New York Supreme Court
Appellate Division--Second Department

W.J.F. REALTY CORP. and REED RUBIN,
Plaintiffs - Respondents - Cross-Appellants,

- against -

THE TOWN OF SOUTHAMPTON, THE TOWN BOARD OF THE TOWN OF SOUTHAMPTON and THE PLANNING BOARD OF THE TOWN OF SOUTHAMPTON,
Defendants - Appellants - Cross-Respondents.

Docket No.: 98-00965

BRIEF OF AMICI CURIAE ENVIRONMENTAL DEFENSE FUND AND GROUP FOR THE SOUTH FORK

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Suffolk County Clerk's
Index No. 93-4906

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TREATISE

William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782 (1995)

The Environmental Defense Fund (EDF) and the Group for the South Fork (GSF) respectfully submit this brief amicus curiae urging the Court to reverse the judgment below.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The judgment entered by the trial court awarding over $14,000,000 to W.J.F. Realty Corp. and Reed Rubin (collectively, "WJF") is unprecedented in scope and size and threatens to undermine severely the ability of elected officials on Long Island and across New York State to carry out their difficult responsibilities in as fair and efficient a fashion as possible.

While there are other substantial grounds for reversing or reducing this award, this brief amicus curiae focuses on the constitutional issues raised by this case. Contrary to the trial court's ruling, which was based on only the most cursory analysis, WJF failed to establish a violation of equal protection. The trial court failed even to consider whether WJF's property was similarly situated to other properties in the community. The trial court also failed to determine whether this land use decision by the Town of Southampton ("Town") was motivated by the kind of invidiousness or irrational considerations offensive to equal protection. In addition, this extraordinary damages award is certainly not supported by WJF's separate taking or due process claims, which the trial court properly dismissed as a matter of law.

This award, if sustained, would severely chill the ability of local officials to do their jobs in a responsible fashion. In this case, the Town was faced with the challenge of devising a program to protect the Long Island Pine Barrens, an area the Court of Appeals has characterized as "an indispensable component of the aquifer system that is the sole natural source of drinking water for over two and half million inhabitants of Long Island." Long Island Pine Barrens Inc. v. Planning Bd. of Town of Brookhaven, 80 N.Y.2d 500, 508, 606 N.E.2d 1373, 1375, 591 N.Y.S.2d 982, 984 (1992). In addition, the Pine Barrens represent a rare and valuable ecological resource, providing critical habitat for threatened and endangered species. See id. The judgment below fails to reflect the magnitude of the challenge the Town, other communities, and New York State as a whole face in crafting an effective, fair, and affordable program to protect the Pine Barrens.

Finally, this multi-million dollar judgment in favor of WJF is fundamentally inequitable. The undisputed evidence demonstrates that WJF received substantial income from its property, notwithstanding the Town's moratorium, ultimately reaping more than it actually paid for the property while still retaining the 272 acres at issue in this case. In addition, WJF never properly availed itself of the opportunities available to obtain permission to develop this property. EDF urges the Court to overturn the judgment entered by the trial court.

POINT I

THE TRIAL COURT ERRONEOUSLY FOUND AN EQUAL PROTECTION VIOLATION WITHOUT CONSIDERING WHETHER WJF'S PROPERTY WAS SIMILARLY SITUATED TO PROPERTIES EXEMPTED FROM THE MORATORIUM AND WITHOUT DETERMINING THAT THE DENIAL OF WJF'S EXEMPTION PETITION WAS BASED UPON INVIDIOUS DISCRIMINATION OR IRRATIONAL DECISION-MAKING

In order to prevail on its equal protection claim, WJF was required to prove beyond a reasonable doubt that (1) it was selectively treated when "compared with others similarly situated" and that (2) "such selective treatment was based on impermissible considerations." A.B.C. Home Furnishings, Inc. v. Town of East Hampton, 947 F. Supp. 635, 646 (E.D.N.Y. 1996).[2] The trial court misapplied both prongs of this two-part test and, therefore, the judgment must be reversed as a matter of law.

First, the trial court neglected to consider whether WJF's 272 acres of property were similarly situated to other properties exempted from the town moratorium; without a finding that these parcels of property were similarly situated, disparate treatment of exemption applications alone could never have amounted to a denial of equal protection. Second, even assuming the subject property was similarly situated to exempted properties, the trial court erroneously concluded that the denial of WJF's exemption petition violated equal protection without determining whether the exemption denial was motivated by invidious or irrational considerations offensive to equal protection.

A. The Trial Court Erred In Its Equal Protection Analysis Because It Failed To Consider Whether WJF's Property Was Similarly Situated To Properties Exempted From The Moratorium.

The constitutional guarantee of equal protection did not require the Town to treat all development applications within the Long Island Pine Barrens identically. Equal protection law demands only similar treatment of similarly situated properties. See Piesco v. di Francesca, 72 Misc. 2d 128, 132, 338 N.Y.S.2d 286, 290-91 (1972). Dissimilarly situated properties may be subjected to disparate treatment without offending equal protection. See id. In this case, the trial court failed to establish the threshold condition for an equal protection violation because it failed even to consider whether WJF's property was similarly situated to other properties which were exempted from the town moratorium.

The trial court erred in this threshold task because it failed to compare the actual parcels of property exempted from the moratorium with the 272 acres at issue in this case. Instead, it concluded without discussion that WJF was "clearly treated differently as compared to other applicants for exemptions" from the moratorium. (R. 18). This conclusion that WJF's exemption was denied while others were granted did not begin to address the critical threshold question of whether the exempted properties were comparable to WJF's property.

The crux of the similarly-situated inquiry in the land-use context is whether the properties -- not the landowners -- are similarly situated. See Pesek v. Hitchcock, 156 A.D.2d 690, 691, 549 N.Y.S.2d 164, 165 (1989). Without a determination that its property was similarly situated as compared to the exempted properties, WJF's equal protection claim evaporates into a generalized allegation of disparate treatment, which, by itself, can never violate equal protection. See Cedarwood Land Planning v. Town of Schodack, 954 F. Supp. 513, 525 (N.D.N.Y. 1997) (equal protection claim based on denial of exemption from ordinance dismissed on summary judgment because no evidence offered of any "similarly situated" subdivision development applications); Elias v. Town of Brookhaven, 783 F. Supp. 758, 760 (E.D.N.Y. 1992) (equal protection claim dismissed on summary judgment because plaintiff asserted only "generalized allegations" that "town provided others 'in similar cases' with 'hardship relief' [from zoning ordinance] but did not do the same for him"). Even A.B.C. Home Furnishings, 947 F. Supp. at 646, which the trial court cited, dismissed the equal protection claim because the plaintiff, which was denied a permit, failed to pinpoint any similarly situated entity that was granted one. The trial court misapplied equal protection law, therefore, because the bare fact that WJF petitioned for, but was denied, an exemption did not mean WJF's property was similarly situated to those exempted from the moratorium.

In any event, even if the trial court had conducted the similarly-situated inquiry as required by the first prong of the selective treatment test, it would have been compelled to conclude that WJF's

property was not similarly situated to other properties. WJF's tract of 272 acres of undeveloped property was significantly larger in size and had significantly greater ecological values than the other properties. As the Town outlined in its December 14, 1993, Resolution denying WJF's exemption request:

[WJF's] site is one of the largest remaining undeveloped tracts of dwarf pine plains forest in the Central Pine Barrens area. The Natural Resources report dated October 4, 1993, which is incorporated herein, cites numerous rare and endangered species of vegetation, butterflies, snakes and birds that have been documented in the region. . . . All information submitted with regard to the subject property, together with the best data gathered up until now in connection with the generic impact study, indicate that the subject site is an integral and critical component of the larger central pine barrens ecosystem. . . . The proposed subdivision could lead to significant disturbance on the site and some potentially high intensity uses. There is potential for negative effects on the groundwater supply and on rare and endangered species.

(R. 6683). Furthermore, as the Town's brief on appeal documents in detail, the exemptions that were granted did not involve proposed development projects of the same type or scale as that associated with WJF's exemption petition. (Appellants' Brief, pp. 39-46). Thus, even if the trial court had considered whether WJF's property was comparable to the exempted properties, there was ample evidence in the record to conclude that WJF's 272 acres were not similarly situated.

B. The Trial Court Erred In Its Equal Protection Analysis Because Intent To Protect Property For Environmental Purposes Does Not Rise To The Level Of Invidious Discrimination Condemned By Equal Protection Law.

The trial court also erred in applying the second prong of the selective treatment test. Even if properties are similarly situated, disparate treatment, by itself, does not violate equal protection unless it is "invidious." DiMaggio v. Brown, 19 N.Y.2d 283, 290, 225 N.E.2d 871, 875, 279 N.Y.S.2d 161, 166 (1967) (scope of equal protection goes "no further than the invidious discrimination") (quoting Willliamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)). There was no demonstration in this case of the type of invidious discrimination necessary to support an equal protection claim.

The trial court concluded that the Town's denial of WJF's exemption application "was based on the impermissible consideration of facilitating the acquisition" of its property. (R. 18). But, contrary to the trial court's reasoning, disparate treatment based on alleged intent to acquire property for environmental preservation does not rise to the level of invidious discriminatory intent that must be proven to support an equal protection violation. See, e.g., Zahra v. Town of Southold, 48 F.3d 674, 684 (2d Cir. 1995) (even where plaintiff demonstrates selective treatment, must show treatment was based on impermissible considerations like race or religion, intent to trammel fundamental constitutional rights, or malice and bad faith); Lucas v. Planning Bd. of Town of LaGrange, 7 F. Supp. 2d 310, 326 (S.D.N.Y. 1998) ("Even accepting as true plaintiffs' assertion that they were selectively treated relative to other Town residents . . ., plaintiffs have failed to allege that such treatment was motivated by an unconstitutional animus or a bad faith intent to injure."); United States v. Schmitt, 999 F. Supp. 317, 363 (E.D.N.Y. 1998) (no equal protection violation when plaintiffs "failed to prove that the land was not sold to them because of their race, religion, or to prevent them from exercising a constitutional right," and when there was no "evidence in the record of a malicious or bad faith intent to injure"); see also Kawaoka, 17 F.3d at 1239 (city council member's statement -- "Why should these Japanese people make all that money?" -- while "deplorable" and "evidence of prejudice," still not proof of racially discriminatory intent for equal protection claim).

New York law is well settled that "the mere fact that one property owner is denied a variance while others similarly situated are granted variances does not, in itself, suffice to establish that the difference in result is due either to impermissible discrimination or to arbitrary action." Cowan v.

Kern, 41 N.Y.2d 591, 595, 363 N.E.2d 305, 307, 394 N.Y.S.2d 579, 581 (1977); accord Spandorf v. Bd. of Appeals of Village of East Hills, 167 A.D.2d 546, 547, 562 N.Y.S.2d 215, 216 (1990) (citing Cowan); Knight v. Amelkin, 150 A.D.2d 528, 529, 541 N.Y.S.2d 435, 436 (1989) (quoting Cowan). Therefore, to sustain its claim of unconstitutional selective treatment, WJF was required to shoulder the "heavy burden" of establishing proof of invidious discriminatory intent. DiMaggio, 19 N.Y.2d at 291, 225 N.E.2d at 875, 279 N.Y.S.2d at 167. In fact, "bad-faith or malicious-intent-to-injure cases are infrequent" in the land-use context because the malice/bad faith standard must be "scrupulously met." Rubinovitz v. Rogato, 60 F.3d 906, 911 (1st Cir. 1995) (citing LeClair v. Saunders, 627 F.2d 606, 611 (2d Cir. 1980)). WJF failed to carry its heavy burden of demonstrating invidious treatment and the trial court erred, therefore, in holding that WJF was deprived of equal protection.

1. WJF never demonstrated and the trial court never found evidence of invidious discriminatory intent as required to sustain an equal protection violation based on disparate treatment.

When articulating the second prong of the selective treatment test, the trial court omitted the well-established list of "impermissible considerations": "race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." A.B.C. Home Furnishings, 947 F. Supp. at 646. Absent proof that any of these pernicious considerations drove the Town's decision to deny WJF's exemption request, its equal protection claim lacked the necessary legal foundation of invidious discriminatory intent. See 303 West 42nd St. Corp. v. Klein, 46 N.Y.2d 686, 695, 389 N.E.2d 815, 819, 416 N.Y.S.2d 219, 224 (1979) (mere showing of selective treatment not enough because "disparate impact must be shown as well to have been the product of an 'evil eye'"); DiMaggio, 19 N.Y.2d at 290, 225 N.E.2d at 874, 279 N.Y.S.2d at 166 (unequal application of facially valid statute "not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination") (quoting Snowden v. Hughes, 321 U.S. 1, 8 (1944)). Significantly, WJF never alleged and the trial court never found any invidious discriminatory motive behind the Town's decision denying WJF's exemption application.[3]

This requirement of invidious discriminatory intent "is the test applied in New York, and it has been strictly interpreted." DiMaggio, 19 N.Y.2d at 291, 225 N.E.2d at 875, 279 N.Y.S.2d at 167. Nevertheless, some decisions suggest that, in the absence of invidious discrimination, relief may still be available if there is no "rational basis" to support the land-use decision. See, e.g., Schwartz v. Hudacs, 149 Misc. 2d 1024, 1031, 566 N.Y.S.2d 435, 439-40 (1990) (absent "intentional or conscious discrimination, based on an arbitrary or prohibitory classification," selective treatment "can be overturned on equal protection grounds if the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude the agency's actions were irrational"); Frooks v. Town of Cortlandt, 997 F. Supp. 438, 453 (S.D.N.Y. 1998) (absent impermissible discriminatory motives, selective treatment claim may be defeated "by showing that the denial or withholding of the land use privileges was rationally related to a legitimate governmental objective").

This residual "rationality" inquiry does not help WJF. First, as a matter of procedure, as the trial court specifically concluded, the Town properly rejected the exemption because WJF filed an inadequate application. (R. 74) ("The advisory report, dated October 4, 1993, by the Town's Planning and Natural Resources Department is replete with specific remarks as to the deficiencies in the exemption application filed by plaintiffs."). Second, as Justice Seidell himself found in his August 23, 1995, opinion dismissing WJF's taking claim, there was a "substantial" basis supporting the Town's land-use decision on the merits. In the trial court's words, the moratorium "substantially advance[d] legitimate state interests" because "a sufficiently close nexus exist[ed] between the moratorium restrictions and the legitimate state interest in maintaining the area's ecological status quo during the preparation of a land-use plan for the Pine Barrens." (R. 74). If maintaining the moratorium substantially advanced legitimate government objectives, it must have -- as a matter of law and logic -- rationally furthered those same aims.

Thus, because WJF never offered -- and the trial court never found -- any evidence of either invidious discriminatory intent or irrational decision-making, the trial court erred as a matter of law when it found an equal protection violation in this case.

2. WJF mistakenly relies on a Ninth Circuit decision, Del Monte Dunes, in an attempt to expand the scope of the equal protection guarantee beyond invidious discrimination.

On appeal, WJF seeks to expand the coverage of equal protection by asserting that less-than-invidious discriminatory intent can still contravene equal protection. Specifically, it argues that the second prong of the selective treatment test has not confined the scope of "impermissible considerations" to only those enumerated as invidious. (Respondents' Brief, p. 42). It advances this argument relying exclusively on Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990) [hereinafter Del Monte Dunes I], a case that does not support its position. According to WJF, Del Monte Dunes I stands for the proposition that "governmental desire to acquire private property or maintain such property as de facto open space" is an impermissible consideration for equal protection purposes. (Respondents' Brief, pp. 28, 42). This novel assertion misconstrues Del Monte Dunes I, however, because the case nowhere states such an untenable proposition.

Del Monte Dunes I addressed the narrow question of whether the City of Monterey was entitled to summary judgment on an equal protection claim brought by a developer challenging development restrictions on its property. Although the court in Del Monte Dunes I reversed the order granting summary judgment in favor of the City, the case itself did not announce any unique equal protection principle. As a subsequent Ninth Circuit decision explained, "Del Monte did not hold that the City violated the equal protection clause, but rather that summary judgment in favor of the City was improper because it never offered a rationale for the regulation." Board of Natural Resources of Washington v. Brown, 992 F.2d 937, 944 (9th Cir. 1993). "At most, Del Monte stands for the unremarkable proposition that a municipal land use regulation might violate the equal protection clause if there exists no rational basis to justify the regulation." Id. (emphasis added). Thus, Del Monte Dunes I merely recognizes the unremarkable proposition -- already acknowledged by some New York decisions -- that, without proof of invidious discriminatory intent, an equal protection challenge might be sustained if there is no rational basis supporting the land-use regulation at issue.

However, as other cases within the Ninth Circuit demonstrate, land-use decisions like the Town's denial of WJF's exemption application are virtually unassailable under the rational basis standard. For example, in Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986), aff'd, 898 F.2d 112 (9th Cir. 1990), commercial developers failed to prevail on claims that were mirror images of WJF's allegations in this case. After arguing that the city had "been on a mission to acquire the land since 1970," the developers in that case alleged that "the City tried to impose unreasonable exactions as a prerequisite for hotel development at Queen's Beach, such as dedication of the oceanfront as a public park; that the City downzoned Queen's Beach and downgraded the density in the area to depress the acquisition price of the land; and that the City's policy has been to freeze development at Queen's Beach until it could be acquired as a park." Id. at 929-30 (emphasis added).

In rejecting plaintiffs' equal protection challenge, the court in Kaiser reasoned that there was a rational basis supporting the various land-use regulations in that case. Id. at 944-45 n. 25. The court first stressed the heavy judicial deference accorded to land-use decisions under equal protection law and then explained that its inquiry was "at an end if [it found] that the legislature rationally could have concluded that their goal was in the best interest of the people of Honolulu, and that the legislature could have determined that the regulations were a reasonable means to promote its objective." Id. at 944. The court concluded that the land-use regulations at issue were supported by a rational basis because they -- like the Town's land-use decisions in this case -- were concerned with "legitimate planning concerns," including "preservation of open space, and

preservation of environmental and historical areas[,] . . . and water supplies." Id. In short, just as the trial court should have done in this case, the Kaiser court properly refused to impute an "illegal" motive to the city simply because it wished to protect environmentally valuable lands.

To the extent that Del Monte Dunes I speaks to the facts of this case at all, therefore, it militates in favor of reversing, not upholding, the trial court's decision on WJF's equal protection claim. WJF's novel argument that the Town's ostensible intent to acquire its property was an impermissible basis for denying its exemption request is, in the final analysis, an attempt to shoe-horn its defeated takings theory into an equal protection challenge. However, as WJF recognizes, a challenge to government action allegedly subjecting private property to public use without just compensation sounds in takings, not equal protection, doctrine. (Respondents' Brief, p. 56). In fact, the idea that a conventional takings claim could be bootstrapped into an equal protection challenge has been expressly rejected. See Panhandle E. Pipe Line Co. v. Madison County Drainage Bd., 898 F. Supp. 1302, 1314-15 (S.D. Ind. 1995) (rejecting argument that constitutional right not to have "property taken for a public purpose without payment of just compensation" can be "bootstrapp[ed]" as the "predicate of the equal protection claim" since property "rights are protected by the takings clause"); cf. E & T Realty v. Strickland, 830 F.2d 1107, 1114 (11th Cir. 1987) ("The requirement of intentional discrimination prevents plaintiffs from bootstrapping all misapplications of state law into equal protection claims."). This Court should likewise recognize that the equal protection guarantee is not designed to function as a catch-all provision authorizing suit for every local land-use restriction in the absence of invidious discrimination or irrational decision-making. So recognized, there is no legitimate equal protection issue presented in this case, and the decision below should, therefore, be reversed.

POINT II

THE TRIAL COURT PROPERLY REJECTED WJF'S TAKING CLAIM BECAUSE WJF NEVER FILED A COMPLETE APPLICATION FOR EXEMPTION FROM THE MORATORIUM AND BECAUSE THE RESTRICTIONS PLACED UPON THE PROPERTY SERVED LEGITIMATE PUBLIC INTERESTS AND DID NOT DESTROY ALL OF THE ECONOMIC VALUE OF THE PROPERTY

In its decision, dated August 23, 1995, the trial court rejected WJF's taking claim, stating that "plaintiffs failed to demonstrate that the challenged restriction, in fact, deprived them of absolutely any economically beneficial use of their property and, hence, their constitutional challenge on this ground must fail." (R. 74). Assuming for the sake of argument that this claim is properly before this Court, although WJF did not appeal from this ruling, the Court should affirm the trial court on either one, or both, of two theories. First, the trial court's ruling can be read as a proper rejection of the taking claim on the ground that this taking claim was not ripe for adjudication. Alternatively, read as a ruling on the merits of the taking claim, the trial court's ruling was correct because the Town's actions substantially advanced a legitimate state interest and did not deny WJF all economic use of the property.

A. As A Threshold Matter, WJF's Taking Claim Was Properly Dismissed Because The Claim Was Never Ripe Given WJF's Failure To File A Complete Application For An Exemption From The Town Moratorium.

A taking claim is not "ripe" for adjudication unless and until the claimant has obtained a "final and authoritative determination of the type and intensity of development permitted on the subject property." McDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986); De St. Aubin v. Flacke, 68 N.Y.2d 66, 75, 496 N.E.2d 879, 884, 505 N.Y.S.2d 859, 864 (1986).

In particular, where a land regulatory process includes an exemption or variance process, a taking claim is not ripe until the claimant has exhausted the available avenue of relief. See

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (takings claim not ripe where applicant failed to pursue available variance process). This rule is based on the "very nature of the inquiry required by the Just Compensation Clause," id. at 190, which includes an inquiry into the economic impact of the challenged regulation and its impact on the owner's investment backed expectations. "Those factors simply cannot be evaluated until the [government] has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Id. at 191.

In this case, WJF failed to file any application for an exemption from the town moratorium before filing suit alleging a taking. As a result, there was no "final, definitive" determination about whether and how the town's moratorium would be applied to this particular property. Because a suit must be ripe at the time it is filed, see Tait v. Schomber, 140 N.Y.S.2d 175, 176 (1955) ("The court may not speculate as to what the circumstances may be at a future time and must necessarily base its determination upon the facts as they exist when the jurisdiction of the court is invoked"), WJF's failure to even file an application for an exemption prior to filing this action mandated rejection of this taking claim. See Williamson, 473 U.S. at 186.

Furthermore, WJF cannot rely on its half-hearted effort to pursue the exemption process, initiated after this lawsuit was filed, to remedy the taking claim's lack of ripeness. Over six weeks after the complaint in this action was filed, and only after the Town raised WJF's failure to exhaust available administrative remedies as a defense, WJF finally filed a formal application with the Town for an exemption from the town moratorium. Even assuming for the sake of argument, that this post-lawsuit application were relevant at all, it cannot establish the ripeness of WJF's taking claim because WJF never filed a complete application and, therefore, still failed to obtain a "final, definitive" determination about whether and how the town's moratorium should be applied to this particular property.

In its decision and order dated August 23, 1995, granting summary judgment to the Town on WJF's taking claim, the trial court properly found that WJF had failed to file a complete application: "The advisory report [on WJF's exemption application], dated October 4, 1993, by the Town's Planning and Natural Resources Department is replete with specific remarks as to deficiencies in the exemption application filed by plaintiffs." (R. 74). The trial court also referenced the Natural Resources Department findings that WJF's data were "limited and insufficient," the environmental assessments "inadequate," and the "potential disturbance of on-site and off-site habitats and wildlife unexamined." (R. 73). The report includes a laundry list of other deficiencies in WJF's application, including failure to address the "possible effects upon the groundwater aquifer which is the drinking water resource for the Long Island community." (R. 73). The report ultimately concluded that WJF's application provided an incomplete and insufficient basis for making an informed decision on WJF's application.[4]

Because WJF failed to file an adequate exemption application, and in fact failed to file any exemption application until after this lawsuit was filed, the trial court properly rejected WJF's taking claim as not ripe.

B. The Trial Court Properly Rejected WJF's Taking Claim On The Merits.

Alternatively, the trial court's rejection of WJF's taking claim should be affirmed because WJF failed to make out a viable taking claim on the merits. In general, a property owner can demonstrate a taking only if a regulation (1) does not substantially further a legitimate public interest, or (2) denies the owner all economically viable use of the land. Seawall Assocs. v. City of New York, 74 N.Y.2d 92, 110, 542 N.E.2d 1059, 1068, 544 N.Y.S.2d 542, 551 (1989); see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (regulation that eliminates all economic value represents a presumptive taking); Agins v. Tiburon, 447 U.S. 255 (1980) (articulating same two-part test). Even if WJF's taking claim were ripe, WJF cannot establish a taking under either prong of this two-part test.

2. The Town's moratorium substantially furthered a legitimate state interest in protecting an ecologically rare and valuable area.

Under the first prong of the taking test, the trial court was plainly correct to reject WJF's taking claim because the Town's land use decision substantially furthered a legitimate state purpose. First, it is indisputable that preservation of the Long Island Pine Barrens represents, at a minimum, a legitimate public purpose.[5] In Long Island Pine Barrens Soc'y, 80 N.Y.2d at 508, 606 N.E.2d at 1375, 591 N.Y.S.2d at 984, the New York Court of Appeals emphasized the vital importance of the Pine Barrens region:

The Pine Barrens is an indispensable component of the aquifer system that is the sole natural source of drinking water for over two and half million inhabitants of Long Island. . . . [A]ny contamination originating in this area would have serious consequences for the entire Long Island groundwater supply. It is thus apparent that the protection of the Pine Barrens region from sources of pollution is vital to the health of Long Island's human population.

The Court of Appeals also discussed at length the ecological importance of the region for rare and endangered species "whose survival could well be threatened by development." Id. at 509, 606 N.E.2d at 1376, 591 N.Y.S.2d at 985.

Second, as the trial court below recognized, the Town's moratorium served to protect these legitimate state interests. In Justice Seidell's words:

Here, the end sought to be furthered by the imposed restrictions, as indicated by the March 28, 1989, resolution, was inter alia, to identify, study and assess the Pine Barrens area, and to develop and implement a plan to avoid adverse environmental impact with respect to the area's natural resources as a result of increased development. Such considerations are legitimate governmental concerns to which the challenged restrictions directly relate.

(R. 74). Maintaining the status quo while the Town formulated a long-term program to preserve the Long Island Pine Barrens substantially furthered the legitimate end of preserving this vital portion of Long Island's environment. Therefore, WJF fails the first prong of the applicable taking test.

2. The moratorium did not destroy all economic value of WJF's property because WJF has received a total of over $2,512,000 on an initial investment of $1.6 million and WJF still retains ownership of a major portion of the property.

Under the second prong of the taking test, WJF must demonstrate beyond a reasonable doubt that it has been denied all economic use of its property. See Gazza v. New York State Dep't of Envtl. Conservation, 89 N.Y.2d 603, 610, 679 N.E.2d 1035, 1037, 657 N.Y.S.2d 555, 557 (1997) ("[E]conomic value had not been extinguished since it could still be used for recreational purposes," because, for example, owner could still build a dock); Wedinger v. Goldberger, 71 N.Y.2d 428, 439, 522 N.E.2d 25, 29, 527 N.Y.S.2d 180, 184 (1988) (owner must show that "no permissible use" exists under restriction beyond a reasonable doubt); see also Lucas, 505 U.S. at 1014 (requiring total destruction of value to constitute a taking).

It is axiomatic that in assessing the economic impact of a government action under the taking clause the property of the claimant must be considered "as a whole." Brotherton v. DEC, 675 N.Y.S.2d 121, 123 (App. Div. 1998) (affirming rejection of taking claim where plaintiff failed to carry "heavy burden" of showing that regulation precluded all economic use of the property "as a whole"); see also Riverdale Realty Co. v. Town of Orangetown, 816 F. Supp. 937, 948 (S.D.N.Y. 1993) (rejecting plaintiff's argument that substantial past sales ought not be considered in takings

analysis). Just a few years ago, the U.S. Supreme Court emphatically rejected the argument that an entire property can be artificially segmented into separate portions:

"[W]e rejected this analysis years ago in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property is taken is all, or only a portion of, the parcel in question." Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 644 (1993).[6]

Applying the property as a whole principle in this case, WJF cannot make out a viable taking claim. While WJF now focuses on the 272 acres it presently owns, the relevant property for the purpose of taking analysis is the entire 519 acres which WJF acquired in 1969 for $1.6 million. (R. 8119-33). In that same year, WJF sold a portion of the property for $840,000 and later received a condemnation award for another portion of the property of $316,442 plus interest. Thus, WJF already received a return of $1,156,000 plus interest on its initial investment of $1.6 million. (R. 1630, 1638-39, 4262-63). Regardless of whether WJF reaps any additional income from the portion of the property that remains, it is plain that WJF has not been denied all economic use of its property as a whole and, therefore, has not suffered a taking.

Furthermore, not only did WJF recoup over 70% of its initial investment by selling other portions of the property ($1,156,000/$1,600,000), but it received substantial additional income by optioning for development purposes the remaining 272 acres during the period that this portion was subject to the town moratorium. While WJF never consummated its agreement to sell the 272 acres to Global Industrial Parks Limited ("Global") for $6,000,000, it did receive $1,356,000 in exchange for granting and extending an option to Global to purchase the property. (R. 14). As Justice Seidell emphasized in his December 5, 1997, order, Global's agreement to make these option payments "was not conditioned" on receipt of subdivision or any other type of land use approval from the Town. (R. 14).[7]

In sum, the $2,512,000 WJF already has received on its initial investment of $1,600,000 -- along with the fact that the WJF still retains the 272 acres, which it is free to sell, or to seek to develop by seeking an exemption from the moratorium established by the 1993 State Act -- precludes a determination of a taking in this case.

POINT III

THE TRIAL COURT PROPERLY DENIED WJF'S DUE PROCESS CLAIM BECAUSE THE CLAIM WAS NOT RIPE, WJF FAILED TO ESTABLISH A PROTECTED PROPERTY INTEREST, AND THE APPLICATION OF THE MORATORIUM WAS NOT UNREASONABLE UNDER THE CIRCUMSTANCES OF THIS CASE

Assuming for the sake of argument that this issue is properly before the Court, despite the fact that it was not identified in the cross-appeal, the Court should affirm rejection of the due process claim on any of three independent bases: (1) the due process claim is not and was never ripe; (2) WJF never had a protected property interest in the development approval it sought from the Town; and (3) the Town's rejection of WJF's exemption application and maintenance of the moratorium was entirely reasonable.

A. Plaintiffs' Substantive Due Process Claim Was Never Ripe Because WJF Failed To File An Adequate And Meaningful Application For Exemption.

First, for the same reason that the regulatory taking claim in this case is not ripe, WJF's due process claim also is not ripe. In Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 96 (2d Cir. 1992) (quoting Williamson, 473 U.S. at 199-200), the U.S. Court of Appeals for the Second Circuit ruled that a substantive due process challenge to a land use regulation, like a regulatory taking claim, is premature "until a final decision is made as to how the regulations will be applied" to a landowner's property. See also Town of Orangetown v. Magee, 88 N.Y.2d 41, 51, 665 N.E.2d 1061, 1066, 643 N.Y.S.2d 21, 26 (1996) ("[S]ubstantive due process claim based on arbitrary and capricious conduct, is subject . . . to the final decision requirement of the Williamson test"). As discussed above, see supra pp. 13-15, WJF never filed an exemption application prior to filing this suit, and then later filed an application which was substantially deficient. Because WJF never obtained a "final and authoritative determination of the type and intensity of development permitted" on the property, McDonald, Sommer & Frates, 477 U.S. at 348, WJF's substantive due process claim is not and never was ripe. The trial court's rejection of the due process claim can properly be affirmed on this basis alone.

B. The Trial Court Properly Held That WJF Did Not Have A Protected Property Interest Because There Is No Right To Subdivide And The Town Had Discretion To Grant or Deny Permission To Subdivide.

Second, to prevail on it due process claim, WJF was required to show, as a threshold matter, that it possessed a property interest protected by the Due Process Clause. Because WJF never had any such protected property interest, as the trial court correctly recognized (R. 18), WJF's substantive due process claim fails as a matter of law on this ground as well.[8]

A protected property interest is a necessary precondition for a viable substantive due claim. See Magee, 88 N.Y.2d at 52, 665 N.E.2d at 1067, 643 N.Y.S.2d at 27 (claimants "must establish . . . the deprivation of a protectable property interest" to succeed on substantive due process claim). To establish such a protected interest, WJF was required to show that it had "more than a mere expectation or hope," but rather a "legitimate claim of entitlement" pursuant to "State or local law" to receive approval of its development plans. Id.; see also Zahra, 48 F.3d at 680-82 (holding that landowner had no protected property interest under the Due Process Clause where local regulator had discretion to deny building permit). As the court emphasized in Zahra, the courts must enforce the requirement of a protected property interest with "considerable rigor" in order to ensure that "decisions on matters of local concern [are] made by those whom local residents select to represent them in municipal government." Id. at 680. Strict enforcement of this requirement "appropriately balances the need for local autonomy, with recognition of constitutional protection at the very outer margins of municipal behavior." Id.

Applying these standards, the trial court properly found that WJF had no protected property interest under the Due Process Clause. In particular, Justice Seidell pointed to three statutory provisions confirming the discretionary nature of the approval WJF sought in this case:

(1) Section 60-6 of the Town Code controls subdivision approvals and states, "The Planning Board shall approve or disapprove said [minor subdivision] application at a regular meeting."
(2) Section 60-1 of the Town Code vests broad discretion in the Planning Board's decisions as it authorizes the Planning Board "simultaneously with the approval of a plat or plats [subdivision maps], to modify applicable provisions of the Zoning Ordinance[.]"
(3) Section 324-8B of the Town Code conferred discretion on the Town Board in reviewing exemption applications under the Western Generic Envirmental Impact Statement (WGEIS Law), allowing the Board to consider a wide range of ecological concerns and to determine "unnecessary hardships and unique circumstances of each applicant." (R. 17).

Because each of these provisions gave the Town wide-ranging discretion as to whether to grant an exemption from the moratorium, Justice Seidell properly determined that WJF was not "entitled" to the exemption it sought and, therefore, suffered no due process violation. (R. 17-18).

C. WJF'S Substantive Due Process Claim Was Properly Rejected Because The Moratorium Was Not An Arbitrary Exercise Of Regulatory Power.

Finally, the trial court properly rejected WJF's due process claim because the application of the moratorium to WJF in this case was entirely reasonable and consistent with the principles of fundamental fairness underlying the due process clause.

Significantly, WJF does not -- and could not -- challenge the authority of the Town to temporarily put off decision on a major development project such as this pending the formulation of a comprehensive strategy for protecting and managing this critical ecological resource. Indeed, it is well established in New York State that a municipality can impose a temporary moratorium on construction pending the development of new planning guidelines and regulatory requirements. See 119 Dev. Assocs. v. Village of Irvington, 171 A.D.2d 656, 657, 566 N.Y.S.2d 954, 955 (1991) ("The moratorium constituted a reasonable measure designed to temporarily halt development while the [Village] considered comprehensive zoning changes and was therefore a valid stopgap or interim measure"); Matter of McDonald's Corp. v. Village of Elmsford, 156 A.D.2d 687, 689, 549 N.Y.S.2d 448, 450 (1989) (extended moratorium valid exercise of regulatory power and "was a legitimate and appropriate response to the problems of traffic congestion and littering"); Matter of Dune Assocs. v. Anderson, 119 A.D.2d 574, 575, 500 N.Y.S.2d 741 (1986) (upholding moratorium even though it was extended: "The moratorium resolution was a reasonable measure designed to temporarily halt development while the town considered comprehensive zoning charges and was therefore a valid stop-gap or interim zoning measure.") (citing Matter of Charles v. Diamond, 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977)).

Under the facts of this case, the moratorium established by the Town was a reasonable response to the growing public and official concern about the need to preserve the Long Island Pine Barrens and was not unduly burdensome on WJF. While the Town moratorium remained in place for four years until it was superseded by the enactment of the Long Island Pine Barrens Act (L.1993, c. 262), WJF at all times had the right to seek an exemption from the moratorium but failed to do so until after it initiated this lawsuit and then only shortly prior to the enactment of the State legislation. Furthermore, while the moratorium was in effect, WJF received $1,356,000 in option payments from Global without actually giving up one acre of land.

The handful of decisions which WJF cites in an effort to support its due process claim are readily distinguishable from this case. Urbanizadora Versalles, Inc v. Rivera Rios, 701 F.2d 993 (1st Cir. 1993), involved a claim that the government had explicitly reserved plaintiff's property for public acquisition and then delayed consummation of the purchase for a period of fourteen years. Furthermore, in contrast to this case, where WJF actually had the opportunity to sell the property and derived substantial income from the property while the moratorium was in place, the court in Urbanizadora specifically found that the property at issue in that case had "been rendered useless for development or sale." Id. at 997. In addition, even on facts as extreme as these, the Court of Appeals in Urbanizadora entered no award of damages, much less a multi-million dollar award such as the trial court awarded in this case, but, instead, simply enjoined further enforcement of the restrictions on development.[9]

Likewise, Q. C. Constr. Co. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986), aff'd, 836 F.2d 1340 (1st Cir. 1987), is distinguishable because it involved a continuing moratorium of apparently indefinite duration which, according to the court's findings, had caused a 90% loss in the value of plaintiff's property. Moreover, the court held that the proper remedy in that case was not to order the town to pay damages, but injunctive relief barring further enforcement of the restrictions.[10] Accordingly, none of the cases cited by respondents justify disturbing the trial court's rejection of the due process claim in this case, much less support this extraordinary award of over $14,000,000 in damages.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed.

Respectfully submitted,

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Dated: Washington, D.C.
October 19, 1998

NOTES

[1] Simultaneously with the filing of this proposed brief EDF and GSF are filing a motion for leave to file this brief *amicus curiae*.

[2] This statement of the applicable equal protection test, which the trial court ostensibly followed in this case (R. 18), is derived from a long line of Second Circuit decisions. See, e.g., Crowley v. Courville, 76 F.3d 47, 52-53 (2d Cir, 1996); LeClair v. Saunders, 627 F.2d 606 (2nd Cir. 1980), cert. denied, 450 U.S. 959 (1981). New York courts apply basically the same test. See, e.g., 303 West 42nd St. Corp. v. Klein, 46 N.Y.2d 686, 693, 389 N.E.2d 815, 818, 416 N.Y.S.2d 219, 223 (1979) ("[T]here must be not only a showing that the law was not applied to others similarly situated but also that such selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification."); New York State Dep't of Taxation & Finance v.Bramhall, 235 A.D.2d 75, 83, 667 N.Y.S.2d 141, 146 (1997) (same) (quoting Klein).

[3] WJF did not – and could not – allege that it was a member of a suspect class or that it had a fundamental right to develop its property. "[D]evelopers" and "commercial landowners" do not constitute a suspect class, and "land use rights" are not fundamental constitutional rights within the meaning of the equal protection guarantee. Frooks v. Town of Cortlandt, 997 F. Supp. 438, 453 (S.D.N.Y. 1998); see also Kawaoka, 17 F.3d at 1239 ("zoning and land use issues do not implicate fundamental rights"). Fundamental constitutional rights are limited to a narrow range of categories. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (right to privacy); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (right of free speech); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to travel).

[4] While it is not directly relevant to this taking claim against the Town, it is noteworthy that after the New York Legislature on July 13, 1993 enacted the Long Island Pine Barrens Act (L. 1993, c.262), prohibiting development in the central Pine Barrens without a variance, and after the Town granted final approval of a revised subdivision application (R. 8822-23, 6727-29, 6651-63), WJF never bothered to seek a variance from the regional Pine Barrens Joint Planning and Policy Commission and consequently let the Town's approval lapse. WJF's failure to pursue in good faith available variance procedures, at both the town and regional levels, supports the inference that WJF was more interested in this property as a vehicle for extracting money from the taxpayers than for any actual development purpose.

[5] While it has relatively little importance in this case (given that WJF so clearly failed to establish a taking on this basis), there is a very real question whether the issue of failure to substantially advance a legitimate state interest actually represents an independent test for a compensable taking or whether, instead, it represents, at best, a potential due process issue. Numerous lower federal and state courts have concluded that this standard does not represent a test for a taking. See Loveladies Harbor v. United States, 15 Cl. Ct. 381, 390 (1988), aff'd, 28 F.3d 1171 (Fed. Cir. 1994) ("no court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced"); Brunelle v. Town of South Kingston, 700 A.2d 1075, 1083 (R.I. 1997) (overruling trial court's erroneous conclusion that "a regulatory taking can be compensable if the ordinance in question does not substantially advance any legitimate state interest," because "a discussion of the arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not under the Fifth Amendment takings clause"). In Eastern Enters. v. Apfel, 118 S.Ct. 2131 (1998), a majority of the U.S. Supreme Court apparently embraced the view that this standard does not represent an independent takings test. Id. at 2157 (Kennedy, J., concurring in part and dissenting in part); id. at 2161 (Breyer, J., dissenting). In the pending case of City of Monterey v. Del Monte Dunes at Monterey, Ltd., 118 S.Ct. 1359 (1998), argued October 7, 1998, the United States, as amicus curiae, has urged the Court to repudiate this ostensible taking test. As discussed, the resolution of this issue is not critical in this case because the Town's actions clearly substantially advanced a legitimate state interest.

[6] The property-as-a-whole rule derives from fundamental principles of takings doctrine. According to general scholarly consensus, the taking clause of the Fifth Amendment was not originally intended to apply to regulations under any circumstances, see, e.g., William Michael Treanor, "The Original Understanding of the Takings Clause and the Political Process," 95 Colum. L. Rev. 782 (1995), and for the first 150 years of the nation's history the clause was not applied to regulations at all. See Lucas, 505 U.S. at 1014. While the Supreme Court has subsequently recognized that a regulation can indeed effect a taking, this doctrine focuses, consistent with the original understanding of the taking clause, on regulatory actions with such severe economic impacts that they may be considered the functional equivalent of actual takings. See id. The property-as-a-whole rule serves the function of helping to keep regulatory takings doctrine within its proper constitutional bounds.

[7] To support its taking claim, WJF relies almost exclusively upon the decision of the U.S. Court of Appeals for the Ninth Circuit in Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1998) [hereinafter Del Monte Dunes II], cert. granted, 118 S. Ct. 1359 (1998). Apart from the fact that this decision represents an unstable precedent because it is now being reviewed by the U.S. Supreme Court, this decision is readily distinguishable from this case. For example, WJF highlights that the Ninth Circuit affirmed a temporary taking award despite the fact that the plaintiff eventually sold the property for $800,000 more than it paid for the property. (Respondents' Brief, p. 56). However, WJF fails to acknowledge that the purchaser in that case was the State of California whereas in this case Global was a private firm purchasing the property for investment and development purposes. The fact that the government would buy out a property which is the subject of an ongoing takings dispute obviously provides little indication of the property's actual value in the marketplace; the price paid by a private firm, by contrast, is highly credible evidence of the property's actual market value. Furthermore, in Del Monte Dunes II, the Ninth Circuit ruled that the evidence supported the trial court's conclusion that the owners had been "denied all economically viable use of the property" id. at 1434; in this case, the evidence at trial and the trial court's findings preclude such a conclusion.

[8] The trial court also recognized that the lack of a protected property interest in subdividing the property was fatal to WJF's separate procedural due process claim: "[P]laintiffs' [sic] failed to establish a protectible property interest in regard to their cause of action for deprivation of procedural due process, [and] plaintiffs' cause of action for deprivation of substantive due process is also untenable on this ground." (R. 18).

[9] In this case, of course, before finally rejecting the due process claim on the merits, the trial court initially granted an injunction under the due process claim, but this Court subsequently vacated that injunction as moot. See W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 658, 659 N.Y.S.2d 81, 82 (1997).

[10] Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977), which involved a claim under the Takings Clause rather than the Due Process Clause, also is distinguishable. That case involved an explicit governmental declaration of intent to acquire private property followed by a five year freeze on development which effectively blocked all opportunities to sell the property, as well as plaintiff's efforts to develop the property, which, unlike in this case, plaintiff actually vigorously pursued.