatic. "[T]he question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." *Yale Auto Parts v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985). Consider again town councilman Douglas Penny's testimony that approving the applications acted as a "safety valve" for the Town once the moratorium came under fire. *See supra* notes 63 and 70 and accompanying text.

⁷² Discretion to grant or deny a permit on the part of a municipality undermines a procedural due process claim. *See Thomas E. Roberts et al., Land Use Litigation, Doctrinal Confusion Under the Fifth and Fourteenth Amendments*, 28 URB. LAW. 765, 772 (1996).

⁷³ Plaintiffs were granted preliminary approval, however, the Town then instituted its series of moratoriums. *See W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29.

⁷⁴ *See id.*

⁷⁵ *See Roberts, supra* note 72, at 775. "The problem with the entitlement test as the sole source of property rights is that a state is invited to do as it wishes with landowners in creating permitting processes. The more discretion, the greater the likelihood of immunity from action." *Id.* (emphasis added); *see also Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990). The Azizi plaintiffs were denied immigrant visas. The court stated that the plaintiffs did "not have an inherent property

tion to grant or deny plaintiffs' building permit, was afforded blanket liability protection, regardless of the fact that it abused such discretion through its excessively long moratoriums.⁷⁶ This rule places too much power in the hands of municipalities and leads to unfair results.⁷⁷

B. Substantive Due Process

The court erred further in rejecting plaintiffs' substantive due process cause of action. As with *W.J.F. Realty's* procedural due process claim, the court refused to consider the underlying facts of the action and simply held that "plaintiffs failed to establish a protectible property interest with respect to their cause of action for deprivation of procedural due process, [therefore], plaintiffs' cause of action for deprivation of substantive due process is also untenable on this ground."⁷⁸ Having argued above that *W.J.F. Realty* did, in fact, possess a protected property interest in the benefits sought, this section will proceed to discuss the merits of plaintiffs' substantive due process claim.

The Supreme Court, in *Village of Arlington Heights v. Metropolitan Housing Corp.*,⁷⁹ held that "arbitrary or irrational" regulations violate the substantive due process rights of property owners.⁸⁰ The Court subsequently stated that due process

right in an immigrant visa," and could not "prevail on their procedural due process challenge." *Id.*

⁷⁶ See *Gardner v. City of Baltimore*, 969 F.2d 63, 69 (4th Cir. 1992) (holding that because appellants possessed no cognizable property right to a permit, the municipalities' actions did not constitute a constitutional violation even if their decisions were motivated solely by arbitrary considerations). Further, the court stated that the permit could have been denied on non-arbitrary grounds, since plaintiff had no property interest, and this was sufficient to defeat any due process claim. See *id.*

⁷⁷ See *supra* note 75 and accompanying text.

⁷⁸ *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30. The court stated that a party must establish a protected property interest in the benefit at issue before proceeding with the heart of the claim—whether that interest was unconstitutionally violated. See *id.* (citing *Zahra v. Town of Southampton*, 48 F.3d 674, 680 (2d Cir. 1995)).

⁷⁹ 429 U.S. 252, 263 (1977). The Court stated that although the Village's decision to rezone may not have been arbitrary or irrational, the issue was one of equal rights. See *id.*

⁸⁰ *Id.* (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); see also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 5 (1974) (reaffirming the *Euclid* test—each person's right "to be free of arbitrary or irrational" zoning actions); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (recognizing a violation of plaintiffs' equal rights).

"demands . . . that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained."⁸¹ Further, substantive due process violations "impose liability for undue interference with the use of land . . . because the regulation itself is arbitrary, capricious, or unreasonable."⁸²

Clearly, the Town's actions in *W.J.F. Realty* interfered with plaintiffs' use of the land in an arbitrary and unreasonable manner. From the time plaintiffs filed their subdivision application in 1985 until it was finally "approved" in 1995, *W.J.F. Realty* was unable to utilize its property for its intended purpose.⁸³ The property was effectively "sterilized."⁸⁴ The Town's series of moratoriums, which the court had previously ruled to be "excessive as to their duration," denied *W.J.F. Realty*, on impermissible grounds, any opportunity to develop the land as the owners desired.⁸⁵ Furthermore, with respect to plaintiffs' exemption application from the WGEIS moratorium, the court held that the Town acted impermissibly in denying the application by treating plaintiffs differently than those similarly situated.⁸⁶ Thus, further arbitrary and unreasonable interference with plaintiffs' property was clearly established.⁸⁷ Therefore, the

⁸¹ *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980) (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)).

⁸² Kenneth B. Bley, *Use of the Civil Rights Act to Recover Damages in Land Use Cases*, SB14 ALI-ABA 261, 280 (1996); see also *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 599-600 (3d Cir. 1995) (reasoning that arbitrary action taken by a zoning board to deny a permit may be a substantive due process violation); *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (finding arbitrary and capricious zoning decisions may be violations of substantive due process); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) (holding that a refusal to grant a building permit for impermissible political reasons was a substantive due process violation); see generally *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (finding that an ordinance must "substantially advance" a legitimate state interest).

⁸³ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30.

⁸⁴ See *supra* note 18 and accompanying text.

⁸⁵ *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30; see also *Zaintz v. City of Albuquerque*, 739 F. Supp. 1462, 1469 (D.N.M. 1990) ("plaintiffs' [have a] right to be free from arbitrary or irrational zoning actions . . . by the principle of substantive due process").

⁸⁶ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 30.

⁸⁷ See *id.* In *Lockary v. Kayfetz*, 917 F.2d 1150, 1156 (9th Cir. 1990), the court held that refusal to allow a new water hook-up, based on the false argument that a water shortage existed, was a substantive due process violation. See *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331, 1338 (D.R.I. 1986), *aff'd* 836 F.2d 1340 (1st Cir. 1987) (holding that a three-year-old moratorium, which "could last indefinitely," was

court should have also held that the Town violated W.J.F. Realty's substantive due process rights.⁸⁸

IV. THE SECOND CIRCUIT'S "STRICT ENTITLEMENT TEST"

The "strict entitlement test" states that "a constitutionally protected property interest in land use regulation arises only if there is an entitlement to the relief sought by the property owner."⁸⁹ Further, a plaintiff has a claim of entitlement only when "there is a certainty or a very strong likelihood that the benefit would have been granted."⁹⁰ If the government agency involved has discretion to grant or deny the benefit, "there normally is no entitlement to that benefit," unless conferral of the benefit is virtually assured.⁹¹ Absent this protected property interest, there can be no procedural due process violation.⁹²

The Second Circuit's use of the "strict entitlement test"

unconstitutional because it deprived the plaintiff of substantive due process rights).

⁸⁸ See *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (holding that the plaintiff's substantive due process rights may have been violated where the zoning commission acted without good faith and with "political animus" when it denied plaintiff's permit, thus interfering with a protected property interest and possibly violating plaintiff's substantive due process rights). The Second Circuit has also held that where a protected property interest was established, an improper motive on behalf of a town in revoking the permit was violative of substantive due process. See *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995).

⁸⁹ *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) (delineating the factors required for a plaintiff to have a "legitimate claim of entitlement" to a particular benefit"); see also *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 919-20 (2d Cir. 1989) (holding that a landowner had no property interest in a permit because of "the discretion enjoyed by the issuing authority"); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 59 (2d Cir. 1985) (expressing that a "legitimate claim of entitlement" arises if "absent the alleged denial of due process, there is a either a certainty or a very strong likelihood that the [benefit] would have been granted").

⁹⁰ *Yale Auto Parts*, 758 F.2d at 59.

⁹¹ *Gagliardi*, 18 F.3d at 192; see *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1201-02 (2d Cir. 1987) (holding that if discretion lies with the government, "one's interest in a favorable decision does not rise to the level of a property right entitled to procedural due process protection").

⁹² See *Hartland Sportsman's Club v. Town of Delafield*, 35 F.3d 1198, 1199-200 (7th Cir. 1994) (stating that zoning disputes represent "infertile grounds" for due process challenges); *PFZ Properties v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991) (holding zoning decisions do not implicate violations of substantive due process); *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (noting that there can be no due process challenge absent a property interest in immigrant visa); *RRI Realty Corp.*, 870 F.2d at 918 (finding that the absence of a property interest precludes due process claims).

should be overturned to prevent results such as those reached in *W.J.F. Realty*. Certain cases serve to illustrate the need to prevent courts from becoming a de facto zoning board of appeals or arbiter of zoning disputes. For example, in *Gagliardi v. Village of Pawling*,⁹³ the plaintiffs alleged they had a protected property interest in the enforcement of zoning codes with respect to adjoining property. The Second Circuit, however, found no property right deserving of either procedural or substantive due process protection.⁹⁴ Although cases such as *Gagliardi* seemingly form the basis for maintaining the strict entitlement test,⁹⁵ this test also leads to abuses on the part of municipalities, which retain ultimate and unchecked discretion in granting or denying zoning permits.⁹⁶

For example, the Town of Southampton, after granting preliminary approval of plaintiffs' subdivision application, instituted a series of moratoriums and failed to act on the application again for a period of ten years.⁹⁷ It took a finding of unconstitutionality with regard to the moratorium's length for the Town to finally act.⁹⁸ Absent the judicial decree finding the moratoriums unconstitutional, the Town would never have had an incentive to act in light of the current state of the law in the Second Circuit. With the authority to grant or deny *W.J.F. Realty's* subdivision application firmly within its sole discretion, the Town could simply refuse to act indefinitely and remain free from liability for due process violations.⁹⁹

⁹³ 18 F.3d 188 (2d Cir. 1994).

⁹⁴ See *id.* at 192-93. The court refused to recognize the creation of a protected property interest in the enforcement of zoning laws with respect to adjoining property. See *id.*

⁹⁵ See *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996) (warning against federal courts becoming "zoning boards of appeal" and, therefore, requiring a valid property interest); *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995) (requiring entitlement test); *Great Atl. & Pac. Tea Co., Inc. v. Town of E. Hampton*, 997 F. Supp. 340, 350 (E.D.N.Y. 1998) (same).

⁹⁶ See *supra* note 75 and accompanying text; see also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (expressing concern that the Supreme Court would become a "zoning board of appeals" if federal courts recognized substantive due process claims with regard to protecting property interests); *Wiener*, *supra* note 5, at 1492.

⁹⁷ See *supra* note 55 and accompanying text.

⁹⁸ See *W.J.F. Realty*, N.Y. L.J., Dec. 16, 1997, at 29; see also *supra* note 16 and accompanying text.

⁹⁹ See *supra* notes 90-95 and accompanying text.

As evidenced by this case, when government action goes unchecked, the danger for abuse arises. The strict entitlement test “promote[s] the oppressive notion that freedom is a special benefit, to be granted or withheld at the whim of state and local government officials.”¹⁰⁰ Furthermore, the entitlement test “invites” government officials to treat property owners in any manner the officials desire.¹⁰¹ The Seventh Circuit stated critically, yet ominously, that the test means that “‘we may put your land in any zone we want, for any reason we feel like’ [and thus] abolish all property rights in land overnight.”¹⁰² The strict entitlement test seemingly violates the prohibition against governmental decision-making that is “arbitrary, capricious or unreasonable” and bears no “rational relationship to a legitimate governmental objective.”¹⁰³ Under the strict entitlement test a government apparently may, at its own self-legislated discretion, deny an applicant a permit for any reason it chooses, regardless of its arbitrariness, without creating a violation of that party’s property rights.¹⁰⁴ Certainly, however, the due process clause is “made of sterner stuff” and should not be marginalized through the operation of the strict entitlement test.¹⁰⁵

The importance of the due process clause in this context is obvious. “The Fourteenth Amendment, if nothing else, was

¹⁰⁰ Wiener, *supra* note 5, at 1490; see Randy E. Barnett, *A Ninth Amendment For Today’s Constitution*, 26 VAL. U. L. REV. 419, 426 (1991) (“Any society such as ours that purports to be based on a theory of limited government already assumes that legislation must be a proper exercise of government power.”).

¹⁰¹ See Roberts, *supra* note 72, at 775.

¹⁰² *Id.* (quoting *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994)); see also *Green v. McGuire*, 683 F.2d 32, 37 (2d Cir. 1982) (Oakes, J., concurring) (stating that “a state may extinguish the possibility of due process safeguards simply by labeling an interest as nonproprietary”).

¹⁰³ *HPB Assocs v. Marsh*, 893 F. Supp. 271, 279 (S.D.N.Y. 1995); see also *supra* note 2 and accompanying text.

¹⁰⁴ See *Zahra v. Town of Southold*, 48 F.3d 674, 681 (2d Cir. 1995) (finding no property interest in a building inspection); *Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1993) (finding no entitlement where action is discretionary); *RR Village Ass’n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir. 1987) (finding no property right where an official action is based on discretion); see also 8 DAVID A. THOMAS, *THOMPSON ON REAL PROPERTY* § 74.02(c), at 405 (Thomas ed. 1994) (stating that zoning laws enjoy a strong presumption of validity); Terry Rice, *Zoning and Land Use*, 47 SYRACUSE L. REV. 883, 911 (1997) (noting difficulty with land use substantive due process claims, since almost all such decisions are made with some discretion).

¹⁰⁵ See generally Roberts, *supra* note 72.

aimed at protecting the rights of individuals against states. If the states can so facilely and conclusively define those rights out of existence, the Fourteenth Amendment becomes, to a great extent, a dead letter¹⁰⁶

In place of the strict entitlement test, the approach taken by the Third Circuit in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*,¹⁰⁷ for example, should be adopted. In the Third Circuit, property ownership alone is a property interest worthy of due process protection from arbitrary zoning actions.¹⁰⁸ The *DeBlasio* court held that "in the context of land use regulation . . . where the governmental decision . . . impinges upon a landowner's use and enjoyment of property . . . plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached."¹⁰⁹ In effect, the Third Circuit requires that governmental land use decisions adhere to the rational basis test.¹¹⁰ In contrast, the Second Circuit is not interested in applying even this base level of judicial oversight to land use decisions, unless plaintiff has first passed the strict entitlement test.¹¹¹

In addition, the Ninth Circuit has held that where a municipality targeted a landowner's property for rezoning to restrict its use without providing individual notice, the "[l]oss of the use and enjoyment of his land deprived [the plaintiff] of no less a property interest" and entitled him to constitutional procedural due

¹⁰⁶ *Greene v. McGuire*, 683 F.2d at 37 (Oakes, J., concurring). Referring to the strict entitlement test, Judge Oakes also questioned "why 'liberty' or property interests for federal constitutional purposes must be so narrowly circumscribed." *Id.*

¹⁰⁷ 53 F.3d 592 (3d Cir. 1995).

¹⁰⁸ *See id.* at 600-01 (citing *Ersek v. Township of Springfield*, 822 F. Supp. 218, 221 n.3 (E.D. Pa. 1993)).

¹⁰⁹ *Id.* at 601.

¹¹⁰ *See id.*

¹¹¹ *See Wiener, supra* note 5, at 1479. Interestingly, the *W.J.F. Realty* court, in adhering to the Second Circuit's strict entitlement test, ignored long-standing case law in New York by holding that when a law "deprives the [land]owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process . . . it deprives him of his property, within the meaning of the constitution." *Forster v. Scott*, 32 N.E. 976, 977 (N.Y. 1893). The *Forster* court stated further that the "powers of government" with regard to land use decisions "are *always* subject to judicial scrutiny." *Id.* (emphasis added) (citations omitted).

process.¹¹² Furthermore, the New Mexico courts have stated that property owners have a "protected property interest in the commercial use of their property on an equal basis with others engaged in their type of business."¹¹³

Clearly, the circuits are split on this issue. Although the Supreme Court has done little to alleviate the dispute,¹¹⁴ in *Washington ex rel. Seattle Title Trust Co. v. Roberge*¹¹⁵ the Court said that the "right of [a landowner] to devote [his] land to any legitimate use is properly within the protection of the Constitution."¹¹⁶ The approaches taken by the Third, Ninth, and Tenth Circuits, for example, seek to give effect to the Supreme Court's words. Such an approach values property rights highly and should replace the Second Circuit's strict entitlement test, which can leave arbitrary governmental land use decisions unchecked.¹¹⁷

CONCLUSION

The court herein correctly held that the Town violated the plaintiff owners' equal protection rights when it denied their WGEIS moratorium exemption application for impermissible reasons. The court failed to recognize, however, that the Town also violated plaintiffs' due process rights. W.J.F. Realty possessed a protected property right to the benefit sought in that it was "virtually assured" of being granted an exemption to the WGEIS moratorium because the Town granted exemptions to all other applicants. Furthermore, the Town admittedly granted

¹¹² *Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990).

¹¹³ *Zaintz v. City of Albuquerque*, 739 F. Supp. 1462, 1468 (D.N.M. 1990) ("New Mexico law in general recognizes a judicial remedy for a property owner aggrieved by a fraudulent, arbitrary or capricious action of a zoning authority.")

¹¹⁴ *See Roberts*, *supra* note 72, at 776 (stating that the Supreme Court refused to settle this dispute among the circuits in 1995 when it declined to review conflicting circuit decisions); *Wiener*, *supra* note 5, at 1472 (noting that since 1928 the Supreme Court has not granted substantive due process protection to a property interest involving a claim of "arbitrary decision making in land use").

¹¹⁵ 278 U.S. 116 (1928).

¹¹⁶ *Id.* at 121; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (stating that parties have a "right to be free of arbitrary or irrational zoning actions"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (asserting that state and local authorities are to be given wide latitude with respect to zoning *unless* such regulations are "clearly arbitrary and unreasonable").

¹¹⁷ *See Roberts*, *supra* note 72 and accompanying text.

exemptions as a "safety valve" to their questionable WGEIS moratorium and the Town was held to have denied W.J.F. Realty's application based upon unconstitutional considerations with respect to equal protection. In the absence of such unconstitutional motives, the WGEIS moratorium exemption application was virtually assured of approval. Also, with respect to W.J.F. Realty's subdivision application, plaintiffs received preliminary approval only to be subsequently denied any due process for the next ten years. The Town of Southampton, by its own arbitrary and capricious actions, deprived W.J.F. Realty from acquiring the requisite protected property interest required under the strict entitlement test. The court's decision, and the strict entitlement test in general, unjustifiably serves to reward the Town for its actions and insulates it from due process liability by allowing it to hide behind a wall of self-legislated discretion.

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