

**SUING THE SCOUNDRELS!
CIVIL ACTIONS AGAINST MUNICIPAL OFFICIALS
FOR DENIAL OF PERMITS OR APPROVALS**

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Property owners wishing to develop or improve their land are generally required to maneuver through a complex network of land use regulations. In maneuvering through those regulations, property owners often feel victimized by the process and by the officials who administer and promulgate those regulations. While the frustration and expense of obtaining the numerous permits and approvals required to develop or improve land is often inherent in the system, there may be times when the officials charged with administering those regulations intentionally act or fail to act in an unjustified or illegal attempt to prevent the proposed development or improvement of property. During those times there is only one thing your client wants to do - sue the scoundrels.

It is every property owners' dream to be able to collect monetary damages from the "scoundrels", and it is every municipal official's nightmare that such an action would be successful. This article attempts to outline the potential causes of action available to property owners who feel they have been victimized by municipal officials acting in bad faith and the immunities available to municipal officials from such actions. The following are the causes of action considered in this article:

- Federal and Massachusetts Civil Rights claims under 42 U.S.C. § 1983 and M.G.L. c.12, §§ 11H & 11I;
- Common Law Actions; and
- Monetary Remedies under M.G.L. c. 40A, § 17 and M.G.L. c. 41, § 81BB

This article does not explore potential causes of action for the negligent conduct of municipal officials.

A -- FEDERAL CIVIL RIGHTS ACTION:

1. Liability of Public Officials Under 42 U.S.C. § 1983

Causes of action under § 1983 in the land use area generally arise due to procedural and substantive due process violations and equal protection violations. Both the First Circuit Court of Appeals and the Massachusetts Supreme Judicial Court have examined a number of § 1983 claims brought against municipal officials and municipalities in connection with the

administration of land use regulations. The Courts have been consistent in holding that “run-of-the-mill land use disputes” do not constitute a violation of § 1983, even if a denial was made in bad faith, and for invalid or illegal reasons. See e.g., Alton Land Trust v. Town of Alton, 745 F.2d 730, 732 (1st Cir. 1984) (no cause of action under § 1983 for delay caused by “excessive land use regulations”); Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524, 1526-28 (1st Cir. 1983) (Damages sought for five year delay between initial application and grant of building permit); Rosenfeld v. Board of Health of Chilmark, 27 Mass. App. Ct. 621, 627 (1989) (no federal constitutional right involved in denial of discretionary variance, and therefore, no cause of action under § 1983).

In commenting on the likelihood of a planning board action giving rise to a § 1983 action the First Circuit has stated that

. . . the conventional planning dispute -- at least when not tainted with fundamental procedural irregularity, racial animus, or the like . . . is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less “distort” the state scheme under which they operate. A federal court, after all, should not . . . sit as a zoning board of appeals Every appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused or “distorted” its legal authority in some manner, often for some allegedly perverse (from the developer’s point of view) reason. It is not enough to simply give these state law claims constitutional labels such as “due process” or “equal protection” in order to raise a substantial federal question under section 1983

Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982). See also Miller v. Town of Hull Mass., 878 F.2d 523 (1st Cir. 1989) (explaining reach of Creative Environments, Inc.).

The reasoning set out by the First Circuit for holding that the general zoning dispute does not give rise to a cause of action under § 1983 is grounded in the proposition that “where state procedures -- although arguably imperfect -- provide a suitable form of pre-deprivation hearing coupled with the availability of meaningful judicial review, the fourteenth amendment guarantee of procedural due process is not embarrassed”. Chongris v. Board of Appeals of the Town of Andover, 811 F.2d 36, 40 (1st Cir. 1987). The fact that there may be no alternative state remedy which provides all of the relief available under § 1983 does not mean that the state remedies are inadequate to satisfy the requirements of due process. Parratt v. Taylor, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917 (1981). The courts are apparently relying on the fact that individuals or entities aggrieved by a wrongful action of a zoning board or planning board have the option of appealing such decision under M.G.L. c. 40A, § 17 or under M.G.L. c. 41, § 81BB. The First Circuit has also stated that no cause of action under § 1983 arises unless a cognizable constitutional right is

[harmed] and the court has held that there is no constitutionally cognizable interest in discretionary permits such as special permits and variances. Chongris, 811 F.2d at 43.

The First Circuit has, however, recognized that on rare occasions a denial of a land use permit may form the basis for a § 1983 claim. In Roy v. City of Augusta, 712 F.2d 1517, 1522-24 (1st Cir. 1983), the court held that an applicant for a license stated a § 1983 claim when he alleged that the City Council issued an expired license in defiance of a state court judgment. The state court had ordered the city council to issue the applicant a license to operate his pool and billiard room. The First Circuit reversed the district court's dismissal for failure to state a claim and remanded for a determination of whether defendants' actions were sufficiently egregious under the circumstances to rise to the level of a Constitutional violation. Id. The court stated:

we emphasize as a crucial element of Roy's due process claim that he must prove that defendants' refusal to issue a license was totally without reasonable sanction under the [state court] judgment. If their issuance of an expired license should turn out to be a reasonable, even if incorrect, response to [the state court judgment], defendants would have official immunity, (citation) and, apart from that, with-holding of the license would not have been a subversion of the state's procedures and the demands of due process However, if defendants withheld the license in defiance of (the state Court judgment), the act was an act of lawlessness [and] we think he might be able to recover damages under section 1983.

Id.

The First Circuit is obviously drawing a distinction between bad faith and egregious conduct. In Roy, the court noted that the board's action would have to be an "act of lawlessness" in order to give rise to a cause of action under § 1983. Under the facts of that case an act of lawlessness would have been presented by the board's outright defiance of a state court's order. The First Circuit has clearly stated, however, that "distortion" of state law does not give rise to a cause of action under § 1983 because most land use disputes involve a claim that the municipal officials exceeded abused or distorted their authority. Creative Environments, 680 F.2d at 833. See also Rosenfeld, 27 Mass. App. Ct. at 628 (intentional, arbitrary, capricious refusal to issue variance not an egregious action which would give rise to cause of action under § 1983). There has in fact been no case decided by the First Circuit where a plaintiff successfully recovered under § 1983 for the egregious conduct of municipal officials in administering land use regulations, other than on equal protection grounds. The types of conduct which will rise to the level of egregious conduct is therefore unclear at this time.

Despite the fact that the First Circuit has failed to find a remedy under § 1983 for the "run-of-the-mill land use dispute", other circuits have found to the contrary. See e.g. Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (cause of action under § 1983 existed where plaintiff was denied substantive due process by zoning authority's refusal to issue building permit which

plaintiff was entitled to under regulations); Shelton v. City College Station, 754 F.2d 1251 (5th Cir. 1985); Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983).¹

Claims alleging a violation of equal protection or a violation of first amendment right will, alternatively, form the basis for a § 1983 action. See e.g. Miller v. Town of Hull Mass., 878 F.2d 523 (1st Cir 1989); Heritage Homes of Attleboro v. Seekonk Water Dist., 648 F.2d 761 (1981), cert granted, 454 U.S. 807, cert denied, 454 U.S. 898, on remand, 670 F.2d 1, cert denied, 457 U.S. 1120 and 459 U.S. 829; Cordeco Development Corp. v. Santiago Vasquez, 539 F.2d 256, 260 (1st Cir. 1976), cert. denied, 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed. 386 (1976) . See also Chongris, 811 F.2d at 40 (Court noting that there may be tenable property interest in building permit when it has in fact been issued).

2. Immunities of Municipal Officials to Actions Brought Under § 1983:

Even if the facts surrounding a particular case do give rise to a cause of action under § 1983, the immunities enjoyed by public officials under § 1983 still must be addressed. Public officials who perform discretionary functions enjoy a qualified immunity in that they are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982). This is an objective test which does not focus of the subjective intent of the official. The official's bad faith or malice, is therefore, not at issue in determining whether the official is immune from suit under § 1983. Floyd v. Farrell, 765 F.2d 1, 4 (1st Cir. 1985). In view of the First Circuit's treatment of § 1983 claims centering on land use disputes where equal protection is not at issue, it is unclear whether a municipal official's conduct would be held to "violate clearly established statutory rights".

It should always be remembered, however, that municipalities enjoy no immunity for their constitutional torts. A municipality can be liable for a violation of § 1983 if one of its municipal official's decisions constituted an execution or implementation of official policy. Pembaur v. City of Cincinnati, 475 U.S. 469, 477-81, 106 S.Ct. 1292, 1297-99 (1986). The municipality will not be liable on a theory of respondeat superior, but rather, the municipality is liable directly for its actions. Id. at 477.

Municipal liability under § 1983 may be imposed for a single decision by municipal officials under appropriate circumstances. Where the decision to deny a permit was an "officially sanctioned" act of "authorized decision makers", the municipality itself is considered to have acted, and therefore, may be liable under § 1983. Id. at 480-81; Bateson, 857 F.2d at 1303. One Massachusetts court has held that there may be a cause of action under § 1983 against a municipality in a case where the selectmen imposed improper conditions on the issuance of a permit. See Thompson v. Labossierre, No. 89-1445 (Sup. Ct. Barnstable Sept. 28, 1990) (recognizing cause of action against municipality were Board of Selectmen imposed improper conditions on permit).

¹ The 8th Circuit found §1983 remedy in "run-of-the-mill land use disputes", (Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1985)), but has since overruled that finding. See Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (1992)(explicitly instructed 8th Cir. courts to follow Creative Environments, 680 F.2d 822.)

B -- MASSACHUSETTS CIVIL RIGHTS ACTION: Liability of Public Officials under M.G.L. c. 12, §§ 11H & 11I

The Massachusetts Civil Rights Act provides a state remedy for interference or attempted interference with either Constitutional rights or those provided by the laws of the United States by way of threats, intimidation or coercion. M.G.L. c.12, §§ 11H & 11I amended by St. 1982, c. 634, § 4. The immunities available to municipal officials in actions brought under the Massachusetts Civil Rights Act are coextensive with those available in actions brought under the Federal Civil Rights Act. See, Duarte v. Healy, 405 Mass. 43, 46-51 (1989).

The types of bad faith actions which this article is concerned with usually do not involve threats, intimidation or coercion, and therefore, it is unlikely that the Massachusetts Civil Rights Act will provide a viable remedy for such conduct. The Appeals Court has recently held that a complaint which alleged that the denial of a sewage disposal permit was an “intentional, arbitrary and capricious” act, did not state a claim for relief under the Massachusetts Civil Rights Act because the complaint did not allege any action which could be construed to be a threat, intimidation or coercion. Rosenfeld v. Board of Health of Chilmark, 27 Mass. App. Ct. 621, 627 (1989). See also Pheasant Ridge Assoc. Limited Partnership v. Burlington, 399 Mass. 771, 781 (1987) (court noting that where town acted in bad faith to take by eminent domain land which plaintiff intended to develop, cause of action under State Civil Rights act unlikely because no threat, intimidation or coercion present where public officials express intent to use lawful means to block development).

C -- COMMON LAW CAUSES OF ACTION:

The potential common law causes of actions which generally may arise when municipal officials act in bad faith in administering zoning by-laws or subdivision control laws consist of interference with contractual relations, interference with advantageous economic relations and civil conspiracy. See Nolan, Massachusetts Practice Series, Torts §§ 97-99 (1989) (discussion of elements necessary to establish cause of action for the above referenced torts). When a common law cause of action is brought against a municipality or a municipal official, however, a number of obstacles to any action are presented by the various immunities enjoyed by the municipality or the municipal official.

1. The Impact of the Massachusetts Tort Claims Act on Actions Against municipalities and Municipal Officials:

The Massachusetts Tort Claims Act (the “Act”) sets out standards and limitations on the ability to sue public employers and employees for tortious injuries. See M.G.L. c.258, §§ 1-13. The primary purpose behind the adoption of the Act was to restructure liability for negligence claims. The Act immunizes public employees for negligent acts while creating liability for public employers for those same acts. Section 10 of the Act, however, provides that the Act shall not apply to intentional torts. See Connerty v. Metropolitan Dist. Comm’n, 398 Mass. 140, 149 n.8 (1986) (§ 10 excludes all intentional torts, including those not specifically set out therein). Section 10 of the Act also provides that the Act shall not apply to claims based upon the exercise of discretionary functions.

This article only deals with intentional actions of municipal officials. Moreover, such actions are generally based upon the exercise of discretionary functions by those individuals. The Act, therefore, should not shield from liability the class of municipal officials with which this article is concerned.

Although the Act does not eliminate the individual liability of officials for intentional torts and claims arising out of the performance of discretionary functions, it does provide that public employers may indemnify their employees for such claims under limited circumstances and when the employees are acting within the scope of their official duties or responsibilities. See M.G.L. c. 258, § 9 (indemnification not allowable where civil rights are violated by employee in grossly negligent, willful or malicious manner); Id. at § 13 (no indemnification for intentional violation of civil rights). The Supreme Judicial Court has construed the indemnification provision of § 9A to bar indemnification where the conduct complained of was egregious enough to warrant an award of punitive damages. Pinshaw v. Metropolitan Dist. Comm'n, 402 Mass. 687, 697 (1988). Despite that limitation, this is obviously an attractive provision for plaintiffs who wish to sue a municipal official for an intentional tort where the official is partially or completely judgment proof, so long as the action is not based upon a civil rights violation or upon actions which may be construed as egregious.

2. Common Law Immunities of Municipal officials:

Although the Act provides that it shall not apply to certain types of claims, it does not alternatively provide what principles of liability will govern those excluded claims. Common law principles of liability therefore govern. At common law, public employers were generally immune from liability for the tortious acts of their employees. Spring v. Geriatric Auth. of Holyoke, 394 Mass. 274, 284-86 (1985). Even an intentional tort committed through an official act of a municipal board or agency which interferes with the economic relations of a developer will not generally give rise to common law liability for the municipality itself. See Glannon, Recovery for Civil Rights Violations In Massachusetts: A Comparison of Section 1983 With State Tort Remedies, 28 Suffolk U.L. Rev. 276, 288 (1984). But See Pheasant Ridge Assoc. Limited Partnership, supra (municipality itself acting in bad faith by vote of Town meeting to take land by eminent domain which plaintiff wanted to develop). Public employees and officials, however, are generally liable for their own intentional torts at common law. See Alves v. Hayes, 381 Mass. 57, 58 (1980).

In the case of Gildea v. Ellershaw, 363 Mass. 800 (1973), the Supreme Judicial Court set out the law of the Commonwealth regarding the liability of municipal officials as follows:

[I]f a public officer, other than a judicial officer, is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby. This rule is presently limited to public officers acting in good faith, without malice and without corruption.

Id. at 820. Unlike the objective immunity for public officials in § 1983 actions, the qualified immunity set out in Gildea is based upon subjective good faith. Therefore, an examination of cases involving the immunity of public officials in actions brought under § 1983 is not instructive as to when the qualified immunity under Gildea can be overcome. Surprisingly, it seems that most plaintiffs in State and Federal civil rights actions do not bring correlative common law tort actions. There is, therefore, a lack of cases examining what will amount to subjective bad faith in order to overcome the qualified immunity found in Gildea. Presumably, however, a plaintiff would not have to show that the municipal official acted egregiously. Any statements or actions made by officials which evince an intent to manipulate the system in an unlawful or improper manner in order to deny relief to an applicant should satisfy the bad faith requirement. C.f. Pheasant Ridge, 399 Mass. at 776-77 (eminent domain case where bad faith was shown).

In setting forth the rule of liability for public officials in Massachusetts, the Gildea Court expressly avoided use of the word “quasi judicial”, reserving for later consideration whether a nonjudicial, public official performing “quasi judicial” acts could enjoy the absolute immunity normally enjoyed by judicial officials. Gildea, 363 Mass. Id. at 822. If the action of municipal officials in administering land use regulations were considered to be quasi judicial, this open issue could be problematic for any claims based upon common law theories because the officials may enjoy absolute immunity like judicial officials. The First Circuit, however, has noted that zoning hearings are generally not of a judicial nature, rather they are more analogous to political or legislative decisions, despite the fact that they impact on specific individuals. O'Neill v. Town of Nantucket, 711 F.2d 469, 471 (1st Cir. 1983). But see Vitale v. Planning Board of Newburyport, 10 Mass. App. Ct. 483, 486 (1980) (formulation of board of health reports is adjudicatory procedure). Whether or not the administration of a particular matter is construed to be adjudicatory may not be determinative because subsequent to Gildea the Supreme Judicial Court has suggested in dicta that only qualified immunity should apply to non-judicial public officials performing adjudicatory functions. See, Sherman v. Rent Control Board of Brookline, 367 Mass. 1, 7 (1975) (commenting that individual members of rent control board would have personal immunity for their actions if they acted in good faith, without malice and without corruption). It is therefore unlikely that municipal officials administering land use regulations enjoy more than the qualified immunity set out in Gildea.

The qualified immunity set out in Gildea only applies to public officials acting within the scope of their official duties or responsibilities. See Joyce v. Hickey, 337 Mass. 118 (1958) (holding that judge who held an attorney in criminal contempt was not absolutely immune to suit if he in fact was not considering a matter permissible for judicial inquiry). Moreover, Gildea only applies to public officials performing discretionary acts. A municipal official performing ministerial functions, such as certain actions of a building inspector, would not enjoy the qualified immunity set out in Gildea. See Breault v. Chairman of the Board of Fire Commissioners of Springfield, 401 Mass. 26 (1987) (no common law immunity for intentional ministerial acts of public officials).

The standard set out in Gildea does not set forth a cause of action, rather it provides a qualified immunity for public officials. An individual or entity injured by the actions of a

municipal official must still set forth an independent cause of action in order to successfully bring an action against a municipal official.

Because this article does not seek to explore the available causes of action against municipal officials for negligent actions, the common law public duty doctrine and the general rule of liability for misfeasance of ministerial acts is not discussed. For a discussion of these issues as they relate to the land use area see the recent Superior Court Case of Zocchi v. The Daley Agency, No. 89-509 (Sup. Ct., Berkshire Sep. 26, 1990) (conservation commission not liable to applicant for negligence because no special duty owed to applicant, rather duty owed to public).

D -- MONETARY REMEDIES PROVIDED BY G.L. c. 40A, § 17 & M.G.L. c. 41., § 81BB

If an individual is economically harmed by the bad faith actions of municipal officials administering zoning or subdivision regulations and for whatever reason he or she does not have an independent cause of action for monetary relief, there still may be hope for recovering some losses in a c. 40A, § 17 or a c. 41, § 81BB appeal. Section 17 of Chapter 40A provides that “[c]osts shall not be allowed against the board or special permit granting authority unless it shall appear to the court that the board or special permit granting authority in making the decision appealed from acted with gross negligence, in bad faith or with malice”. Section 81BB of Chapter 41 provides that “[c]osts shall not be allowed against the planning board or board of appeals unless it shall appear that such board acted with gross negligence or in bad faith”. The above two provisions give the reviewing court the authority to impose costs on municipal boards for decision under appeal. Exactly what costs may be awarded are not specified in either section.

At least one Massachusetts court has construed the costs provision in § 81BB to entail more than just court costs. In Yeadon v. The Grafton Planning Board, No. 87-2239 (Sup. Ct. Worcester May 11, 1990) the Worcester Superior Court was reviewing the denial of a subdivision approval. The court in that case made extensive factual findings regarding the bad faith actions of the planning board and its chairman, and based upon those findings ruled that the Planning Board's disapproval was in bad faith.

The court in Yeadon, while noting that no court had decided what the term “costs” means, stated that court costs in that case would be a “pittance” against the unnecessary engineering costs and attorney’s fees suffered by the plaintiff. Id. at 16. Relying on Young v. Planning Board of Chilmark, 402 Mass. 841, 847 (1988), the court awarded forty-seven thousand dollars (\$47,000.00) in engineering costs which the court found were incurred unnecessarily due to the planning boards actions. The Court, in reliance on M.G.L. c. 231, § 6f, also awarded attorney’s fees and computed interest as provided for by that section on the grounds that the planning board's “defenses” were not advanced in good faith.

In Young v. Planning Board of Chilmark, the Supreme Judicial Court upheld a trial court’s decision not to award costs and attorney’s fees where the court had found that the planning board, although erring as a matter of law, acted neither in bad faith nor with gross negligence. Young, 402 Mass. at 841. In so holding, the court cited inter alia, to M.G.L. c. 231, § 6f, thereby implying that attorneys fees, costs and expenses would be a proper remedy if the requirements of that section were met. Section 6f provides that:

Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice . . . the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the . . . defenses, . . . whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith

If such a finding is made with respect to a party's defenses . . . the court shall award to each party against whom such defenses . . . were asserted . . . an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims [and]; interest on the unpaid portion of the monetary claim at issue in such defense . . . at one hundred and fifty percent of the rate set in section six C from the date when the claim was due

While it is unclear how other courts will construe the "costs" provision in §§ 17 & 81BB, parties appealing under either of those sections should, in cases of gross negligence or bad faith, include in their complaint a prayer for costs incurred due to a municipal board's actions. If during the pendency of the action the defendant municipal board consistently advances defenses which are wholly insubstantial, frivolous and not advanced in good faith, then the plaintiff should move to have costs, attorneys fees and expenses assessed against the defendant as well as having interest computed thereon as provided for by § 6F.