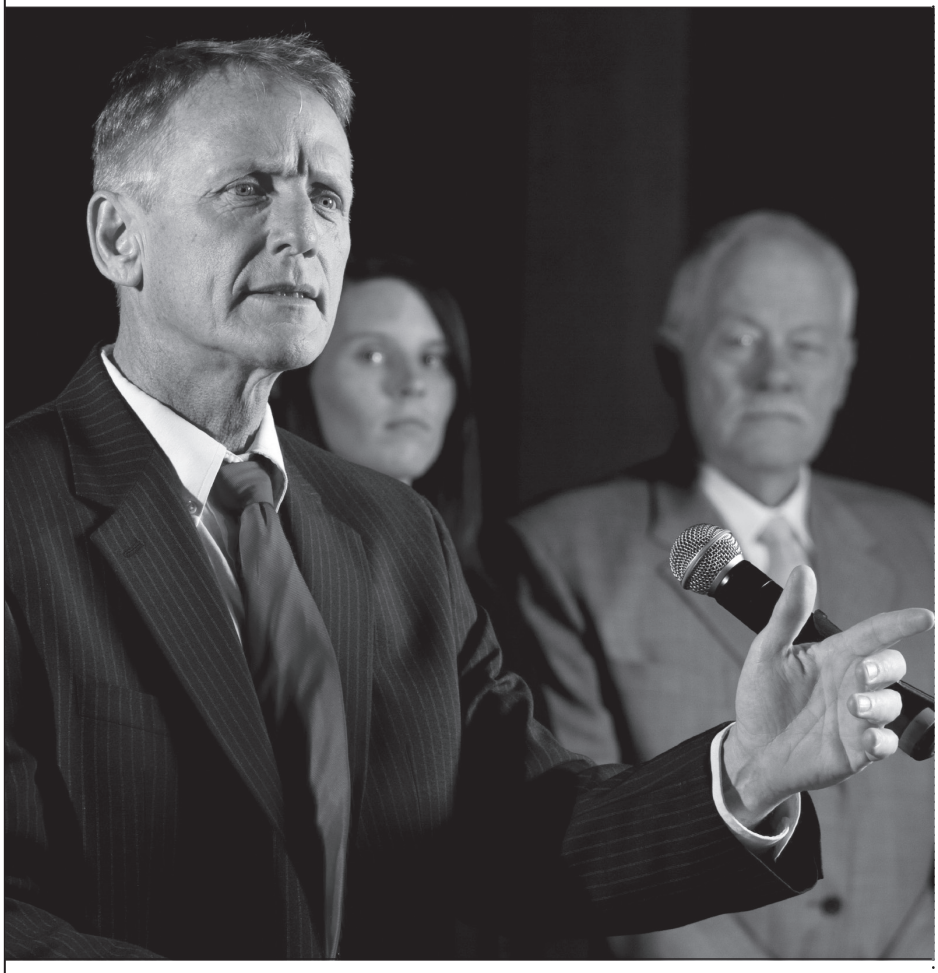
Elected Official Immunity in Making Local Zoning Decisions

by Steven M. Elrod and Hart M. Passman



For years, elected members of municipal boards or councils charged with making local land use and zoning decisions enjoyed full personal immunity. When disgruntled land owners or developers aggrieved by an adverse zoning decision attempted to seek damages from the individual members of the board, council or commission making the decision, courts routinely rejected such efforts. Courts found that local zoning decision-makers are protected by either legislative or "quasi-judicial" immunity for those decisions. These doctrines of immunity reflect the courts' recognition that whether acting in a legislative capacity, or in an adjudicative capacity similar to that of a judge, the decision-maker should not be burdened with the fear of a lawsuit when officially exercising his or her zoning authority.

The District Court for the Northern District of Illinois recently broke from this precedent in a decision with potential far-reaching negative consequences for elected officials. In *Chicago Joe's Tea Room LLC v. Village of Broadview*,[1] the court refused to grant quasi-judicial immunity to the trustees of the defendant municipality—despite classifying the zoning denial as a quasi-judicial action.[2] The seemingly incongruous decision threatens the very immunity on which local officials often rely when reviewing zoning issues, and opens the door for litigation-prone zoning applicants to scare local officials into granting zoning relief—whether or not that relief is merited.

The Doctrine of Quasi-Judicial Immunity

The doctrine of quasi-judicial immunity is rooted in the United States Supreme Court's 1978 opinion in *Butz v. Economou*.[3] In *Butz*, a commodities merchant and his companies filed a federal lawsuit alleging that the federal Department of Agriculture infringed the plaintiffs' constitutional rights by revoking their commodities merchant registration.[4] The lawsuit sought damages from the Secretary of Agriculture, the hearing examiner, and the prosecuting attorney involved in the revocation proceedings, along with a host of other Department officers, all of whom were named as individual defendants. The government argued that its officers enjoyed absolute immunity from liability for damages for their role in the revocation proceedings, even if those proceedings infringed the merchant's constitutional rights and even if the infringement was deliberate.[5]

Although the Supreme Court disagreed with the government's broad assertion of absolute immunity for its officials in all circumstances, it recognized that "there are some officials whose special functions require a full exemption from liability,"[6] such as judicial officials and others engaging in judicial functions (e.g., federal prosecutors). Going further, the Court declared that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages."[7]

Specifically, the Court identified six features of the judicial process that, if present in an administrative proceeding, would favor a finding that quasi-judicial immunity was available to those participating in the adjudication. Those features are: (1) whether the proceeding is adversarial in nature; (2) whether the decision-maker is insulated from political influence; (3) whether the parties may present evidence in support of their cases; (4) the use of precedent to resolve the controversy; (5) the ability to appeal the outcome of the proceeding; and (6) whether the decision and findings are presented on the record.[8] The Court ordered that the case be remanded so that the district court could reanalyze the officials' claim of immunity.[9]

Quasi-Judicial Immunity and Special Use Permits

Prior to the recent *Chicago Joe's* decision, at least three federal courts applied the doctrine of quasi-judicial immunity to a special use permit determination by local zoning officials. Most recently, in *Dotzel v. Ashbridge,* the U.S. Court of Appeals for the Third Circuit relied upon *Butz* when it granted individual elected members of a township board immunity from a 42 U.S.C. § 1983 lawsuit involving the denial of a conditional use permit for a mining operation.[10]

First, though the court noted the discussion in *Butz* concerning the need for "insulation from political influence," and that the board supervisors were all elected, the court nevertheless granted quasi-judicial immunity. The court explained that this *Butz* factor did not depend simply on whether the official was elected or appointed, but rather, on whether the official could "be removed from office based on the substance of [his or her] official work."[11] As the supervisors could not be removed directly because of a particular decision without due process, the court concluded that they were insulated from political influence, even though they were elected.

The *Dotzel* court also held that the use of precedent to decide a case, also cited in *Butz*, turned on the extent to which the decision was "constrained by outside law."[12] The court reasoned that a decision was more "judicial" in nature if it was dependent more on precedent and external standards and less on the discretion of the official. The court found that the supervisors' obligation to rely upon specified land-use standards, and to set forth the board's reasoning in writing, indicated that they were acting in a quasi-judicial capacity. Finally, the court asserted the public interest in providing quasi-judicial immunity to those making zoning decisions, so that the decision-makers could act "without fear" that deep-pocketed developers would threaten litigation and thereby improperly influence the outcome of the zoning process.[13] Although the court acknowledged that quasi-judicial immunity did not necessarily apply to every zoning body, it found that the supervisors in this case were acting in a quasi-judicial capacity and, therefore, entitled to quasi-judicial immunity from liability.

Two federal district courts—both in cases involving the denial of a special use permit for a religious institution—have explored whether local zoning officials enjoy quasi-judicial immunity from liability for their special use permit decisions. In *Hale O Kaula Church v. Maui Planning Commission,*[14] the District Court of Hawaii granted immunity to the individual members of a county planning commission for their decision to reject a permit for a church in an agricultural area. In contrast, the District Court for the Eastern District of California ruled, in *Guru Nanak Sikh Society of Yuba City v. County of Sutter,*[15] that county supervisors were not immune from liability for their decision. The *Guru Nanak* court noted that the supervisors' "primary role" was that of "elected legislators," indicating thereby that they were not insulated from political influence.[16] The court also held that quasi-judicial immunity was not available to officials who served both as "lawmaker and [as] monitor of compliance" with those laws.[17]

Quasi-Judicial Immunity in Other Contexts

Perhaps not surprisingly, quasi-judicial immunity has also been extended to local zoning officials conducting appellate-style review of decisions made by subordinate officials.[18] In rendering those decisions, courts have shed further light on why quasi-judicial immunity is often determined to be appropriate for officials involved in zoning decisions. The District Court for the Western District of North Carolina held that members of a town council were immune from liability for affirming the denial of a zoning variation, finding that "the touchstone" of judicial immunity was the "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights."[19] The U.S. Court of Appeals for the Ninth Circuit noted the applicable public policy concerns: "[l]and use decisions are often contentious and involve conflicting interests and policies. Permitting suits against the quasi-judicial decision makers would discourage knowledgeable individuals from serving as Board members and thwart the orderly process of judicial review."[20]

Quasi-judicial immunity has also been granted to local officials rendering decisions with respect to licenses. The First Circuit has held that the members of the Massachusetts Board of Registration in Medicine enjoyed quasi-judicial immunity from liability when revoking medical licenses.[21] In *Killinger v. Johnson* and *Reed v. Village of Shorewood*, the Seventh Circuit has twice upheld quasi-judicial immunity for Illinois mayors when acting in a statutory capacity as the Local Liquor Control Commissioner.[22] In these cases, the Seventh Circuit observed that the Local Liquor Control Commissioner could not take action against a liquor licensee except after a quasi-judicial proceeding.[23]

continued on page 36



Steven M. Elrod is chairman of Holland & Knight's National Land Use and Government Team and Executive Partner of the firm's Chicago office. He represents public and private sector clients on a broad range of land use, zoning, real estate and entitlements matters. He is the corporation counsel for the City of Highland Park, IL and is the Village Attorney for the villages of Lincolnwood and Northbrook, IL. Mr. Elrod is an adjunct professor at Northwestern University School of Law.



Hart M. Passman is an associate in Holland & Knight's Chicago office. He practices in the area of land use and local government. As counsel to various Illinois municipalities, he has drafted and negotiated numerous zoning variations and prepared many comprehensive local ordinances, including zoning codes. Mr. Passman has also worked extensively on land use and zoning issues for private sector clients.

Ordinances

cont'd from page 29

solicitors" also failed on overbreadth grounds. Based on *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), it broadly restricted speech and failed to strike a balance "between the speech affected and the governmental interests" asserted by the City. The only interest that Ocean City advanced in support of the registration requirement was the need to protect children from potential inappropriate conduct by costumed street performers, and the registration requirement was "vastly overinclusive with respect to the City's stated concerns." The case is *Chase v. Town of Ocean City*, No. ELH-11-1771, 2011 U.S. Dist. LEXIS 102162 (D. Md. Sept. 09, 2011). ML

Code Enforcement

cont'd from page 31

because the individual was subject to increased penalties without being afforded a hearing to contest the validity of the violation. As a result, I changed our ordinance's penalty provision. Now, it provides for a set minimum fine, and allows an individual to pay a reduced amount if he or she chooses to admit the violation and pay within a short time after the violation date. An individual wishing to contest a violation merely faces the established minimum fine. Since the provision does not automatically increase the fine amount without a hearing, the provision should pass constitutional muster.

Municipalities always struggle to balance the needs of their businesses with the need for parking regulations—namely, how strict should enforcement be if the municipality wants to encourage customers to come downtown and patronize local businesses? Municipalities may address that balance in different ways, but rest assured that, as long as parking regulations exist, *Parking Wars* will continue. Perhaps your best bet is to make violators an offer they can't refuse. ML

Second Look

cont'd from page 30

facts not within the testifying individual witness' own knowledge.

I believe that we should use the 30(b)(6) deposition to discover the names of those persons employed by, or contracting with, the organization that *do* have personal knowledge of the relevant facts, and then either depose them, or (if within subpoena distance and also within our client's risk tolerance) call them as trial witnesses. Time and rules permitting, one could also use the Rule 30(b)(6) testimony as the basis for requests for admission, and ask that the opposing party be required to pay the expenses of proving any denied facts.

Notes

1. (6) **Notice or Subpoena Directed to an Organization.** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

2. Based on the Advisory Committee notes and the only four decisions under Rule 4.1, I think that the "other process" contemplated by the Rule means court orders for contempt, civil committal or the like. However, nothing in Rule 4.1 excludes using it for serving subpoenas, and one could argue that a "subpoena" is one example of "process." Indeed, prior to the 1993 amendments, Rule 4 referred to "process other than a subpoena ... ":

> In support of the contention that the word "process" in [ERISA] section 502(e)(2) includes a trial subpoena, plaintiff cites to the portion of [former] Rule 4 that states:
>
> > *Process, other than a subpoena or a summons and complaint*, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.
>
> [Former] FRCP 4(c)(1) (emphasis added) [now recodified in Rule 4.1, without reference to "subpoena"].
>
> As the passage cited by plaintiff indicates, "process" certainly can include a subpoena. It need not be construed so broadly though, as:
>
> > The word "process" ... as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ.
>
> Black's Law Dictionary at 1085 (West 5th ed 1979). The court accordingly does not find the broad use of the word "process" in Federal Rule of Civil Procedure 4 conclusive on the question of the meaning of "process" in section 502(e)(2) of ERISA.

Martin v. Cont'l Cas. Co., 807 F. Supp. 1359, 1360 (N.D. Ill. 1992).

In any event, we would find out very quickly if the Rule applies to serving subpoenas if we try to use it for that purpose—the Rule requires service by the U.S. Marshals Service or a person specially appointed by the court. I suspect that at least until a court otherwise orders, the Marshals Service will take the position that Rule 4.1 does not apply to subpoenas. A district court probably would grant a motion to appoint a person to make personal service of a subpoena upon a corporation, but not necessarily relying on Rule 4.1. If we sought such order, we should try to include specific instructions on how the organization is to be served. ML

Zoning Decision Immunity

cont'd from page 17

Chicago Joe's

In the *Chicago Joe's* case, Chicago Joe's submitted an application for a special use permit to operate an adult use facility in the Village of Broadview, Illinois. The District Court for the Northern District of Illinois reviewed whether the Village Trustees were immune from liability for their denial of the permit.[24] In accordance with the Village's zoning ordinance, the Planning and Zoning Commission held a public hearing on the application, and recommended to the Village's corporate authorities, the Village Board of Trustees, that the requested permit be denied. The Board of Trustees

agreed, and at one of its regular Village Board meetings, it rejected the application. The plaintiffs then sued the Village and all seven members of the Board of Trustees, contending that the permit denial violated their First and Fourteenth Amendment rights. The Trustees moved for judgment on the pleadings, arguing that they enjoyed "absolute immunity from personal liability."[25]

The court began its inquiry by reviewing Illinois law to determine how to classify a decision regarding a special use permit. The Trustees, looking to an Illinois statute that mandated judicial review of special use permit decisions under a deferential standard applicable to legislative acts,[26] argued that their decision was legislative in nature, and that as a result, they enjoyed legislative immunity. Although the court acknowledged the statutory standard of review, it declined to classify the permit denial as a legislative decision. Instead, the court relied upon the legislative history of the statute, which provided that, despite the required form of judicial review, special use permit decisions were of a "quasi-judicial character." The court noted that the Trustees were required to decide proposed special use permit applications by "apply[ing] pre-existing land use standards and policies," which was a "quasi-judicial, not classically legislative" act.[27] Accordingly, the court concluded that, "[d]espite their formal status as legislators ... the Trustees do not act in their legislative capacity when granting or denying a special use permit."[28] Rather, the Trustees' decision to deny the special use permit was characterized as a quasi-judicial act. In light of that classification, the court declined to extend legislative immunity to the Trustees for their denial of the permit.

However, citing the Seventh Circuit decisions in *Reed* and *Killinger*, the court acknowledged that quasi-judicial immunity might still apply.[29] Although it did not cite *Butz*, the court specifically noted that the availability of quasi-judicial immunity depended, in part, upon the presence of procedural protections, such as notice and a hearing, and the availability of appellate review of the local official's decision.[30] Applying these cases to the facts, the court found that the special use proceedings before the Village were quasi-judicial.[31] Importantly, the Village's Planning and Zoning Commission had conducted a public hearing, reviewed the relevant facts, issued a set of factual findings, and submitted a report of its findings and a formal recommendation to the Trustees.[32] The court also noted that the Trustees were obligated to base their decision on pre-determined standards of review, and that their ultimate decision was subject to judicial review.[33]

Nevertheless—after concluding that the Village's special use process *and* the Trustees' decision were quasi-judicial—the court determined that quasi-judicial immunity was not available to the Trustees.[34] Because the Trustees were not obligated to state the rationale behind their denial, their decision could not be reviewed in the same manner as that of a typical judge, or even that of an Illinois liquor commissioner, both of whom were required to "provide some reason for any adverse decision."[35] The court further explained that the deferential standard of judicial review of special use permit decisions was "too insubstantial a procedural safeguard" to extend quasi-judicial immunity to the Trustees.[36]

Notably, the court did not cite *Butz* or any of its progeny in support of its conclusions, nor did it analyze all six of the *Butz* factors (it noted only two of the standards, as mentioned above). Rather, the court relied upon two United States Circuit Court decisions involving *legislative* immunity, along with its own analysis.[37]

Consequences of *Chicago Joe's*

As of September 15, 2011, the *Chicago Joe's* litigation remains pending. The decision, when examined along with the other cases involving quasi-judicial immunity, is clearly at odds with the doctrine. Had the court in *Chicago Joe's* reviewed the claim of immunity in the context of the six *Butz* factors, the case may well have been decided differently. The special use permit decision in *Chicago Joe's* involved an adjudication of private rights, which has been recognized as the "touchstone" of judicial immunity. Though the Trustees were elected, *Dotzel* demonstrates that even elected officials may be entitled to quasi-judicial immunity. Further, Illinois special use permit decisions involve both the presentation of evidence on the Court record, and the use of established standards to guide the ultimate decision.

Fortunately, at least one court—interestingly, another judge within the Northern District of Illinois—has expressly rejected the logic of *Chicago Joe's*. In *Irshad Learning Center v. County of DuPage*, the court reviewed a challenge to the denial, by a county board, of a special use permit for a religious worship and educational facility.[38] The plaintiff's suit included a plea for relief from the individual members of the county board in their individual capacities.[39] The county board members assumed that they were protected by quasi-judicial immunity, and the court agreed.[40]

The *Irshad* court expressly rejected the notion in *Chicago Joe's* that quasi-judicial review was not available for officials whose decisions enjoyed deferential judicial review.[41] Instead, relying on the approach employed in *Dotzel*, the court found the county board members acted in an adjudicatory capacity when they denied the zoning relief, that the level of judicial review was sufficient, and that the members required protection from the "threat of retaliatory lawsuits."[42] On those bases, the court granted quasi-judicial immunity.

Conclusion

The *Chicago Joe's* decision is out there, and caution is advised. Local elected officials in Illinois (and perhaps, nationwide) will potentially be subject to lawsuits seeking monetary damages, without the protection of quasi-judicial immunity. An uptick in such cases would surely lead directly to that which the Third and Ninth Circuits cautioned against: the improper influence of the outcome of zoning processes, based solely on fears of litigation.

Editor's Note: An earlier version of this article was published in the American Bar Association's publication, 42 URBAN LAWYER 73 (No. 3, Summer 2010).

Notes

1. No. 07 C 2680, 2009 WL 3824723, 2009 U.S. Dist. LEXIS 106202 (N.D. Ill. Nov. 12, 2009) (hereinafter "*Chicago*

continued on page 38

Zoning Decision Immunity

cont'd from page 37

Joe's").
2. *Id.* at *3.
3. 438 U.S. 478 (1978).
4. *Id.* at 481.
5. *Id.* at 485.
6. *Id.* at 508.
7. *Id.* at 512-13.
8. *Id.* at 512-13.
9. *Id.* at 517.
10. 438 F.3d 320 (3rd Cir. 2006).
11. *Id.* at 325-26.
12. *Id.* at 326-27.
13. *Id.* at 325-326, quoting *Bass v. Attardi*, 868 F.2d 45, 50 (3rd Cir. 1989).
14. 229 F. Supp. 2d 1056, 1065-67 (D. Haw. 2002).
15. 326 F. Supp. 2d 1128, 1135-36 (E.D. Cal. 2003).
16. *Id.* at 1135.
17. *Id.* at 1136.
18. *See, e.g.*, Associates in Obstetrics & Gynecology v. Upper Merion Township, 270 F. Supp. 2d 633 (E.D. Pa. 2003); Hyatt v. Town of Lake Lure, 225 F. Supp. 2d 647, 656 (W.D.N.C. 2002); Ryan v. Lower Merion Township, 205 F. Supp. 2d 434 (E.D. Pa. 2002); Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999).
19. *Hyatt*, 225 F. Supp. 2d at 656, quoting *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-436 (1993) (internal citations omitted).
20. *Buckles*, 191 F.3d at 1136.
21. *See, e.g.* Bettencourt v. Bd. of Registration in Medicine, 721 F. Supp. 382, 385 (D. Mass. 1989).
22. Killinger v. Johnson, 389 F.3d 765, 770-71 (7th Cir. 2004); Reed v. Village of Shorewood, 704 F.2d 943, 952 (7th Cir. 1983).
23. *Id.*
24. *Chicago Joe's*, 2009 WL 3824723 (N.D. Ill. Nov. 12, 2009).
25. *Id.* at *1.
26. *Id.* at *2, citing 65 ILCS 5/11-13-25 (2006).
27. *Id.*
28. *Id.*
29. *Id.* at *2-*3.
30. *Id.*
31. *Id.* at *3.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (citing *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1392 (11th Cir. 1993) and *Biblia Abierta v. Banks*, 129 F.3d 899, 904 (7th Cir. 1997), to support the denial of absolute immunity to "local legislators").
38. No. 10 C 2168, 2011 WL 1225459, 2011 U.S. Dist. LEXIS 33481 (N.D. Ill. Mar. 28, 2011).
39. *Id.* at *8.
40. *Id.* at *9-*11.
41. *Id.* at *11.
42. *Id.* ML

Federal

cont'd from page 18

been referred to the Committee on Finance, and H.R. 2701 has been referred to the Subcommittee on Courts, Commercial and Administrative Law. The text and status updates for both bills are available online from the Library of Congress website, http://thomas.loc.gov.

In California, Governor Brown signed a bill that gave Amazon, reportedly the world's largest online retailer, a one-year moratorium on the obligation to collect the State's 7.25% sales tax on internet transactions imposed by a June law, in return for the company discontinuing its efforts for a referendum to repeal the sales tax measure. According to the *Washington Post*, Amazon is due to begin collecting the tax in September 2012 if no national online sales tax is in place by then. ML

Supreme Court

cont'd from page 23

require public improvements and fund those improvements by levying special assessments against the properties that benefitted, either as a lump sum or in installments. In 2005, the City discontinued the Barrett Law method in favor of a new system that imposed less of a financial burden on property owners. As part of this transition, the City passed a resolution discharging all Barrett Law assessments owing as of November 1, 2005, but did not give refunds to those property owners who had previously paid their Barrett Law assessments, including the plaintiffs. When the refund request was denied, the plaintiffs brought a Section 1983 action alleging that the City violated their federal constitutional rights to due process and equal protection under the Fourteenth Amendment. The trial court entered judgment against the City; on appeal, the Supreme Court of Indiana reversed, finding that, on application of rational basis review, the law was rationally related to legitimate governmental interests and survived constitutional challenge. The question before the U.S. Supreme Court is whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who paid their assessments in full, while forgiving the obligations of identically-situated taxpayers who chose to pay using a multi-year installment plan.

Magner v. Gallagher, 619 F.3d 823 (8th Cir. 2010), *petition for cert. filed* (U.S. Feb. 14, 2011) (No. 10-1032). The plaintiffs, owners of rental properties, brought an action claiming that the City of St. Paul's enforcement of its housing code was discriminatory, being based on the large percentage of minority tenants in their properties, and violated the Fair Housing Act. As evidence, they cited statements made by the relevant City official indicating his desire and intent to reduce the amount of low-income tenants in the City. The district court granted the City's motion for summary judgment; on appeal, the Eighth Circuit affirmed with the exception of the owners' disparate impact claim, which was reversed. It was reasonable to infer that racial minorities, particularly African-Americans, were disproportionately affected by these events. The question for the U.S. Supreme Court is whether disparate impact claims are cognizable under the Fair Housing Act; if so, which test should be used to analyze them? IMLA has filed an *amicus* brief in this case.

As mentioned in a recent IMLA Newsletter, the Court has agreed to hear the appeal in *Filarsky v. Delia*, 621 F.3d 1069 (9th Cir. 2010), *cert. granted*,