1979

Monell v. New York Board of Social Services: New Liability for Land Use Regulators in Ohio - The Limits of Regulatory Power

James M. Speros
NOTE

Monell v. New York Board of Social Services: NEW LIABILITY FOR LAND USE REGULATORS IN OHIO—THE LIMITS OF REGULATORY POWER

Until June of 1978, an agency of local government making land use decisions could do so with the knowledge that any litigation regarding such decisions would, at worst, result in such decision being invalidated. Unless an aggrieved landowner sought monetary damages from the individual members of the decision-making board or agencies themselves, injunctive or other equitable relief was the only remedy allowed by the courts in challenges to land use decisions.

Then, in June, 1978, the United States Supreme Court decided Monell v. New York Board of Social Services. The 6-2 decision overruled the earlier holding of Monroe v. Pape and held that local governments are no longer wholly immune from liability for monetary damages in actions under section 1 of the Civil Rights Act of 1871, now section 1983 of title 42 of the United States Code.

Such decisions will typically involve zoning classifications and reclassifications (re zoning) and subdivision review and approval. This article will focus primarily on the impact of zoning decisions on the property owner or option-to-purchase holder, to the exclusion of others potentially affected. Litigation giving rise to civil rights liability for unlawful land use decisions is most likely to be raised by one in the position of an owner or option holder.

The term “landowner” or “property owner” will be used herein to refer to any person or entity which has a property interest in a parcel of land. Typically, a person in such an action will be a developer.

There has always been monetary liability imposed by statute upon a public official who denies, under color of state law, rights guaranteed by the federal constitution. 42 U.S.C. § 1983 (1976) (enacted 1871). But monetary damages, until recently, have been limited to that which an individual official could pay, and units of local government, with their “deep pockets,” were held not liable for monetary damages. Monroe v. Pape, 365 U.S. 167 (1961). See note 4 infra.

Under Ohio law, a challenge to the constitutionality of an entire zoning ordinance may be made pursuant to statute. Ohio Rev. Code Ann. ch. 2506 (Page 1972). A challenge to a decision regarding reclassification of a particular parcel is taken under chapter 2721. Id. ch. 2721. See Flair Corp. v. City of Brecksville, 49 Ohio App. 2d 77, 359 N.E.2d 459 (8th Dist. 1976) and authorities cited therein. The remedies provided by chapters 2506 and 2721 are exclusively declaratory in nature.

Federal rights of action under section 1983, see note 3 supra, for deprivation of constitutionally protected rights under color of state law had, until 1961, conceivably permitted recovery of monetary damages from a unit of local government. In that year, however, the Supreme Court held in Monroe v. Pape, 365 U.S. 167 (1961), that a municipality was not liable in a section 1983 action for monetary damages. Much litigation then proceeded under the theory that injunctive relief could be had against a municipality in such an action. This theory was dashed by the Court in City of Kenosha v. Bruno, 412 U.S. 507 (1973). What remained of section 1983 was thus not a cause of action against agencies of local government but rather a cause of action against the individuals acting as officials of those agencies. For these causes of action, successful plaintiffs could look to the officials as individuals for monetary damages pursuant to section 1983, as well as attorney’s fees. 42 U.S.C. § 1988 (1976). In Monell v. New York Board of Social Services, 436 U.S. 658 (1978), the Court expressly overruled Monroe insofar as municipal liability is concerned and implicitly overruled Bruno. See text accompanying note 20 infra.

Monell places decisions of local agencies regarding land use in an entirely new light. While the exact scope of local governmental liability is yet to be determined, land use decisions can no longer be made without consideration of potential financial consequences from this new civil rights liability. Local governments must be aware that this potential financial responsibility will make challenges to land use decisions far more attractive to landowners. Thus, local governments must pay particular attention to the specific limitations on their power to regulate land use control, for significant financial liability may now be imposed if these bodies exceed their authority and deprive an individual of a constitutionally protected right. This article will concentrate on the significance of Monell to local governments in Ohio.

I. THE ROAD TO MONELL

In Monroe v. Pape, the Supreme Court held that Congress intended to exclude municipalities and other units of local government from the reach of section 1983. The Court noted that the rejected “Sherman Amendment” to the legislation would have specifically placed local governments within the purview of the section and concluded from the rejection that Congress did not intend to place local governments within its reach. This position was reaffirmed in several subsequent cases.

Section 1983 thus became the basis for a cause of action against public officials in their individual capacities only, a cause of action which the Supreme Court apparently felt was sufficient to prevent wholesale violations of constitutional rights under color of law. This limitation, however, proved to be ineffective in the area of land use control for a number of reasons.

Litigation of any matter, even when the parties are desirous of a speedy

9 This statute reads:
Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, 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.
10 Congress’ doubts in 1871 about the constitutionality of a federal statute placing liability on an agency of local government proved to be unfounded. As noted in Monell, 436 U.S. at 690 n.54, the case of Milliken v. Bradley, 433 U.S. 267, 291 (1977), settled this issue adversely to local governments.
11 In Moor v. County of Alameda, 411 U.S. 693 (1973), Justice Douglas, the author of Monroe, suggested in his dissent that injunctive relief could still be asserted against a unit of local government. Id. at 722 (Douglas, J., dissenting). The Court waited less than a month before it rejected that suggestion in City of Kenosha v. Bruno, 412 U.S. 507 (1973), abandoning the bifurcated approach to the relief sought. The Court appeared overanxious to reach the result as the issue was neither briefed nor argued. In Bruno, Justice Douglas attempted to justify his approach by asserting that the reason for Congress’ decision not to adopt the “Sherman Amendment” to section 1 of the Civil Rights Act of 1871 was that it did not want to expose municipalities to potential “financial ruin” for their constitutional transgressions. 412 U.S. at 517-20. By 1976, it was merely asserted, with Monroe, Moor, and Bruno as authority, that counties were “excluded from liability in Section 1983.” Aldinger v. Howard, 427 U.S. 1, 17 (1976).
12 In Monell, the Court said:
Indeed, municipalities simply cannot “arrange their affairs” on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials would prohibit any such arrangement. And it scarcely need be mentioned that nothing in Monroe encourages municipalities to violate constitutional rights or even suggests that such violations are anything other than completely wrong.
resolution of the issue, takes time. To the landowner, any delay in proceeding with development proscribed by land use regulation can be fatal to the success of his development. Any plan for the improvement of land is based upon the perceived demand of the market for a particular type of development at a particular location at a particular time. If a landowner is forced to wait for several years for judicial review of a land use decision, he may find that the eventually approved plans are no longer marketable. A second problem with delay is that of inflation. Construction costs of all types have risen at a rate of at least one percent per month for the last several years. A successful landowner-litigant may therefore leave the courtroom, return to a site five or six years after original submission of development plans and find his development costs have nearly doubled. The new cost factors may well make the development financially infeasible. At the very least, delay makes the improvement costs of any development much greater.

A third problem for the landowner, particularly in the area of land subdivision, is the cost of money. Significant sums must be spent prior to the submission of plans for approval. Site acquisition, engineering studies, and plat preparation involve large sums of money. A five or six year delay in proceeding with a development which requires an initial one million dollar investment can cost the developer six hundred thousand dollars in interest. Another consideration is the cost of litigation itself, which, if it is extended, can result in attorney’s fees and costs of tens of thousands of dollars. While attorney’s fees may be deferred until the conclusion of the case, payment of court fees and other litigation costs cannot be so delayed.

Prior to Monell, even if a landowner was willing to incur the actual and consequential costs of litigation, he was not assured of an adequate recovery. Under Monroe, he could bring an action for damages against the public officials only as individuals; he was limited, as a practical matter, to a maximum recovery of the aggregate net worth of the individuals involved in denying him the right to use his land in a reasonable manner.

13 Backlogs of several years in civil dockets are all too familiar at the trial level; that appellate review may consume several additional years needs no documentation. See, e.g., United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975), where public opposition to a housing project proposed in 1969 ripened into litigation which did not finally dispose of the merits of the zoning provision until 1975. Litigation of the relief to be provided continues: on August 28, 1979 the United States Court of Appeals for the Eighth Circuit entered judgment in Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033 (8th Cir. 1979), reversing the lower court’s denial of equitable relief and remanding for still further consideration by the lower court. See also Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir.), cert. denied, 434 U.S. 1025 (1977), where plans submitted in 1971 have not received judicial approval to date, despite the court of appeals’ determination that the village probably had violated provisions of the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1976).

14 U.S. DEP’T OF HOUSING & URBAN DEVELOPMENT, FINAL REPORT OF THE TASK FORCE ON HOUSING COSTS 28 (1978) [hereinafter cited as TASK FORCE REPORT].

15 It is noted in Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033 (8th Cir. 1979), that during a construction delay of six years the costs of 108 apartment units increased from $1.3 million to $3.1 million. Because of this increase, the project became financially infeasible.

16 R. FISHMAN, HOUSING FOR ALL UNDER LAW 47, 55 (1978); NATIONAL COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 22 (1968); S. SEIDEL, HOUSING COSTS AND GOVERNMENT REGULATIONS 380 (1978); TASK FORCE REPORT, supra note 14, at 29.

17 TASK FORCE REPORT, supra note 14, at 28.

18 The aggregate net worth of land use regulators may be miniscule in relation to the amount of damages suffered by the wrongful denial of development permits.
Thus, except in extreme cases landowners faced with unreasonable demands of local officials, whether such demands were specifically stated in a development-control ordinance or not, were forced to comply with those demands. The cost of compliance was simply less than the cost and risk of litigation. Therefore, Monroe and its progeny placed local government in a strong bargaining position when controlling land use and development. If anything, Monroe encouraged, rather than discouraged, unreasonable and unconstitutional regulation of land use, because the remedies available were insufficient for redress of the denied rights. 19

The holding of Monell significantly altered the bargaining positions of the landowner and the land use regulator. A party is no longer limited to the individual worth of the land use regulator. Monetary damages are available from the local government itself under section 1983 where an action taken pursuant to official policy, ordinance, regulation, officially adopted decision, or governmental custom deprives any person of rights guaranteed under the constitution. 20

It seems that Monell will provide an effective remedy for an unconstitutional deprivation of land use rights. With public treasuries available as a source of monetary damages, parties should now be more willing to bear the risk of litigation and to challenge local land use decisions. Thus local governments 21 engaging in land use control must take great care that their decisions are within the bounds of established law if they wish to avoid civil rights liability under section 1983.

II. LIABILITY UNDER 42 U.S.C. SECTION 1983

To maintain a successful action under section 1983, a plaintiff must prove:

(1) that he has been deprived of a right, privilege, or immunity secured by the Constitution and laws of the United States; (2) that the defendants subjected plaintiff to this deprivation, or cause[d] him to be so subjected; and (3) that the defendants acted under color of any statute, ordinance, regulation, custom, or usage, of any State. . . . 22

Disputes concerning land use control are ripe for section 1983 action. The right to own, use and dispose of property is now recognized as a constitutional right, the denial of which can be redressed under that section. 23

19 R. Fishman, supra note 16, and the massive body of literature regarding exclusionary zoning and “snob” subdivision control cited therein bear witness to the discriminatory effects of excessive government regulation of the housing industry quantified by S. Semel, supra note 16. Neither Fishman nor Seidel answers the question of how much of the excess regulation could have remained in the code books had an effective remedy existed during the interim between Monroe and Monell.

20 436 U.S. at 690.

21 The term “municipalities,” as used by the Court to describe units of local government, was generic, rather than specific. It would appear from the discussion in Monell that “municipalities” means all units of local government, be they actually municipal corporations or agencies of state sovereignty under another name or with different powers. Id.


23 Until Lynch v. Household Fin. Co., 405 U.S. 538 (1972), it was unclear whether rights
protection includes unreasonable or confiscatory regulation of land, as well as any actions taken by political subdivisions which are clearly actions "under color" of state law. The key, therefore, to a successful section 1983 action is to establish that a regulation or decision is unconstitutional as unreasonable and confiscatory or that it was enacted without authority in law. If either of these positions is established, a number of remedies are available to plaintiffs.

Actual damages are recoverable in section 1983 actions. These damages are measured by traditional methods, i.e., damages which could foreseeably flow from the unlawful action. The full extent of recoverable damages after Monell has not been determined, but as litigation proceeds the exact outline of damages recoverable in land use cases will be developed. Under the law as it cognizable in a section 1983 action were only those personal rights within the privileges and immunities clause of the Constitution or whether proprietary and property rights could also be recognized. Lynch held unequivocally that property rights were cognizable, with even the three dissenters concurring as to that point. The Court commented: Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, in no less the right to speak or the right to travel, is in truth a "personal" right whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. Congress recognized these rights in 1871 when it enacted the predecessor of Sections 1983 and 1343(3).


24 In Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 399-400 (1979), the Court held, without significant analysis of the property-liberty distinction, that plaintiff landowners in a zoning case had stated facts in their complaint sufficient to give rise to a cause of action under section 1983. Lower courts had reached that conclusion in a number of cases. See, e.g., Harrison v. Brooks, 466 F.2d 404 (1st Cir. 1971); National Land & Inv. Co. v. Spector, 423 F.2d 91 (3d Cir. 1970); Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961); Alwin Constr. Co. v. Lufkin, 360 F. Supp. 1119 (D. Conn. 1973).

25 Evans v. Newton, 387 U.S. 296 (1967); Robinson v. Florida, 378 U.S. 153 (1964). In the area of land use control, there is little doubt as to the "state action" element, since any denial of the proposed use of real property could not occur unless the police power of the state, as delegated to the community, was asserted via a zoning, subdivision, or development regulation. Monell, however, made it clear that a community will not be held liable for the constitutionally tortious conduct of its officers on a respondeat superior theory, absent some official policy or custom commanding the action which deprives the plaintiff of his constitutional rights. 436 U.S. at 694.

26 Analysis of the unreasonableness or confiscatory nature of a land use decision or the authority in law to make such a decision or regulation in a section 1983 action would follow the same analysis as used in an action in state court for declaratory relief. Whether a particular land use decision will withstand either state or federal judicial scrutiny has been completely discussed in other works on the subject and will not be discussed further herein, except in regard to certain areas determined to be clearly outside the authority of certain local agencies. See Comment, Exclusionary Zoning: An Overview, 47 Tul. L. Rev. 1056 (1973); Comment, Exclusionary Zoning—Does a Zoning Ordinance with Racially Discriminatory Effects Violate the Constitution?—Metropolitan Housing Development Corp. v. Village of Arlington Heights, 7 Loy. Chi. L.J. 141 (1976); Comment, Exclusionary Zoning Challenged: New Hope for the Economically Deprived?, 59 Marq. L. Rev. 211 (1976).


28 Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033 (8th Cir. 1979); Kerr v. City of Chicago, 424 F.2d 1134 (7th Cir. 1970).

29 See 436 U.S. at 695.
now stands, such damages can be substantial. Injunctive relief and declaratory judgments are also available under section 1983.

III. IMMUNITY FROM SECTION 1983 ACTIONS

Although state and regional legislators and judicial officers are accorded absolute immunity from section 1983 actions when acting within the bounds of their authority, local legislators and administrative officers at all levels have a very limited immunity from civil rights actions. The generally accepted rule adopted by lower federal courts is that legislative and administrative officers of state and local government are immune from section 1983 actions if they act (1) in good faith, and (2) within the bounds of authority granted the official by law, and (3) in a manner which does not violate the clearly established constitutional rights of the persons with whom they deal. Thus if it is determined that a local official or board denied a

30 Attorney's fees, for example, may be awarded the prevailing party. 42 U.S.C. § 1988 (1976).
31 See Dombrowski v. Pfister, 380 U.S. 479 (1965); Hague v. CIO, 307 U.S. 496 (1939). Desegregation orders in school segregation cases are an example of the potential scope of injunctive relief. Equitable orders in land use cases may approach such wide scope if appropriate. Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033 (8th Cir. 1979).
32 This proposition appears not to have been seriously challenged. See Baker v. Binder, 274 F. Supp. 658 (D. Ky. 1967).
35 Lower federal courts, particularly the Sixth Circuit, have held that the immunity enjoyed by federal and state legislators does not extend to officials of local government, who enjoy only a qualified immunity. Burnett v. McNabb, 665 F.2d 398, 400 (6th Cir. 1977); Lynch v. Johnson, 420 F.2d 818, 821 (6th Cir. 1970); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958); Cobb v. City of Malden, 202 F.2d 701, 706-07 (1st Cir. 1953); Ka-Haar v. Huck, 345 F. Supp. 54 (E.D. Wis. 1972).
36 However, the question of local legislative immunity seems open at this juncture. In Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), the Court held that absolute immunity extends at least to regional planning officials. The Court declined to reach the issue of immunity of local officials. Id. at 404 n.26. It did indicate, however, that governmental liability pursuant to section 1983 may be independent of the immunity enjoyed by its officials. The Court stated:

There is no allegation in this complaint that any members of [Tahoe Regional Planning Agency's] governing board profited personally for performance of any legislative act. If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978).

Id. at 405 n.29. Thus, the immunity of any governmental official in a section 1983 action may be irrelevant to the issue of liability of the governmental agency itself. The precise issue of immunity for units of local government is now before the Supreme Court. Owen v. City of Independence, 589 F.2d 335 (8th Cir.), cert. granted, 438 U.S. 902 (1978).

Public officials are not, however, required to predict the future course of constitutional law. Procunier v. Navarette, 434 U.S. at 562.

O'Connor, Wood, and Scheuer were all specifically limited to the particular classes of public officials involved but followed the basic rule set forth in Scheuer and Wood. Thus, the rule first announced in Cobb v. City of Malden, 202 F.2d 701, 706-07 (1st Cir. 1953), adopted in Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958), and consistently applied thereafter, would seem to have the support of the Supreme Court inasmuch as the rule is consistent with O'Connor, Wood, and Scheuer.
landowner any constitutionally protected right of use in that land, the local official or board could escape liability only by asserting (1) that the actions were done in good faith, i.e., without personal animosity toward the landowner or without other improper motive; (2) that the actions taken were authorized by law; and (3) that court decisions clearly establishing limitations on authority and defining constitutional rights were observed. The second and third factors are of the greatest concern here inasmuch as, merged and summarized, they stand for the proposition that a public official must regulate within the limitations established by law to avoid liability.

Public officials engaged in the control of land use clearly must review, first, the authority granted to them to regulate and, second, limitations placed on that authority. These two factors must be adhered to if local governments wish to have available an effective defense to liability for the deprivation of the property rights of a landowner. It cannot be overemphasized that because of Monell an attempt to regulate the use of land without authority in law or in excess of the authority granted by law will result not only in the decision or regulation being nullified but may create section 1983 liability. Acting outside the authority granted by law is a particular concern for county and township government in Ohio, as their authority is strictly limited by statute.

IV. STATUTORY SOURCES AND LIMITATIONS OF POWER

Since the earliest zoning cases it has been axiomatic that the power to regulate the use of land is within the power of the state and must be delegated...
to local governments wishing to engage in zoning, subdivision regulation, and other land use control. Municipalities in Ohio enjoy a broad range of land use control powers. Non-charter municipalities are limited to powers defined by statute, while charter cities define the limits of their own powers, subject only to the general laws of the state and judicial definitions of the dimensions of the police power itself.

In sharp contrast to the broad powers of municipalities, counties and townships must operate within the powers delegated by the General Assembly. Thus, a power available to a charter municipality may not be available to a statutory political subdivision. These limitations take on a heightened importance since Monell, for an unauthorized action in the area of land use control could result in monetary liability.

A. Zoning

Although municipalities in Ohio are delegated powers of local self-government by the state constitution, unless the community has adopted a charter granting land use control powers, statutes limit both the extent of the police power and the method of exercising it to control the use of land. Nevertheless, the powers which a statutory municipality may exercise are broad and inclusive. While the statutes prescribe a mandatory procedure for adoption of any zoning ordinance, they also allow broad use of the powers...
to regulate land use,\textsuperscript{53} building height,\textsuperscript{54} building location and bulk, lot size and occupancy, and areas of open space.\textsuperscript{55}

Thus, non-charter municipalities enjoy comprehensive powers to regulate land use through zoning. If these statutory municipalities follow the procedures set by statute and do not attempt to regulate matters outside the scope of the statutes, they are, like charter municipalities, limited primarily by the general laws of the state and by judicial definitions of the scope of the police power.\textsuperscript{56}

Zoning in Ohio's unincorporated areas may be established by either counties or townships. Counties may enact zoning regulations for the unincorporated areas of the county,\textsuperscript{57} but a township may preempt county regulations by merely adopting zoning regulations of its own.\textsuperscript{58} Ohio statutes governing county and township use of the police power to control land use are nearly identical.\textsuperscript{59} Therefore, any discussion of a township's authority to regulate land use through zoning is, to the extent discussed herein, applicable to county rural zoning.

While townships may regulate a limited number of matters regarding land use,\textsuperscript{60} it is significant to note that the purposes the regulations may serve are also limited. Section 519.02 of the Ohio Revised Code\textsuperscript{61} permits townships to regulate zoning to promote "the public health, safety, and morals" only.\textsuperscript{62} This is a significant limitation in light of the expansive powers given to charter municipalities.\textsuperscript{63} Considerations such as aesthetic attributes, property values,
effect of development on schools and other city services, etc., while perhaps forming a valid basis for municipal zoning regulations, are not proper purposes for township zoning regulations. Such a limitation is significant in light of Monell.

Townships are specifically prohibited from regulating, through zoning, the use of land for the construction of buildings for agricultural purposes, the use of land or construction of buildings by public utilities, the sale or use of alcoholic beverages where restaurants or retail businesses are permitted, and the use of land for production of oil or gas by industry.

Furthermore, townships must concern themselves with what they may regulate. The statute authorizing zoning lists a variety of structures and matters which may be regulated. This list is finite, and so, too, is the extent of township power.

As we have seen, attempting to regulate matters outside the scope or extent of delegated power provides both a key to a successful section 1983 action and eliminates any qualified immunity defense on the part of local government. Therefore, in light of Monell, counties and townships which exceed their statutory powers in the area of land use control risk the imposition of substantial monetary damages under section 1983.

B. Subdivision Regulation

As noted earlier, municipalities in Ohio possess broad powers of local self-government, and they may adopt charters which define the limits of their powers. These include subdivision control powers within the municipality. County government exercises exclusive control over the regulation of subdivisions in unincorporated areas and derives its powers from the same statutes which empower non-charter municipalities. Counties, unlike

---

64 In practice, some Ohio courts have been less than meticulous in observing the limited delegation of zoning power to counties and townships but instead have merely recited the formula of "health, safety, morals and welfare" as permitting whatever regulation the court had decided it was going to uphold. There are exceptions, e.g., Burger v. Board of Trustees, 58 Ohio Misc. 21, 389 N.E.2d 866 (C.P. Medina County 1979); see Addendum: Zoning for Population Control, 23 Ohio Op. 2d 44 (1973) (discussing an unreported Montgomery County Common Pleas court decision), but the sloppiness in application of fundamental delegation of power principles is all too prevalent. See, e.g., State, ex rel. Keener v. Beer, 53 Ohio App. 2d 143, 372 N.E.2d 360 (6th Dist. 1976); P. & S. Inv. Co. v. Brown, 40 Ohio App. 2d 535, 320 N.E.2d 675 (7th Dist. 1974); Samsa v. Heck, 13 Ohio App. 2d 94, 234 N.E.2d 360 (9th Dist. 1967); State, ex rel. Bugden Dev. Co. v. Kiefaber, 113 Ohio App. 523, 179 N.E.2d 360 (2d Dist. 1960).


66 Id. § 519.02, quoted at note 60 supra.

67 See Yorkavitz v. Board of Township Trustees, 168 Ohio St. 349, 142 N.E.2d 655 (1957): At the outset it must be noted that the townships of Ohio have no inherent or constitutionally granted police power, the power upon which zoning regulation is based. Whatever police or zoning power the townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by the statute.

Id. at 351, 142 N.E.2d at 657.

68 See notes 44-49 supra and accompanying text.

69 Absent a charter provision granting subdivision control powers, however, chapter 711 of the Ohio Revised Code limits both the extent and use of the power to regulate platting. Ohio Rev. Code Ann. ch. 711 (Page 1978). Chapter 711, however, does not appear to limit a municipality's taxing or police power when such powers are exercised at the time of subdivision. Towne Properties v. Fairfield, 50 Ohio St. 2d 356, 364 N.E.2d 289 (1977).

municipalities, do not have taxing or general police powers, so the Ohio Revised Code defines and limits the use of county subdivision control powers.\textsuperscript{71}

Chapter 711 of the code distinguishes between \textit{platting}, the division of one lot into a number of sublots, and \textit{improvements} which may be required prior to the sale of, or construction on, sublots.\textsuperscript{72} The code does not authorize a planning commission to require improvements, or the assurance thereof, as a condition precedent to plat approval. It is only within the authority of the local legislature, \textit{i.e.}, the county commissioners or city council, to set standards for improvements and to establish approval procedures.\textsuperscript{73} This distinction is often clouded, for the code permits the local legislative authority to delegate the \textit{administration} of its improvements requirements to a planning commission.\textsuperscript{74} A planning commission, however, may only administer and enforce the improvements regulations established by the local legislative authority and may not adopt improvements regulations of its own.\textsuperscript{75} The

\textsuperscript{71} State, \textit{ex rel.} Foster v. Evatt, 144 Ohio St. 65, 56 N.E.2d 265 (1944); State, \textit{ex rel.} Bushnell v. Cuyahoga County, 107 Ohio St. 465, 140 N.E. 81 (1923); Elder v. Smith, 103 Ohio St. 369, 133 N.E. 791 (1921).

\textsuperscript{72} Chapter 711 of the Ohio Revised Code makes a number of provisions for both platting and requiring improvements. Section 711.01 provides that “[a]ny person may lay out a . . . subdivision . . . by having a plat of it made . . . .” \textit{Ohio Rev. Code Ann.} § 711.01 (Page 1976), but the remainder of the chapter imposes limitations on that right.

Section 711.041 requires approval of a plat by county commissioners when the lands involved are in an unincorporated area. \textit{Id.} § 711.041. Section 711.05 empowers county commissioners to adopt general rules governing plats and subdivisions and requires that trustees of the township in which the platted land is located be given notice of the filing of the plat for approval. \textit{Id.} § 711.05. Section 711.08 requires that plats involving land in a municipal subdivision be approved by the city engineer or legislative authority. \textit{Id.} § 711.08.

Where a municipal planning commission has adopted “a plan for the major streets or thoroughfares and for the parks . . . of a city . . . .” then the municipality may take advantage of section 711.09, which (1) empowers control of platting in unincorporated areas outside the city or village not governed by a county planning commission and (2) permits the adoption of rules and regulations governing plats to provide for the coordination of streets and open spaces with the community plan. \textit{Id.} § 711.09.

Similarly, where a county planning commission “adopts a plan for the major streets or highways of the county . . . .” then the county may take advantage of section 711.10, which permits the county to adopt rules governing the coordination of streets and open spaces with the county plan. This section also requires that notice of proposed plats be given to township trustees. \textit{Id.} § 711.10.

Section 711.101, applicable to all of the foregoing statutes, empowers the legislative authority of a municipality or county to establish “standards and specifications for the constructions of street lights, water mains, storm sewers, sanitary sewers, and other utility mains, piping, and other facilities . . . .” and further empowers the legislative authority to make installation of improvements which are shown on the plats a condition precedent to “the sale or lease of lots . . . or the issuance of a building permit . . . .” All such required improvements shall directly affect the lots to be improved or sold. \textit{Id.} § 711.101.

\textsuperscript{73} \textit{Id.} § 711.101 provides, in part, that the legislative authority of a municipality or county may adopt “rules and regulations . . . [establishing] standards and specifications for the construction of streets, curbs, gutters, sidewalks, street lights, water mains, storm sewers, sanitary sewers, and other utility mains, piping, and other facilities . . . .”

\textsuperscript{74} “Such rules and regulations may provide for the administration thereof by the regulating body or by a city, county, or regional planning commission having platting jurisdiction over the land affected . . . .” \textit{Id.}

\textsuperscript{75} In \textit{English, Inc. v. Koster}, 61 Ohio St. 2d 17, 390 N.E.2d 72 (1980), the subdivider was required by the planning commission rules to receive approval of a preliminary plat as a condition precedent to filing a final plat for approval. The rules further provided that the planning commission could consume 30 days in considering each. Section 711.10, however, requires the planning commission to approve or disapprove plats within 30 days and to note the approval
procedural limitations of chapter 711 must be strictly observed by counties because after Monell an unauthorized act by an agency of local government which denies a landowner constitutionally protected rights to use the land could result in substantial monetary liability under section 1983.76

Similarly, the purposes for which a planning commission may adopt rules under section 711.1077 should not be construed as authorizing a legislative authority to require such items as improvements under section 711.101.78 Plat-approval statutes such as section 711.10 have been uniformly held not to empower a community to require improvements or dedications but rather only to allow it to reject what it does not want.79

The sole authority, then, to require improvements is vested by statute in

or rejection on the plat itself.

English, Inc. delivered both preliminary and final plats of its subdivision to the Geauga County Planning Commission, which rejected the preliminary plat, taking no action on the final plat, as the commission did not consider the final plat properly before it. After more than 30 days had passed, English, Inc. sued to compel recordation and prevailed in both the common pleas and appellate courts.

The Ohio Supreme Court affirmed, holding that the 30 day period set forth in the statute was designed to prevent "bureaucratic obstructionism" and that any procedure which lengthened the review time could not be enforced. Significantly, the court held that the action of the planning commission to disapprove the preliminary plat would have been effective had the disapproval been noted on the plat itself. Because the disapproval was noted only in the commission's records, however, it was ineffective, and the plat was ordered recorded.

English, Inc. was denied the right to subdivide its land for two years by regulations adopted in excess of the authority granted by law, and it has been denied a use right in land without due process of law. Its damages for the two-year delay presumably would be recoverable directly from the Geauga County treasury, following a section 1983 action.

Thus, a seemingly minor procedural distinction, notation of disapproval on the plat itself, could have significant financial consequences.

76 The statutory requirements and limits in chapter 711 will be of lesser concern to municipalities, for their subdivision control powers can also be justified as an exercise of their general police and taxing powers. Counties, however, do not possess general police or taxing powers and must carefully observe the limitations in chapter 711 to avoid potential liability under Monell.

77 OHIO REV. CODE ANN. § 711.10 (Page 1976) reads, in pertinent part:

Any such county or regional planning commission shall adopt general rules . . . to secure and provide for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the county or regional plan, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light, air, and for the avoidance of congestion of population.

78 See note 73 supra.

79 Ohio Revised Code section 711.10 is similar in content and operation to sections 711.041 (approval of plat by county commissioners required); 711.05 (method of approval by commissioners; rules may be established); 711.08 (approval by city engineer); and 711.09 (method of approval by city or city planning commission; rules and regulations may be established). OHIO REV. CODE ANN. § 711.10 (Page 1976). Section 711.10 applies only to those cities and counties which have adopted "a plan for the major streets or highways" in the community.

Of the similar sections noted above, section 711.08 was the first to appear in the laws of Ohio, having been adopted in 1852 for the express purpose of "preventing the city from being compelled to care for streets which it does not want." Abraham v. Cincinnati, 13 Ohio Dec. 619 (C.P. Hamilton County 1903). This predecessor to the present subdivision-approval sections was not intended as a limitation upon the general power of the corporation for opening and improving streets, but as a restriction to prevent proprietors, who may lay out grounds into lots within the limits of the corporation, from vesting in the corporation the title to streets and alleys, and thus charging the corporation, without its consent, with the duty of keeping them open and in repair.

Wisby v. Bonte, 19 Ohio St. 238, 238 (1896) (syllabus para. no 2).

The planning function of the subdivision-approval statutes was recognized in 1908, by which time the predecessor to 711.09 had been adopted, by the Circuit (appellate) Court of Erie County

https://engagedscholarship.csuohio.edu/clevstlrev/vol28/iss2/5 12
the local legislative authority, and the improvements which can be required are those shown on the plat by the subdividee and noted in the finite list in section 711.101. The kinds of improvements also are limited to "improvements and facilities directly affecting the lots to be improved and sold."*

Another problem area for counties is that of pressures to provide other regulatory authorities, particularly townships, some substantive voice in subdivision review. The legislature, however, has chosen to place all authority for plat approval in the county planning commissions, and the authority may not be delegated. Nevertheless, township activity purporting to regulate platting and subdivision development (other than in areas within the zoning power) may cause difficulty for both townships and counties.

in Wagner v. Fitz, 33 Ohio C.C. (n.s.) 108 (Cir. Ct. Erie County 1908), where it was asserted:

The work of the platting commission is . . . very important. Its purpose is to provide uniformity and regularity in streets and alleys, so that they may not be narrow in one place and wide in another; so that they may be free from jogs, twists, and turns; so that they may be open at either end, and not in the nature of pockets and all those miserable contrivances we find in villages that are built up haphazard . . . .

Id. at 111.

The judiciary thus concluded the intent and purpose of the original subdivision-approval statutes was not to grant or limit the powers of municipalities but rather to limit subdividers, who theretofore had the power to unilaterally impose streets on a community by the mere expedient of platting them. The community acquired no power via the statutes to mandate an improvement or dedication; rather it acquired only the ability to decline to accept what was not considered in the public interest.

This holding was stated frequently before the legislature enacted the predecessor to present section 711.10 in 1935. See Bay v. United States Fidelity & Guar. Co., 24 Ohio App. 73, 156 N.E. 227 (8th Dist. 1926). Section 3586-2 of the General Code, enacted at 116 Ohio Laws 505 (1935), while in minor respects different from present section 711.10, contained identical language in that portion authorizing the adoption of rules . . . . to secure and provide for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the county or regional plan, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light and air, and for the avoidance of congestion of population.

116 Ohio Laws at 505.

This language is similar to that in other plat-approval statutes cited above.

80 See note 73 supra.

81 Ohio Rev. Code Ann. § 711.101 (Page 1976). An additional restriction on a county's power to require improvements is its lack of a general police power, which has been delegated to municipalities. This limitation has the potential for creating much difficulty for counties. For example, one common requirement in subdivision regulations is that utilities must be placed underground. This can be justified on public safety considerations. The lack of a general police power to justify such a requirement would prevent a county from lawfully requiring that all utilities be placed underground, although installation of utilities themselves could be required pursuant to section 711.101.

82 Intense township pressure on the General Assembly during the 1979 legislative session resulted in only an amendment to section 711.10 requiring notice of proposed plats to be sent to township trustees. Trustees may demand a public hearing prior to plat approval but may not appeal any approval to the common pleas court. Act of May 16, 1979, 1979 Ohio Laws 5-56.

It must be questioned, however, whether townships, particularly rural townships, are in a position to independently afford the planning expertise required for adequate review of proposed plats. The potential for "elitist and isolationist mischief," Simmons, supra note 42, at 627, would undoubtedly be greater at the township level than at the county or regional level.


84 Township "zoning" regulations setting standards for land subdivision are not uncommon. To the extent that these "zoning" regulations are met by a subdivider as a consequence of his
V. Judicial Limitations of Land Use Regulation

Municipalities enjoy far broader powers than do counties and townships in the area of land use regulation, chiefly because of broad, constitutionally delegated police powers. Nevertheless, the police power is not unlimited, and a community which exercises its police power within the area of land use control must do so within court-imposed limitations to avoid section 1983 liability.

The case law in Ohio regarding the extent to which the police power may regulate the use of land is neither clear nor consistent. Some guidelines do exist as to the extent to which the police power may justify a land use regulation.

A. Zoning

In one of the earliest Ohio zoning cases, City of Youngstown v. Kahn Brothers Building Co., the Ohio Supreme Court held that aesthetic considerations could not solely justify the use of the zoning power. The court stated:

The police power . . . is based upon public necessity. There must be an essential public need for the exercise of the power in order to justify its use. This is the reason why mere aesthetic considerations cannot justify the use of the police power. . . . It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the city needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for the use restriction upon property.

The holding that aesthetic considerations alone would not justify the use of the zoning power was the law in Ohio until 1968, when the high court, in State v. Buckley, held: “We think that aesthetic considerations can support these statutes, because interference with the natural aesthetics of the surrounding countryside caused by an unfenced or inadequately fenced junk yard is meeting county subdivision regulations, no problems should arise. Difficulty will arise, however, if a township refuses to issue a zoning permit (a prerequisite to building permits) for a lot in a new subdivision on the grounds that the subdivider did not meet a township “regulation” regarding subdivisions which is different in kind or amount than that required by a county. Such a denial would give rise to a cause of action under section 1983, and an innocent county could be drawn into the litigation if the subdivider or builder was refused building permits by the county for failure to present a township zoning permit.

85 See notes 44-55 supra and accompanying text.
86 112 Ohio St. 654, 148 N.E. 842 (1921).
87 Id. at 661-62, 148 N.E. at 845.
88 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968). Buckley involved a challenge to a state law which required junk yards outside municipalities to be fenced so that persons passing on adjacent roads could not view the interior. Buckley, a junk yard operator in Summit County, challenged the constitutionality of the law on the grounds that it was based solely on aesthetics.
generally patent and gross, and not merely a matter of taste." But those who would regulate in the name of aesthetics must recognize that the Buckley court intends a very limited use of such regulations:

This holding is not to be construed as a blanket approval of all regulations based upon aesthetics. Other jurisdictions have gone beyond the holding here and have held that it is within the power of the legislature to determine that a community should be beautiful. So large a step presupposes an exact definition of beauty which is acceptable to all tastes.  

Traffic control is also a concern of local land use regulators, for most large scale or commercial developments increase traffic hazards and nuisances in the area. However, traffic control may not be the sole justification for an exercise of the zoning power.

In State, ex rel. Killeen Realty Co. v. City of East Cleveland, the supreme court discussed the burdens of traffic which are the natural result of any development and concluded:

[T]raffic regulations must remain a byproduct of zoning activities, and the primary product must always be to insure the greatest enjoyment of one's land, taking into account the rights of others and the needs of the community. Thus, if the present proposal is otherwise lawful and proper, the public authorities must find some manner of dealing with the traffic hazards of Euclid Avenue other than by curtailing the use [of the land in question].

Local officials find it easy to justify their land use decisions to preserve economic benefits such as property values or to help the tax base. While politically appealing, these reasons for zoning are highly suspect from a constitutional viewpoint.

---

89 Id. at 132, 243 N.E.2d at 70.
90 Id. at 133, 243 N.E.2d at 70. Lower courts, however, have not followed this lead but instead have adopted the standard that a regulation validly may be based on aesthetics where what is to be prohibited has an appearance "in such gross contrast to the permitted uses of such zone as to be patently offensive." Sun Oil Co. v. City of Upper Arlington, 55 Ohio App. 2d 27, 30-31, 379 N.E.2d 266, 268 (10th Dist. 1977); P. & S. Inv. Co. v. Brown, 40 Ohio App. 2d 535, 320 N.E.2d 675 (7th Dist. 1974). Such a standard is no less vague than that rejected in Kahn; what is "offensive" remains a matter of taste. While fitting the facts of Buckley, this "standard" would allow a community to prohibit, for example, modern architecture in an area zoned for colonial-style houses or even a "greenbelt" area in a heavy industrial zone.
92 Id. at 386, 160 N.E.2d at 8. But see Wilcott v. Village of Beachwood, 175 Ohio St. 557, 197 N.E.2d 201 (1964), where the court declared it would defer to local legislatures on matters regarding "the control of traffic," thus creating an inconsistency which has not been resolved. Lower courts have, however, ignored Wilcott and have followed Killeen Realty. See, e.g., In re Ederer v. Board of Zoning Appeals, 18 Ohio Misc. 143, 248 N.E.2d 284 (C.P. Medina County 1969).
93 The source of this ill-advised "justification" for the police power may be the language in the zoning statutes discussed at note 62 supra and deleted by the General Assembly in 1957. But as the supreme court has noted: "There must be an essential public need for the exercise of the police power in order to justify its use." City of Youngstown v. Kahn Brothers Bldg. Co., 112 Ohio St. 654, 661, 148 N.E. 842, 845 (1921). And to paraphrase the court's words in Kahn, it is commendable and desirable but not essential to the public need that our desires for increased property values be gratified. This essential limitation of the police power is too often lost by lay
In Killeen Realty, the court discussed the use of the zoning power to support two economic benefits, one going to the landowner in a community in the form of increased or maintained property values and the other flowing to the community itself in the form of increased property taxes. The Killeen court specifically rejected the notion that zoning could be used to benefit landowners or business operators:

[W]e fully recognize the fact that constantly expanding concepts of zoning philosophies dictate that restrictions are no longer imposed simply to please the aesthetic taste and protect the economic investment of the next-door neighbor, and that wise zoning must be based on a wider interest than those of adjacent property owners. . . . [R]estrictions imposed must stop short of imposition as a means of establishing economic fiat as opposed to a mere limitation of land use.95

The impact of this statement was succinctly stated by the Cuyahoga County Court of Appeals in Willott v. Village of Beachwood: "Zoning classifications must be based on protection of the public health, safety and welfare and cannot be used for anyone’s economic advantage or by a municipality as a means of increasing its tax revenues."96 The Ohio Supreme Court, however, later reversed the judgment of the court of appeals in Willott, commenting that: "[W]here the council of a municipality makes a determination of land-use policy which involves . . . revenue which will be produced for the city . . . the courts are without authority to interfere."97 This unfortunate language, not incorporated into the syllabus, is obviously in conflict with the well-reasoned statement quoted from Killeen. If the supreme court’s Willott statement is authoritatively adopted, then landowners will find themselves at the mercy of the appraiser chosen by the local community, with property values or tax revenues as the sole justification for the use of the police power and the appraiser thus provided with the near plenary power to decree acceptable and unacceptable uses.

B. Subdivision Review

Litigation as to the permissible extent of subdivision regulations and exactions is sparse in Ohio. Yet as in other states where more or less planners and public officials when they regulate not for the public need but rather for the public “nice.” Id.

94 See notes 91-92 supra and accompanying text.
95 169 Ohio St. at 384-85, 160 N.E.2d at 7-8.
96 119 Ohio App. 403, 188 N.E.2d 625 (8th Dist. 1963), rev’d, 175 Ohio St. 557, 197 N.E.2d 201 (1964).
97 119 Ohio App. at 417, 118 N.E.2d at 634.
98 175 Ohio St. 557, 197 N.E.2d 201 (1964).
99 Id. at 559, 197 N.E.2d at 202.
100 The syllabus of an Ohio Supreme Court decision is the definitive statement of the law in a particular case. Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).
101 One may speculate that a major reason for the paucity of case law is that prior to Monell, subdividers simply could not afford to challenge unreasonable demands. See notes 13-19 supra and accompanying text.
102 Some state courts have sanctioned almost any kind of exaction from a subdivider, provided such an exaction has any reasonable relation to his activity. See Billings Properties, Inc.
latitude is given to local governments, litigation in this state has centered on the extent to which local governments can shift costs of a governmental nature on new residents via required improvements and exactions.

The supreme court has spoken only twice in the area, both times dealing with fees assessed on new residential lots to pay for purchases of recreational land. In *Towne Properties v. City of Fairfield*, the supreme court approved of a fifty dollar tax on new residential units, which was matched by an equivalent appropriation from the community general fund and used to purchase recreational land facilities. In *State ex rel. Waterbury Development Co. v. Witten*, the court struck down a thirty dollar tax, holding: "It does not appear that . . . the park fee, in the instant case, can be equated with the tax levied in *Towne*, which was a revenue measure imposed upon both developers and purchasers and present residents." Significant in the analysis of both *Towne* and *Witten* is the fact that the fees were not justified on police power grounds but rather on the power of municipalities to levy taxes. The only possible reconciliation of the cases leads to a conclusion that a tax may be imposed by a municipality on new residential lots to purchase recreational land provided that the proceeds from such a tax are matched with funds collected from the community as a whole.

Lower courts in Ohio have embraced the "Pioneer Trust doctrine" which limits the exactions or improvements which may be required of a subdivider to those "uniquely and specifically" attributable to the subdivider's activity. Requirements which sought to impose governmental costs on a subdivider or developer as the *quid pro quo* to plat approval have been invalidated. Thus the case law of Ohio limits the improvements which may

---

See note 103 supra.


105 In R.G. Dunbar, Inc. v. Toledo Plan Comm'n, 52 Ohio App. 2d 45, 367 N.E.2d 1193 (6th Dist. 1976), a city requirement that a developer dedicate land within a proposed subdivision for a major thoroughfare was invalidated. In McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d...
be required of a developer to those specifically attributable to his activity, and
exactions for the purchase of recreational land will be permitted only when
matched with funding from the general community.

VI. A NOTE ON REFERENDA

While the case of City of Eastlake v. Forest City Enterprises111 established
that an electorate has an absolute right to a final and perhaps mandatory voice
on land use decisions, such referenda may not completely insulate a community from section 1983 liability. There is case law since Eastlake which
indicates that the voter zoning decisions will not be accorded the deference
usually given such a determination when made by a legislative authority112
and that such decisions are more easily overturned as unconstitutional.

It also appears that where it can be demonstrated that the voters were
motivated by bigotry or other improper motive, that motive may be imputed
to the community as a whole.113 Thus, land use control officials may not be
able to use mandatory or permissive referenda as a means of insulating either
themselves or their communities from section 1983 liability.

VII. CONCLUSION

Monell v. New York Board of Social Services has significantly changed the
liability for local governments under section 1983 and requires local officials to
consider carefully the actions they take with respect to the civil rights of those
affected by their actions.

Those engaged in land use control must be particularly careful because the
damages which could arise from exceeding that authority and denying a
landowner his right of use of his property are likely to be large. Statutory
political subdivisions, i.e., counties and townships, have the added burden of
closely-construed powers derived solely from statutes. Both factors will
encourage litigation. Thus, the best defense to a civil rights action challenging
a land use decision is prevention of the action in the first instance through
careful examination of all regulations and practices of the regulatory agency
and careful attention to the limits of regulatory power.

JAMES M. SPEROS