Substantive Due Process Protection at the Outer Margins of Municipal Behavior

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I. INTRODUCTION

> The power of local governments to zone and control land use is undoubtedly broad. . . . But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." Accordingly, it is subject to judicial review; and is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.
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> —*Schad v. Borough of Mount Ephraim* (1981)[1]

As originally conceived, zoning was supposed to require very little exercise of discretion. Rather, it was intended to be a self-administering land use allocation system, that is, a system of pre-stated land use classifications and rules under which only cases of particular hardship would require administrative (variance) or legislative (zone amendment) action to resolve. A desire to avoid legislative or administrative interference with the land market drove this original premise.[2] In other words, concern for property rights and the goal of maximizing the productivity of private actors in the land market led the founders of zoning to design a "zoning by rules" system of land use control.

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1. 452 U.S. 61, 67 (1981) (citations omitted).

2. *See* Jan Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion*, *in* THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 3 (Norman Marcus & Marilyn W. Groves eds. 1970); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 50 (1981).

Zoning and land use controls have hardly remained faithful to that original property rights-based concept. In their effort to manage growth, protect natural resources, preserve community "character," provide for infrastructure needs, and secure public amenities, local governments have gone far beyond the original limited concept of the variance procedure. Today, they rely heavily upon *discretionary* review and approval procedures to address development proposals. Discretion is nothing more than the exercise of judgment. In the context of land use and development approvals, discretion means the substantive and procedural choices made by a legislative or an administrative body for the purpose for which the power was delegated.[3]

Generally, landowners and developers welcome the exercise of judgment in the implementation of land use and development controls, provided that the addition of this human ingredient improves the efficiency and predictability of the decision making process and promotes pragmatic government flexibility that allows the developer to respond to the physical constraints of a development site and changes in the market. Realistically, the landowner and developer know that the review of a development project in light of today's more complex land use, growth, and environmental considerations requires in many cases the ingredient of human judgment in order to provide pragmatic resolution of these issues. There is always a tension between landowners' and developers' preferences for certainty on the one hand and on the other hand their need for pragmatic solutions that only the exercise of judgment can provide.[4]

II. DISCRETIONARY DECISIONS AND SUBSTANTIVE DUE PROCESS

When discretionary decision making goes awry and judgment is exercised arbitrarily, there is an abuse of discretion that may amount to a constitutional violation in the form of substantive due process,

3. *See generally* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

4. See BRIAN WILLIAM BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION (2000).

which is actionable under federal law. Substantive due process refers to the fact that the Fourteenth Amendment to the U.S. Constitution imposes both substantive and procedural requirements when it prohibits any government action that deprives "any person of . . . liberty, or property, without due process of law."[5] This substantive component of the Due Process Clause "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"[6] It has been referred to by some (notably Judge Posner of the U.S. Court of Appeals for the Seventh Circuit) as a diluted constitutional clause,[7] but that view would appear to be accurate only in the context of a facial attack on a land use regulation. When a land use regulation is attacked as it is "applied" to a particular development proposal, substantive due process should work at full strength.

The right not to be subject to arbitrary or capricious action by a governmental, legislative, or administrative action is a substantive due process right. In the face of irrational or wrongful land use regulatory decisions that may *not* amount to a taking, landowners and developers have relied on substantive due process claims in federal court as an important means to remedy such actions. To their dismay, however, landowners and developers are learning from federal court decisions in some of the circuits that, as the *degree of discretion* that can be exercised by a government decision making body increases, the less likely it is that they will be deemed to have any "property interest" to protect, regardless of how arbitrarily that discretion is exercised in a particular case. This approach is particularly evident in the Second, Fourth, and Sixth Circuits, which require, as a threshold step before even reaching the alleged substantive due process violation, that the plaintiff landowner or developer first prove a legitimate claim of entitlement to a desired land use or approval so as to establish a protected property interest in the benefit sought from the decision making authority.[8] Other circuits, notably, the First and

5. U.S. Const. amend. XIV.

6. Zinermon v Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

7. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464-66 (7th Cir. 1988).

8. *See, e.g.*, Triomphe Investors v. City of Norwood, 49 F.3d 198, 202-03 (6th Cir. 1995); Gardner v. Baltimore Mayor & City Council, 969 F.2d 63, 69 (4th Cir. 1992); DLC

Seventh Circuits, regard land use disputes as political disputes rarely containing facts sufficient to state a substantive due process claim.[9] Only one circuit, the Third Circuit, has concluded that ownership of property, in and of itself, is a property interest that deserves substantive due process protection.[10] This divergence among the federal circuits can be attributed in large part to the fact that the U.S. Supreme Court has never given the lower federal courts adequate guidance for how to deal with land use cases involving substantive due process claims of arbitrary and capricious action by local governments. With local governments increasingly employing discretionary land use control systems, the decisions of those circuits that require proof that a protected property interest exist before proceeding to the alleged substantive due process violation are the most troubling. This is because the prevailing standard of proof—the *degree of discretion* that can be exercised by the decision maker—is subject to manipulation to defeat legitimate claims of entitlement to a desired use or a permit approval. Whether such manipulation is merely the changing of "shall" to "may" in describing the regulator's approval authority, creating broad standards under special use or conditional use procedures, or subjecting all proposed projects to development "impact" determinations as a condition of approval, the point has not been lost on municipal attorneys.[11]

III. PROTECTED PROPERTY INTEREST—THE THRESHOLD INQUIRY

The preoccupation of certain federal circuits with finding a property interest in substantive due process challenges to land use regulatory decisions stems from the U.S. Supreme Court's two 1972

Management Corp. v. Town of Hyde Park, 163 F.3d 124, 129-30 (2d Cir. 1998).

9. *See, e.g.*, Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45-46 (1st Cir. 1992); Coniston Corporation v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988).

10. *See* DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 599-600 (3d Cir. 1995) (relying upon the analysis in *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988) (footnote and citation omitted).

11. *See, e.g.*, Hollister and Abare-Brown, Protected Property Interest Analysis: The First Line of Defense in Due Process Litigation (address at the NIMLO 1990 Annual Conference (September 23, 1990)).

non-land use decisions: *Band of Regents v. Roth*[12] and *Perry v. Sindermann*.[13] Both of these cases addressed the question of whether there was an interest in employment and the degree of *procedural* protection—not substantive due process—that should be accorded under the Fourteenth Amendment to the U.S. Constitution.[14] *Roth* has had the most influence on federal court review of substantive due process challenges to land use decisions.

A. Procedural Due Process Protection

In *Roth* the Court considered whether a university's refusal to renew an untenured professor's employment contract was a deprivation of liberty or property under the Fourteenth Amendment.[15] Before reaching that question, the Court asked whether the professor had a constitutionally protected interest in his continued employment.[16] In its analysis the Court recognized that in addition to property interests arising from ownership of real estate, chattels, or money, there exists a class of property interests that includes "the security of interests that a person has already acquired in specific benefits."[17] However, according to the Court a person's property interest in a benefit or entitlement must be based upon more than an abstract need or desire, or unilateral expectation for such an entitlement. It must be based upon a "legitimate claim of entitlement."[18] Hence, the untenured professor whose contract was not renewed had only a unilateral expectation of continued employment and no legitimate claim of entitlement.[19] Because Professor Roth did not have a property interest in his continued

12. 408 U.S. 564 (1972).
13. 408 U.S. 593 (1972).
14. *See id.*
15. 408 U.S. at 571.
16. *Id.*
17. *Id.* at 573, 576. This expanded definition of property interests had been articulated by the Court two years earlier, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which the Court extended procedural due process protection to persons whose welfare benefits are terminated. *See id.* at 260-61. *See also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).
18. 408 U.S. at 577.
19. *See id.* at 571-78.

employment, he could not claim a violation of procedural due process.[20]

B. Substantive Due Process Protection

Since *Roth*, when asked to consider a substantive due process challenge to land use regulation, some federal circuits that have been the most reluctant to become involved in what they consider to be "local" land use matters, have incorporated *Roth's* property interest inquiry into their analysis in order not to reach the substantive due process question. If they must reach that question because the facts demonstrate that the plaintiff has a protected property interest, they apply a strict, narrow test for substantive due process.

The Second Circuit provides the most emphatic example of this approach to substantive due process claims. A number of the federal circuits appear to share its formulation of the *Roth* entitlement analysis, or one similar to it, in substantive due process challenges to land use decisions.[21] The Second Circuit's most significant entitlement decision is *RRI Realty Corp. Inc. v. Village of Southampton*[22] for what it reveals about the reasoning and attitude of many federal courts when presented with substantive due process challenges to land use decisions. The court in that case commenced its analysis by noting that its prior decision in a licensing case, *Yale Auto Parts, Inc. v. Johnson,*[23] had committed the circuit to an entitlement test that focused on whether "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." [24] Because the *Yale Auto Parts* court had found that "the licensing authorities had discretion in the issuance of the requested permit," there was no protected property interest.[25] The court then expressed the sentiment that is frequently

20. *Id*. at 578.

21. *See, e.g.*, Triomphe Investors v. City of Norwood, 49 F.3d 198, 202-03 (6th Cir. 1995); Gardner v. Baltimore Mayor & City Council, 969 F.2d 63, 68-69 (4th Cir. 1992); RRI Realty Corp. Inc. v. Village of Southampton, 870 F.2d 911, 917-18 (2d Cir. 1989).

22. 870 F.2d 911 (2d Cir. 1989).

23. 758 F.2d 54 (2d Cir. 1985).

24. 870 F.2d at 917 (quoting Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985)).

25. 870 F.2d at 917.

uttered by federal judges who preside over land use cases:

> If federal courts are not to become zoning boards of appeals (and not to substitute for state courts in their state law review of local land use regulatory decisions), the entitlement test of Yale Auto Parts—"certainty or a very strong likelihood" of issuance—must be applied with considerable rigor.[26]

At least as defined, the *Yale Auto Parts* entitlement test appears to focus upon the likelihood that an application will be granted. However, the court in *RRI Realty* stated that its proper application means that it "must focus primarily on the *degree of discretion* enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case."[27] The following chart summarizes the standard as applied by the Second Circuit in *RRI Realty Corp*.

As the chart illustrates, as long as the degree of official discretion is high or deemed by the court to be significant, it always trumps the probability of permit issuance, whether high or low. The court's formulation would not even appear to depend upon whether the degree of discretion is "high"—only that there is an "opportunity" to deny: "Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest."[28]

Because the Second Circuit's application of this entitlement test is independent of the probability of permit approval, it is virtually impossible to establish a protected property interest so long as the government decision maker retains discretion or the opportunity to deny the approval sought. In an era of land use controls that rely upon discretionary review and decision making mechanisms, the extent to which other circuits embrace this harsh entitlement test has serious implications for property owners and developers who seek to challenge arbitrary decisions by local government.

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26. *Id.* (quoting Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d. Cir. 1985)).
27. *Id*. at 918 (emphasis added) (citations omitted).
28. *Id*.

PERMIT ENTITLEMENT STANDARD *(Second Circuit)*		
FACTORS		**DEGREE OF OFFICIAL DISCRETION**
		High
PROBABILITY OF PERMIT ISSUING	High	No Protected Property Interest
	Low	No Protected Property Interest

The acknowledged motivation of the Second Circuit and other federal circuits not to become federal zoning boards of appeals is the same motivation that has led the federal courts increasingly to employ the ripeness and abstention doctrines to either dismiss or stay constitutional challenges to land use decisions—in effect, leaving the federal courthouse door only slightly ajar for land use cases that involve only the most egregious examples of arbitrary action by local governments.[29] The irony of the Second Circuit's entitlement test is that while the Second Circuit professes deference to state law as interpreted by state courts in zoning and land use matters, the Second

29. *See, e.g.*, John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988).

Circuit applied the test in *RRI Realty Corp.* without regard for the very state and municipal law upon which the state court had relied and which defined the degree of discretion that the local agency had to deny the permit. After all, as the U.S. Supreme Court has explained, property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[30]

In *RRI Realty Corp.* the plaintiff, RRI, purchased a sixty-three room mansion on waterfront property and sought a building permit for extensive renovations to the mansion.[31] The building inspector advised RRI to make one omnibus building permit application when its plans were finalized.[32] In the meantime, he issued a limited building permit to cover minor structural renovations, and construction began in early 1981.[33] The Zoning Board of Appeals (ZBA) granted RRI's application for a height variance.[34] In 1983 RRI submitted its final overall design plan to the Architectural Review Board (ARB), whose approval was required before the building inspector could issue the permit.[35] After the ARB approved the final overall design plan, RRI submitted the comprehensive building permit application, and applied for another height variance from the ZBA to allow a portion of the structure to exceed the height limitations of the previously granted variance.[36] While the variance application was pending, the building inspector divided the building permit application into three stages, with stage one being for the structural work covered by the initial building permit that had already been issued and stage two covering the balance of the construction allowed under the zoning and first variance granted.[37] Stage three was for the portion of the structure for which the pending height variance was required.[38]

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30. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
31. 870 F.2d 911, 913 (2d Cir 1989).
32. *Id.*
33. *Id.*
34. *Id.*
35. 870 F.2d at 913.
36. *Id.*
37. *Id.*
38. *Id.*

At the building inspector's request, RRI submitted a new set of more detailed plans for everything but the stage three work.[39] The building inspector referred these plans to the ARB for its approval as a prerequisite to the issuance of a building permit.[40] In the spring of 1984, the building inspector notified RRI that a building permit was forthcoming.[41] However, by then, the mansion renovation had become controversial among residents.[42] Without informing RRI, the ARB decided to take no action, allowing a mandatory thirty day time period under the zoning code to expire.[43] Then the mayor, reacting to the residents' pressure, ordered the building inspector to issue a stop work order because RRI did not have the building permit for work past the stage one permit.[44] The ZBA denied the stage three variance request.[45]

RRI then secured a state court decision, holding that the ARB had arbitrarily refused to approve the stage two building permit for RRI's project because it knew that the stage three permit (requiring the height variance that had been denied) would violate the existing regulations.[46] This action, the court held, exceeded the ARB's jurisdiction, which was limited to matters of aesthetic judgment.[47] The state court also found that the village had failed to act within the requisite time frame of thirty days following receipt of RRI's application, and therefore RRI was entitled to the stage-two permit as a matter of law.[48]

Subsequently, RRI brought a Section 1983 action[49] in federal district court seeking damages for the delay in the issuance of the stage two building permit and for attorneys fees and costs.[50] The jury awarded RRI $1.9 million in damages and attorney fees and costs.[51]

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39. *Id.*
40. 870 F.2d at 913.
41. *Id.*
42. *Id.*
43. *Id.* at 914.
44. *Id.* at 913.
45. 870 F.2d 913.
46. *Id.* at 913-14.
47. *Id.* at 914.
48. *Id.*
49. 42 U.S.C. § 1983 (1994).
50. *Id.*
51. 870 F.2d at 914.

However, the Second Circuit reversed, finding that, as a matter of law, there was no property interest in the stage-two permit.[52] The Court's reasoning is difficult to fathom. Most importantly, if the court's approach to determining the existence of a protected property interest is followed in other circuits, the substantive due process question will rarely be reached in challenges to land use decisions.

Because the Second Circuit focused upon the *degree of discretion* within the power of the regulator, the facts of the case evidencing probability of permit issuance were virtually irrelevant.[53] These facts were that: (1) ARB had approved RRI's initial overall design, (2) the two-stage construction was in full compliance with the zoning law, (3) there was correspondence between the Building Inspector and RRI and other discussions to support RRI's assertion that approval of the application could be expected, and, most importantly, that (4) ARB's time limits within which to act on the application had expired, causing it to forfeit any discretion it may have had in approving the permit.[54]

The court's reasoning on the expiration of the thirty day time period to act is particularly baffling. The court essentially dismissed the significance of the thirty day "deemed approved" provision of the Village Code, concluding that RRI's claim to the permit could not be "fragmented" into two claims—one subject to the ARB's discretion within thirty days and one subject to a mandatory duty to issue a permit after thirty days.[55] That, however, is precisely what the Village's own regulations provided. Incredibly, the court held that despite the fact that the village's regulatory provisions divested the ARB of all discretion after the thirty day period had expired without action, somehow the ARB's discretion remained.[56]

The Second Circuit's disregard for the state court determinations of the applicable law is perhaps not surprising in view of the circuit's entitlement test. This test, by definition, disregards the probability of permit issuance. Its approach ignores the U.S. Supreme Court's

52. *Id.* at 919.
53. *Id.* at 918-19.
54. *Id.*
55. *See id.* at 919.
56. *See id.* at 919.

admonition in *Schad v. Borough of Mount Ephraim*, quoted at the beginning of this article, that the standard of review in constitutional challenges to land use regulations should be "determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation being imposed."[57] The Second Circuit's entitlement test is so rigorous that it invariably results in courts focusing exclusively on the power (degree of discretion) being exercised as a matter of law, obviating the need for courts to consider the nature of the right (substantive due process) being asserted.

C. Varying Definitions of "Arbitrary" Among the Circuits

The Second Circuit, like other federal circuits that rigorously apply the *Roth* entitlement test to determine if a protected property interest exists, views the substantive due process right as a narrowly defined right that is rarely triggered by local governmental action. This action is given great deference whenever some rational basis for the action can be identified. Accordingly, for these circuits, only arbitrary action that is extreme in some form merits consideration under substantive due process. For example, the Sixth Circuit has adopted the "shocks the conscience" standard for determining when a local zoning decision violates substantive due process.[58] While one Sixth Circuit panel acknowledged that the terminology is "more apt for cases involving physical force,"[59] another panel observed that "it is useful in the zoning context too, to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority. . .."[60] The Seventh Circuit defines the level of arbitrariness required to sustain a substantive due process claim as "invidious or irrational" governmental action.[61] The Eighth Circuit has indicated that the government action must be "truly irrational," meaning the

57. Schad v. Borough of Mount Ephraim 452 U.S. 61, 68 (1981) (quoting Thomas v Collins, 323 U.S. 516, 529-30 (1945)).

58. Pearson v. City of Grand Blanc, 961 F.2d 1211, 1222 (6th Cir. 1992).

59. Cassady v. Tackett, 938 F.2d 693, 698 (6th Cir. 1991).

60. Pearson v. City of Grand Blanc, 961 F.2d at 1222.

61. Coniston Corporation v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (citation omitted).

standard is more stringent than "arbitrary, capricious, or in violation of state law."[62]

Other circuits, notably the First and Ninth, by announcing their great deference toward local land use decisions whenever there is any conceivable rational basis, signal by implication that for governmental land use decisions to be actionable under substantive due process, the decision must be extremely irrational.[63] For example, the First Circuit has been reluctant to find a substantive due process violation in a zoning decision even when it involved claims of malicious obstruction of a landowner's rights.[64] Although the Ninth Circuit will apply substantive due process analysis to a local zoning decision involving an individual property owner's claim, it reviews such decisions under the highly deferential standard used for legislation.[65]

D. Parcel Specific Zoning Decisions—Legislative or Administrative?

One principal reason for the lack of harmony among the federal circuits on substantive due process is the divergence among the states themselves on the question of treating a parcel-specific zoning decision as a *legislative* versus a *quasi-judicial* decision. Many state courts hold that a village board or city council acts in a legislative capacity when it approves a special use or a planned unit development—typical discretionary review mechanisms. Consequently, no precise standards are necessary.[66] The village board or city council is also not bound by the recommendations of its staff or experts on such matters.[67] Unlike legislative decision makers, administrative bodies must review and draw conclusions from facts

62. Anderson v. Douglas County, 4 F.3d 574, 577 (8th Cir. 1993) (citation omitted).

63. *See, e.g.*, Dodd v Hood River County, 59 F.3d 852, 864 (9th Cir. 1995); Chesterfield Dev. Corp. v City of Chesterfield, 963 F.2d 1102, 1105 (8th Cir. 1992); Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 44-45 (1st Cir. 1992).

64. *See, e.g.*, Cloutier v. Town of Epping, 714 F.2d 1184, 1189 (1st Cir. 1983); Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (lst Cir. 1982).

65. Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 507 (9th Cir. 1990).

66. *See, e.g.*, LaSalle National Bank v. County of Lake, 325 N.E.2d 105, 110 (Ill. App. Ct. 1975).

67. Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee, 226 N.W.2d 306, 309 (Minn. 1975).

presented with respect to a specific parcel of property. Under these procedural due process requirements, which are similar to those followed in a court of law, their actions are sometimes referred to as *quasi-judicial* or *adjudicative*, that is, judicial-type or adjudicating actions performed by individuals who are not judges. For example, courts in Oregon have stated that a decision by a local legislative body concerning the zoning of an individual parcel is a quasi-judicial rather than a legislative decision.[68] Courts in several other states have embraced this view.[69] However, the majority of states continue to view parcel specific zoning decisions made by a legislative body as "legislative." Consequently, the majority of the federal circuits mirror this view. Some, such as the Seventh Circuit, even go as far as characterizing a site plan decision for a single parcel as "legislative," which frees the decision maker of making any findings of fact, and makes the decision, however driven by protectionist or parochial motives, immune from challenge on substantive due process grounds so long as there is some relation to land use.[70] The First Circuit also views zoning as a legislative act, such that due process is satisfied where the decision bears a "*conceivable* rational relationship" to "legitimate governmental ends."[71]

From a review of the circuits' discussion of what is meant by "arbitrary" for purposes of substantive due process claims, it appears that there are three basic categories. These are:

- Decision is inadequately supported by the record;
- Decision is irrational–no reasonable basis in law; and
- Decision is outside substantive limits of delegated authority (abuse of discretion).

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68. *See* Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23, 29 (Ore. 1973), *superseded by statute as noted in* Menges v. Board of County Comm'rs Jackson County, 606 P.2d 681, 684-85 (Or. Ct. App. 1980).

69. *See, e.g.*, Board of County Comm'rs v. Snyder, 627 So. 2d 469, 474-75 (Fla. 1993); New Castle County. Council v. BC Dev. Assocs., 567 A.2d 1271, 1275 (Del. 1989); Golden v. City of Overland Park, 584 P.2d 130, 135 (Kan. 1978).

70. New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1479-80 (7th Cir. 1990).

71. Gilbert v. City of Cambridge, 932 F.2d 51, 65-66 (1st Cir. 1991) (quoting Smithfield Concerned Citizens for Fair Zoning v. Smithfield, 907 F.2d 239, 244 (1st Cir. 1990)) (citations omitted).

The following briefly illustrates each of these categories of arbitrariness.

E. Decision Inadequately Supported by the Record

This form of arbitrariness, which occurs primarily as a result of quasi-judicial decisions, may not rise to the level of a substantive due process violation, provided there is truly a rational basis for the decision. For example, in *Sylvia Development Corp. v. Calvert County, Maryland*,[72] the plaintiff brought a civil rights action against the board of county commissioners after a state court had reversed the board's denial of the developer's application for designation of its property as a "Transfer Zone District" (TZD).[73] That designation would allow the increase in density on a parcel through transfer of development rights from participating agricultural property owners under the county's transferable development rights (TDR) program.[74] The state court had found that the board's decision was "arbitrary"—made without the support of any evidence in the record, and ordered the board to approve the application.[75] In its subsequent civil rights action in federal court, the developer argued that the state court's decision that the board had acted arbitrarily by ordering the TZD application approved created an entitlement to the TZD zone.[76] The Fourth Circuit rejected this reasoning, stating that "a court order requiring the Board to approve the application does not mean that the applicant had a preexisting legal right to that approval."[77] In support of this conclusion, the court quoted from *RRI Realty Corp*: "The fact that the permit *could* have been denied on nonarbitrary grounds defeats the federal due process claim."[78] However, this statement begs the question. A violation of substantive due process occurs if the decision is not, in fact, rational, not that it could have been rational.

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72. 48 F.3d 810 (4th Cir. 1995).
73. *See id.* at 815-17.
74. *Id.* at 815.
75. *Id.* at 827 (citation omitted).
76. *Id.* at 826.
77. 48 F.3d at 827.
78. *Id.* (citing Gardner v. Baltimore Mayor & City Council, 969 F.2d 63, 71 (4th Cir. 1992)) (emphasis added) (quoting RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911, 918 (2d Cir. 1989)).

The better reasoning, stated elsewhere in the court's opinion, is that the decision was, in fact, rational based upon inadequate road access to accommodate the increased density but not supported by sufficient evidence in the record.[79]

F. Irrational Decision—No Reasonable Basis in Law

Even though the Second Circuit's entitlement test means that it rarely reaches the step of analyzing the substantive due process claim, it has found that a decision is arbitrary where it is based upon an improper motive—in one case involving revocation of a permit because of "impermissible political animus"[80] and in another case where a town official acted with wrongful motive in imposing unreasonable conditions upon a permit.[81] The Eleventh Circuit has also found that deprivation of a property interest rises to the level of a substantive due process violation when done for improper motives. In one case, for example, the court held that a town's "reinterpretation" of a ten year termination date for a residential planned unit development, contrary to prior written representations upon which the developer had relied, violated substantive due process.[82]

G. Decision Outside Substantive Limits of Delegated Authority

The Second Circuit's decision in *RRI Realty Corp.* provides the best example of the category of arbitrary decision making that rises to the level of a substantive due process violation.[83] There, the Architectural Review Board (ARB) had refused to approve the stage two building permit for RRI's project because it knew that the stage three permit (requiring the height variance that had been denied) would violate the existing regulations.[84] This action, the state court had held, exceeded the ARB's jurisdiction, which was limited to

79. *Id.* at 825.
80. Brady v. Town of Colchester, 863 F.2d 205, 215-16 (2d Cir. 1988).
81. Walz v. Town of Smithtown, 46 F.3d 162, 167-69 (2d Cir. 1995).
82. Resolution Trust Corporation v. Town of Highland Beach, 18 F.3d 1536, 1549 (11th Cir. 1994).
83. 870 F.2d 911 (2d Cir. 1989).
84. *Id.* at 919-20.

matters of aesthetic judgment.[85] In other words, the ARB had abused its discretion by acting outside the substantive authority delegated to it.[86] However, because of the Second Circuit's peculiar entitlement formulation, it was able to make a "threshold rejection" of the substantive due process claim despite the clear abuse of discretion committed by ARB.[87]

If we examine the circuits' decisions involving these three categories of arbitrary government behavior, in my view, as summarized in the table below, at least two of these categories are sufficiently wrongful to always constitute a violation of substantive due process. When the courts have not found these two categories of government action to violate substantive due process, it is principally because either they never get past the threshold inquiry of whether there is a protected property interest, or apply the extremely deferential rational relationship test appropriate only for truly "legislative" decisions, which individual zoning decisions arguably are not. The only category of arbitrariness that, on its face, may appear not to rise to the level of a substantive due process claim is when the decision maker fails to support an otherwise rational decision with adequate evidence in the record.

According to the Second Circuit, such a circumstance is a matter of state law for the state court to resolve. But if a developer who is denied the requisite approval based upon a facially reasonable rationale that is unsupported by the record loses its financing and ultimately the property as a result, certainly it has incurred damages as a result of the violation of due process, which is actionable under 42 U.S.C. § 1983. This would seem to be particularly so when the purported rationale for a denial, such as adequate road access, however legitimate as a land use matter generally, is not adequately supported in the record precisely because it is not really an issue—regardless of how significant neighboring property owners may think it is. In such instances, a federal circuit, that looks for any "conceivable rational relationship" to "legitimate government ends,"

85. *See* RRI Realty Corp. v. Hattrick, 132 A. D. 2d 558, 517 N.Y.S. 2d 284, 285 (1985).
86. *See supra* note 3 and accompanying text.
87. *See* 870 F.2d at 918.

such as the First Circuit, is unlikely to find a substantive due process violation.

ARBITRARY GOVERNMENT ACTION	
CATEGORIES OF ARBITRARINESS	**SUFFICIENT TO CONSTITUTE SUBSTANTIVE DUE PROCESS VIOLATION**
Decision Inadequately Supported by Record	Sometimes
Irrational Decision No Reasonable Basis in Law	Always
Decision Outside Delegated Authority (Abuse of Discretion)	Always

IV. CONCLUSION

When land use regulatory decisions are the result of improper motives such as personal animus, political bias, or conflicts of interest, or are the result of judgment being exercised outside the legal bounds of the authority that was given to the decision maker, such wrongful governmental action is barred by the substantive component of the Due Process Clause. Because many local governments are currently attempting to address increasingly complex, sometimes subjective issues—preservation of "community character," urban design, "cumulative impacts" of land uses, growth control, environmental protection, affordable housing and infrastructure needs—through discretionary regulations, there is significant risk of arbitrary decision making.

Landowners and developers who seek a substantive due process remedy for injury resulting from such arbitrary decision making face an almost insurmountable barrier in those federal circuits that have erected the protected property interest threshold test in order to avoid becoming zoning boards of appeal. As recognized by the Third Circuit, ownership of property should be sufficient to invoke substantive due process protection from arbitrary government action. Landowners and developers face an equally difficult hurdle in those circuits that look for any conceivable rational relationship between a parcel specific zoning decision and a legitimate governmental objective—perpetuating the fiction that such decisions are "legislative" in nature.

As with the confusion among the federal circuits over the application of the ripeness doctrine in land use disputes, landowners and developers await clarification from the U.S. Supreme Court to resolve the confusion among the federal circuits in addressing substantive due process claims for arbitrary governmental actions.