DRAFT

GOOD AND EVIL IN THE VILLAGE OF WILLOWBROOK: THE STORY OF THE *OLECH* CASE

by Dwight H. Merriam, AICP

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Introduction

Even the most interesting of the U. S. Supreme Court's land use opinions—say, for example, *Penn Central v. City of New York*, 438 U.S. 104 (1978)—are not all that much fun to read and often fail to relate the complex web of facts, politics and law that leaven the otherwise ordinary mix of land use disputes and municipal law problems into cases fit for the table of the High Court.

The stories behind the stories are usually better than the cases themselves. Jacqueline Kennedy Onassis picketed the U.S. Supreme Court in support of the New York Landmarks Commission the day the Court heard argument in *Penn Central*, but the Brethren don't mention it in the decision.

David Lucas was a partner in Wild Dunes development and not just a hapless buyer coming in off the street, but you won't find that in the decision. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). And you certainly couldn't guess that after saving the two lots from risky development on a battered shoreline, the State of South Carolina would sell

them both to a developer to build on to recoup its costs in protecting them. *Not with a Bang, but a Giggle: The Settlement of the Lucas Case* in David L. Callies, Ed., Takings 308-11 (1996).

Sure, the church won its right to seek money damages in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), but you don't get a hint in that decision that they would later fail to win a dime below on remand. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989).

You could never tell that Mrs. Dolan, who accurately fashioned herself as "Mrs. Dolan, an elderly widow" in the opening words of her brief to the U.S. Supreme Court, wasn't the proprietor of a mom-and-pop operation. She had at least a half dozen large stores named "A-Boy" (comes up first in the Yellow Pages); and at the Tigard store, there was a large trailer parked on the lawn with the store's name plastered on the side. In the end, she settled for $1.45 million and a plaque on the property commemorating her victory in the courts.[1] Nowhere in the reported decisions will you see that she received at least $100,000 in help from a property rights organization.[2]

So what does all this have to do with Grace Olech, an elderly widow who claims her equal protection rights were violated by the local government's delay in providing public water service, and her win in the United States Supreme Court on February 23, 2000? The *per curiam* decision doesn't tell us much. We need to go behind it to the factual background to figure out what the Court's decision might mean.

First, let's read the decision. Then, we'll go to the facts as they are at this stage. Next, you'll learn a little about the sparse news coverage and the first case to cite the decision. We'll hear from the usual pundits. Finally, we'll talk with the lawyers who argued before the Court. In the end, you should be able to follow the coming proceedings with greater insight and put this potentially important decision into perspective.

[1] In a telephone conversation on November 8, 1999, Oregonians in Action Legal Center President Bill Moshofsky said that as a condition of the settlement, the Dolans insisted that the city erect a plaque commemorating the Fifth Amendment to the United States Constitution. The plaque is to be embedded in the sidewalk of the new bike path.
[2] See Id. OIA received $100,000 from the settlement of Dolan's case, but the organization devoted about $200,000 worth of time.

The Decision

SUPREME COURT OF THE UNITED STATES

VILLAGE OF WILLOWBROOK, et al., PETITIONERS *v.* GRACE OLECH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February 23, 2000]

Per Curiam. (Breyer concurring)

Respondent Grace Olech and her late husband Thaddeus asked petitioner Village of Willowbrook to connect their property to the municipal water supply. The Village at first conditioned the connection on the Olechs granting the Village a 33-foot easement. The Olechs objected, claiming that the Village only required a 15-foot easement from other property owners seeking access to the water supply. After a 3-month delay, the Village relented and agreed to provide water service with only a 15-foot easement.

Olech sued the Village claiming that the Village's demand of an additional 18-foot easement violated the Equal Protection Clause of the Fourteenth Amendment. Olech asserted that the 33-foot easement demand was "irrational and wholly arbitrary"; that the Village's demand was actually motivated by ill will resulting from the Olechs' previous filing of an unrelated, successful lawsuit against the Village; and that the Village acted either with the intent to deprive Olech of her rights or in reckless disregard of her rights. App. 10, 12.

The District Court dismissed the lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a cognizable claim under the Equal Protection Clause. Relying on Circuit precedent, the Court of Appeals for the Seventh Circuit reversed, holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a "'spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective.'" 160 F.3d 386, 387 (CA7 1998) (quoting *Esmail* v. *Macrane*, 53 F.3d 176, 180 (CA7 1995)). It determined that Olech's complaint sufficiently alleged such a claim. 160 F.3d, at 388. We granted certiorari to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the plaintiff did not allege membership in a class or group.[*]

Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co.* v. *Commission of Webster Cty.*, 488 U.S. 336 (1989). In so doing, we have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge*

Co., supra, at 445 (quoting *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 352 (1918)).

That reasoning is applicable to this case. Olech's complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners. See *Conley* v. *Gibson*, 355 U.S. 41, 45—46 (1957). The complaint also alleged that the Village's demand was "irrational and wholly arbitrary" and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of "subjective ill will" relied on by that court.

It is so ordered.

Notes

1. * We note that the complaint in this case could be read to allege a class of five. In addition to Grace and Thaddeus Olech, their neighbors Rodney and Phyllis Zimmer and Howard Brinkman requested to be connected to the municipal water supply, and the Village initially demanded the 33-foot easement from all of them. The Zimmers and Mr. Brinkman were also involved in the previous, successful lawsuit against the Village, which allegedly created the ill will motivating the excessive easement demand. Whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis.

Justice Breyer, concurring in the result.

The Solicitor General and the village of Willowbrook have expressed concern lest we interpret the Equal Protection Clause in this case in a way that would transform many ordinary violations of city or state law into violations of the Constitution. It might be thought that a rule that looks only to an intentional difference in treatment and a lack of a rational basis for that different treatment would work such a transformation. Zoning decisions, for example, will often, perhaps almost always, treat one landowner differently from another, and one might claim that, when a city's zoning authority takes an action that fails to conform to a city zoning regulation, it lacks a "rational basis" for its action (at least if the regulation in question is reasonably clear).

This case, however, does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause. That is because the Court of Appeals found that in this case respondent had alleged an extra factor as well–a

factor that the Court of Appeals called "vindictive action," "illegitimate animus," or "ill will." 160 F.3d 386, 388 (CA7 1998). And, in that respect, the court said this case resembled *Esmail* v. *Macrane*, 53 F.3d 176 (CA7 1995), because the *Esmail* plaintiff had alleged that the municipality's differential treatment "was the result not of prosecutorial discretion honestly (even if ineptly–even if arbitrarily) exercised but of an illegitimate desire to 'get' him." 160 F.3d at 388.

In my view, the presence of that added factor in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right. For this reason, along with the others mentioned by the Court, I concur in the result.

The History

The story behind the story is found in the Amended Complaint and the pleadings in the District Court, Court of Appeals and U.S. Supreme Court—and a few phone calls. We'll dispense with the citations.

The Village of Willowbrook lies 20 miles from downtown Chicago and since its incorporation in 1960 has grown from 167 to about 9,100 people.

Thaddeus Olech and his wife Grace moved to Willowbrook many years ago, buying a modest home on five acres at 6440 Tennessee Avenue—an unpaved, private street. They had the great pleasure of having their daughter Phyllis and her husband, Rodney Zimmer, live next door to the south.

But life on Tennessee Avenue was not without its problems. The Olechs, their daughter and son-in-law, another neighbor, Howard Brinkman (their abutter to the north), and others had their properties flooded with stormwater, allegedly as a consequence of the Village installing and enlarging culverts near their property. The Olechs and Mr. Brinkman refused to grant easements to the Village for a drainage improvement project.

In 1989 they sued the Village and Cecil Allen (who they claimed caused flooding by constructing a pond, culverts and drains on his property) and the case began winding its way slowly through a long docket, ultimately taking eight years to get to trial. The trial court granted the Village's motion to dismiss, but the Illinois Appellate Court reversed in 1993 and sent the case back for trial. "Civil Procedure – Statute of Limitations," *Chicago Daily Law Bulletin*, page 1, April 5, 1993. *Zimmer v. Village of Willowbrook*, 610 N.E.2d 709 (Ill. App. 1993).

In the spring of 1995, while the controversial stormwater case was still awaiting trial, the Village developed a two-year plan to hook up all homeowners on Tennessee Avenue to public water. That same spring the Olechs' well failed beyond repair; and they and their daughter, son-in-law and Mr. Brinkman asked on May 23, 1995 that they all be connected "right away" to the public water system which stub-ended at the at the northern end of Mr. Brinkman's lot. To get

water, the Olechs ran a rubber hose over the ground from their house to their daughter's home. That worked for them over the summer and into the fall, but the Olechs told the Village's Director of Public Services, Phillip J. Modaff, the line would freeze in the winter. There is no evidence as to what efforts, if any, were made to protect the hose from freezing or to bury a line.

In July of 1995, the Olechs paid the Village $7,012.67, their one-third share of the estimated project costs. Their neighbors paid their balance the day after the Olechs.

In August of 1995, Mr. Modaff and the Village's chief elected official, Gary Pretzer, demanded that the Olechs grant a 33-foot wide easement along their property line (the centerline of Tennessee Avenue) to enable development of a dedicated 66-foot wide, paved street with sidewalks and public utilities. On September 21, 1995, Mr. Modaff reiterated the demanded in a letter and accompanying Plat of Easement sent to the Olechs and the other property owners on the west side of Tennessee Avenue—the Zimmers and Mr. Brinkman.

Apparently realizing the Olechs and others were not going to give in and grant the easement, the Village Attorney, Gerald M. Gorski, sent a letter on November 10, 1995 to the effect that the 15-foot easement would be sufficient. The Olechs agreed to it. As this letter later seemed to take on some significance in the later litigation and the reported decision only has a snippet from it, here's the full version:

November 10, 1995

Mr. John Wimmer
928 Warren Avenue
Downers Grove, IL 60515

RE: Tennessee Avenue/Willowbrook

Dear John:

As you know, we have been awaiting the results of title research by Chicago Title as to several parcels of property along Tennessee Avenue, in regard to the request for connection to the Village's water supply. The research has revealed that the two parcels on the west side owned by the Olechs and Phyllis Zimmer are subject to thirty three feet (33') easements along the east (Tennessee Avenue) side in favor of Northern Illinois Gas Co.

In addition, all nine of the parcels were at one time under common ownership. When the property was deeded out to different owners, the original deeds all contained language that they were subject to the right of public travel over the east and/or west thirty three feet (33') of each parcel (along Tennessee Avenue). Clearly this evidences an intent that such portions of the property be used for a public roadway.

> The Village's original position of requesting a dedication of thirty three feet (33') is certainly consistent with, and vindicated by, the results of this research. That position was taken in an effort to clear up any confusion that exists over the legal status of the property. It is unfortunate that your clients have been unwilling to do so, as the search results confirm exactly what the Village was attempting to do.
>
> As we have discussed, in an effort to alleviate your client's water problem, the Village has moved off of its original position and indicated that a fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village.
>
> It is the Village's position that such an easement is both reasonable and necessary. Of course, it is still necessary to determine where the connections to the main will be located. As I have previously advised you, the Village is working towards obtaining the necessary easements along the east side of the road so that the main can be properly installed.
>
> If you have any additional thoughts, please feel free to call.
>
> Very truly yours,
>
> GERALD M. GORSKI

As expected, the hose froze in November, 1995. Grace and Thaddeus Olech, 72 and 76 years old respectively at the time, used buckets of water from their neighbors through the winter and later alleged in their complaint that they "suffered great inconvenience, humiliation, and mental and physical distress." The wrangling over the easement for about three months delayed project completion until March 19, 1996. The water hook-up, however, did occur a year earlier than the two-year plan anticipated, though there were no road improvements because the Village never acquired the necessary dedication of the 66-foot right of way.

While the water crisis arose and was resolved, the stormwater case languished on the docket. Ultimately, the court dismissed Mr. Brinkman's claim for failure to prosecute, and the Olechs' and Zimmers' claims were tried to a jury in February 1997; they won $20,000 and $135,000 respectively. There were hard feelings on both sides. It must have been a difficult time for Grace Olech; her husband died two months before the trial.

On July 11, 1997, Grace Olech brought an action in the U.S. District Court for the Northern District of Illinois Eastern Division under 42 U.S.C Sec. 1983 against the Village and its chief elected official and public works director claiming that the initial refusal to hook her up unless she gave the 33-foot wide easement and the resulting delay in the project violated her

rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and that the Village acted intentionally or with reckless disregard of her rights.

The district court, Judge George M. Marovich, who will likely have the case to try on remand, granted the defendant's motion to dismiss on April 13, 1998, because it found that "the alleged treatment of Olech by Willowbrook and its officers—as well as the alleged motivation behind this treatment—is not sufficient to state an equal protection claim under the standards as set forth in *Esmail*." 1998 U.S. Dist. LEXIS 5494.

Esmail v. Macrane, 53 F.3d 179 (7th Cir. 1995) is now especially worth reading. It sets out three types of equal protection claims: (1) those based on unequal treatment of a member of a vulnerable group, such as race-based claims; (2) those involving laws or rules making irrational distinctions; and (3) an "unusual" type involving "orchestrated campaigns of official harassment against [a plaintiff] out of sheer malice." *Esmail* at 179.

The *Esmail* facts give new meaning to the word egregious. Basim Esmail was a Naperville, Illinois liquor dealer. The mayor, who was also the liquor control commissioner, denied him a renewal after 11 years of annual renewals and instituted a "campaign of vengeance" that included repeated police stops, field sobriety tests and false criminal charges. As the Seventh Circuit put it: "If the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." At 179. In *Olech* the trial court did not believe there was "malignant animosity" or that there was an "orchestrated campaign of official harassment."

Grace Olech appealed the dismissal to the Seventh Circuit, and the Court of Appeals reversed in a unanimous opinion written by Judge Posner, the author of the *Esmail* opinion. Those who argue—including the Village—that the *Olech* facts don't justify applying the *Esmail* "Category Three" "campaign of vengeance" and "malignant animosity" standard will have tough going, given that Judge Posner wrote both opinions.

My miserly editor won't give me enough words to tell you much about Judge Posner, but our readers might want to read his latest book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*, or read his comments in *The New York Times Book Review* for September 26, 1999 at page 14: "Take Rehnquist's Iolanthe costume [referring to the four gold stripes the Chief Justice added to each sleeve of his robe] . If I wrote a novel and put in a Chief Justice wearing a costume from a comic opera, any editor would take it out and tell me: 'This is ridiculous.' But it's such an entertainment-saturated society that it didn't really register with many people that this was a bizarre way for the Chief Justice to present himself to his first live television audience." So much for making friends with and influencing the Chief Justice…

In his *Olech* opinion, 160 F.3d 386, Judge Posner says that nothing in *Esmail* suggests a "*general* requirement of 'orchestration' in vindictive-action equal protection cases, let alone a legally significant distinction between 'sheer malice' and 'substantial ill will,' if, as alleged here,

the ill will is the sole cause for the action of which the plaintiff complains." Emphasis in original. *See id*. at 388. "If it [the Village} refuses to perform this obligation [to provide water] for one of its residents, for no reason other than a baseless hatred, then it denies that resident the equal protection of the laws. And that is sufficiently alleged." *Id.* "Nor is it important that the oppression of the plaintiff was merely temporary." *Id.*

Judge Posner said he, like the district judge, was "troubled" that "every squabble over municipal services" might be turned into a federal constitutional claim, but he felt that the requirement that there be a "totally illegitimate animus" would set a high enough threshold. *Id.* In any event, he decided the matter could not be decided on the pleadings but must go to trial or perhaps could be decided short of trial, which suggests a motion for summary judgment. *Id.*

The Village requested, and the Court granted, certiorari. Only two amicus briefs were filed, one for nine of the usual pro-government groups and one from the ACLU. The American Planning Association did not file a brief. Rumor has it that its amicus curiae committee wanted to file a brief in support of Mrs. Olech but couldn't find a volunteer to write it in time. An unremarkable oral argument was held on January 10, 2000, and the decision was rendered on February 23, 2000, less than three years from the time the action was started.

Olech **in the Courts**

The first (and as of April 10, 2000, the only) decision to cite *Olech* is *Allan v. Board of Trustees*, 2000 U.S. Dist. LEXIS 2329 (March 7, 2000) in which the U.S. District Court for the District of New Jersey granted the defendant college's motion for summary judgment in a case involving a military veteran's claim that he was not given proper credit for his service. Said the court citing *Olech*: "If he is alleging membership in a 'class of one' for purposes of equal protection, he must prove that his treatment was intentional, irrational, and wholly arbitrary." *Allan*, at 24.

Olech **in the News**

There has been little coverage of *Olech* in the press. *The National Law Journal* had one sentence and one quote about the Supreme Court decision. March 6, 2000 at A20. *The New York Times* had six short paragraphs in an article following a long discussion of the *Rice v. Cayetano* decision handed down the same day. February 24, 2000 Section A, Page 16, Column 5. A somewhat more detailed description of the facts and holding were set out in an *Associated Press State & Local Wire* article "Rule Liberalized for Suing Government" on February 23, 2000. The *White House Bulletin* carried a one-paragraph summary in its Supreme Court Update on February 23, 2000.

Commentary of more substance is to be found in two articles, one before and one after the argument. On January 11, 2000, *The New York Times* covered the oral argument. "Supreme Court Roundup; Justices Consider Remedy For Government Grudges," Section A, Page 16, Column 1. The *Times* characterized the Clinton administration as taking "a middle position in the case,…" by arguing through assistant solicitor general Irving L Gornstein that while the courts should recognize an equal protection suit for a class of one, the government should win if it showed it had a "conceivable rational basis" for its actions.

The Chicago Tribune in a page 1 story in its West edition on January 18, 2000, interviewed the Village's attorney, James L. DeAno: "There was no aim to deprive them of water. The village needed a right of way. The loss of water is incidental." He further stated that vindictiveness had nothing to do with the village's action, and the proper venue for the case was state, not federal, court. The *Chicago Tribune* had a follow-up story on February 24, 2000, reporting on the decision.

The lawyers drew their battle line. John Wimmer, representing Mrs. Olech, is quoted: "As long as the government can come up with a rational basis for not treating people equally related to a legitimate government objective, then the government will be protected. But if the government can't do that, then the residents should get redress." James L. DeAno responded: "Your typical zoning case won't meet the standard required by this ruling. Some attorneys might make the allegations, but, without the facts to back it up, they won't be able to sustain the claim." The two lawyers agreed that the decision set a high enough standard that routine zoning conflicts won't be going to federal court. They disagreed, as you might imagine, on whether the 33-foot easement measured up.

From the Pundits

Here's what a few of the experts say:

"*Olech* opens up new avenues for judicial redress in cases where landowners are treated unfairly. Plaintiffs who bring their case within the *Olech* requirements can survive a motion to dismiss and move on to discovery and trial."

--Professor Daniel R. Mandeleker, Washington University School of Law

"Olé for Olech! She dodged the Village's bull."

--John J. Delaney, Linowes and Blocher, LLP

"The brevity of the opinion, its per curiam nature, and its express reliance on the rather stark allegation that the Village's demand was "irrational and wholly arbitrary" all suggest that

the Court was not trying to do anything dramatic. Although no other Justice joined Justice Breyer's limiting concurrence, I believe it would be a serious error to conclude that majority opinion opens the floodgates to constitutional challenges to routine land use decisions. The opinion might encourage a spate of new lawsuits, but all indications are that the Supreme Court and the lower federal courts remain leery of the prospect of becoming boards of land use appeals. If the Village proffers any conceivable rational basis for requiring a 33-foot easement from these landowners, it should prevail on remand."

--Timothy J. Dowling, Community Rights Council

Olech in the Words of the Lawyers

I had the pleasure on March 15, 2000 of interviewing the two lawyers who argued for the parties in the U.S. Supreme Court, James L. DeAno for the Village and John R. Wimmer for Mrs. Olech. Unlike some of the lawyers involved in some of the takings cases I've covered, these men were totally civil to each other, frank and open about their positions, and seemingly incapable of exaggerating their claims.

Here's what they had to say about working with each other:

J. DeAno: John is a gentleman. He is an honorable man, I can take him at his word and that made the entire process much less difficult than it could have been. I know that John is going to follow the rules even though he is going to represent his client to the best of his ability.

J. Wimmer: I can say the same about Jim. It is like being in a boxing ring with a boxer who is out to destroy you but who is never going to hit you below the belt. It is always a pleasure to work with him.

In response to my question of whether *Esmail* was unique to the Seventh Circuit and remained intact after the Court's decision they said:

J. DeAno: You know, I think it was the first case that used vindictiveness. I wasn't aware of anything before *Esmail* that cited vindictiveness as an element that could sustain an equal protection claim.

J. Wimmer: Well, I'm not sure that *Esmail* said that vindictiveness could sustain an equal protection claim, because in the *Esmail* decision, Judge Posner said that the plaintiff also had to show that differential treatment was unrelated to any legitimate government objective. I argued in the Supreme Court that if it's unrelated to any legitimate government objective, it's also not rationally related to any legitimate government objective. So I don't think *Esmail* was way out there. I think it pretty much followed prior decisions and precedents.

And when I asked about the role of rationality:

J. DeAno: *Esmail* says that the distinctive feature in that case was the vindictiveness, so you already had the elements of no rational basis and differential treatment. I think *Esmail* says those elements were not enough, but throw in the fact or the allegation of vindictiveness, that is, an effort to "get" somebody or to bring the power of government to bear on a single person, and that was what brought them into federal court under equal protection. Under the per curiam opinion, they seemed to say directly that subjective motivation isn't an issue. It's intentional, differential treatment with no rational basis for it. So our effort to get *Esmail* before the Supreme Court was to question whether a class that is created by vindictiveness, as opposed to any other characteristic or classification, is proper under equal protection law. Are you protected constitutionally from being the victim of vindictiveness? Then, I think what the Supreme Court did is say vindictiveness doesn't matter. The question concerns differential treatment intentionally done for no rational reason.

I asked if the category three equal protection had essentially collapsed into category two:

J. DeAno: Yes.

J. Wimmer: I would agree with that.

I asked them if any interest groups were giving them money to wage this litigation:

J. DeAno: No.

J. Wimmer: I wish there were!

And when I inquired as to what it was like to argue their first case before the Court:

J. DeAno: Well, I thought it was a wonderful experience. Since then, I've argued cases in court, and I've tried a case, and it just isn't the same. You know, there's no intimidation anymore when you argue before a jury, because they can't yell back at you, and you know that you can get through an argument without one of nine people interrupting you after each sentence. But I know that's the way they do things there, and we were prepared for that. I just thought it was a great experience. We're not happy about the outcome, but the case isn't over yet.

J. Wimmer: I've got to tell you from my perspective, Dwight, it was like getting to the top of the mountain for just a brief moment, because if you've ever climbed a mountain, you're climbing up the side, and it's hot, and the bugs are flying in your hair and stuff; and you finally get to the top, and the trees are all like scrub, and there's a cool breeze, and you can see for miles. And then the very next day, it was back to business as usual.

J. DeAno: That's true.

J. Wimmer: I said to the assistant solicitor general, "You know, you don't know how lucky you are. You do this every day. I can't imagine it." It was such a thrill. I'll never forget it. The next day I was in a suburban courtroom, and I had a judge telling me, "Now, Counsel, I don't want to go around this tree with you again," and I felt like saying, "Listen, I was talking with Justice Rehnquist yesterday, and he called me by my name!"

When I asked whether they sensed, as I did in reading the transcript of the oral argument, that the Court regretted taking the case on the pleadings:

J. Wimmer: Justice O'Connor, in questioning you, Jim, asked some questions along that line, and why didn't you answer it?

J. DeAno: I think they were questioning whether the complaint said enough for them to read in a rational basis, and my understanding of the law has always been that the court can conceive of a rational basis. It doesn't have to appear in the record or in the complaint. But on that issue, they seemed to be saying, is an effort to widen or improve a road a rational basis? And I thought that they could determine that from the allegations in the complaint.

J. Wimmer: One thing, too, rational basis has to be related to a legitimate government objective, and one of the things that I argued was that taking private property for public use without paying for it is not a legitimate government objective.

I asked him why he didn't claim a taking:

J. Wimmer: Because they didn't ever get the property. They demanded it, but it was never ceded to them. I think the point is, when they are taking a part of your land for a right-of-way, they have to pay you. The Village, instead of offering to pay Mrs. Olech, demanded as a condition of her receiving running water that she give them things that other people don't have to give them as a condition of receiving running water. I think that is the problem.

The letter from Village Attorney Gerald M. Gorski seemed to figure in Judge Posner's decision and I wondered what role it would play on remand:

J. DeAno: I think you have to read the entire letter, especially the first two paragraphs, and I certainly don't think it is a smoking gun. I think he can explain what he meant by the use of words he chose in the last paragraph, but I think that the letter also explains why there was a request for 33 feet in the first place.

J. Wimmer: Well, we will see what it says in his deposition. But he did say in the letter that a 15-foot easement with an extra temporary construction easement of 5 feet on either side was so that the water main is consistent with all of the property in the Village. That is what he said in the letter, but we haven't taken his deposition yet.

I asked them what questions a municipal lawyer might have:

J. DeAno: I guess how wide open now is the equal protection clause? If you look at the case law in the Sixth and Ninth and even the Seventh Circuit, they were all very clear that an equal protection claim needed an allegation of class membership. It's also unfortunate that they didn't fully explore the rational basis issue in this case, because many of the cases cited talk about just any conceivable rational basis, anything that's plausible; and I think when you explore the facts of this case, one certainly emerges. I just think that in future cases, as municipal lawyers, we're going to have to focus more on the rational basis or the conceivable rational basis as a defense.

How about Mrs. Olech's fundamental right to sue in the stormwater case:

J. DeAno: That didn't become an issue, so they didn't hinge it on that. They simply mentioned the three elements: intentional differential treatment, no rational basis. I guess the concern would be, is that going to let employment and zoning cases into federal court where otherwise they would not have been permitted?

When I asked if the law had changed as result of the decision:

J. Wimmer: I don't think the law has changed because the Supreme Court stated that the Complaint had stated a cause of action for violation of equal protection. I think they said on a traditional equal protection analysis. So I don't think the law has changed.

And as to how they felt going forward:

J. Wimmer: I feel it is a strong position, because I think, as I indicated, the rational basis has to be related to a legitimate government objective; and if they take private property without paying for it, it is not such an objective. So in a situation in which they demand more of you to provide a government service than they demand of someone else, and there is nothing relating to you that makes it more expensive for the government to provide it to you, it seems to me that you are in a pretty strong position; and I think the equal protection clause should provide a remedy for people who are intentionally treated differently by local, state or federal officials if there is not a rational basis related to a legitimate government objective for doing that.

And didn't Judge Posner suggest a resolution short of trial?:

J. DeAno: He alluded to, I think, a potential summary motion. When we fully explore the facts and can put them in the record and present them to the court, I think there are a couple of defenses in the case that will be shown, and I think he might be alluding to those.

How can Mrs. Olech get around the Village's likely claim that they were just trying to do good by improving the road in front of her house?:

J. Wimmer: If I were the Village, I would be saying yes, I have a rational basis for 33 feet. I am trying to give Mrs. Olech a benefit of having a paved public street that is going to be developed and maintained by the Village. The desire to build the street would give the Village a

rational basis to condemn the property and take it from her and pay her for it, but it doesn't provide a rational basis for treating her differently from other people who wish to have municipal water hook-up. In other words, if the Village demands X property rights from everybody else as a condition of receiving a municipal water hook-up, and they demand Y property rights from my client as a condition of a municipal law hook-up, and there is nothing about the property that makes it more expensive to provide a municipal law hook-up to my client, I think they have run afoul of the provisions. Like Judge Scalia said at one point in the argument to Mr. DeAno, it was rational, you were greedy, you wanted more. Justice Scalia: "Oh, it's a perfectly rational basis. We want an additional 40 feet. We're greedy." At p. 6 of the Transcript.

And I assume the trial or next proceedings will focus on the two-year plan and its relationship to the request for the hook-up:

J. DeAno: Well, John alleged in the Complaint that there was a two-year plan to have everyone hooked up by 1997 …

J. Wimmer: …to require everyone to hook up.

J. DeAno: … and in the process make everyone connected. Without getting into whether there was actually such a plan, and I mean with the allegation being there, I think that lent support to the claim that this wasn't any aim to retaliate against Mrs. Olech. These facts all fell together quite apart from whatever happened a few years earlier. If you look at that road and the dimensions of it and the appearance of it, you can tell that it is in need of some improvement, and this was an opportunity to do all of these things at once. I don't think that the fact that there might have been a plan to require everyone to hook up had anything to do with it. This is an opportunity to be efficient. If you are going to go in and dig up the side of the road, you might as well take the opportunity to do whatever other work you need to do on that road at the same time.

I wondered whether a Village in Illinois sometimes or ever paid for the dedication for the right-of-way for this type of improvement? And if they did, wouldn't it be offset by the benefits of the property owner of increased value being on an improved street?

J. DeAno: I think one of the big questions here is what is typically required of a homeowner when you are going to install a water main, and I don't think it is 15 feet. I think it is 33 feet. But that is an allegation of the complaint that we had to assume as truthful to move on with this case.

The "Bottom Line":

Here it is folks:

1. *Olech* apparently doesn't change the law.

2. Defendant local governments should save their energy for motions for summary judgment and not try to dispense with such cases on the pleadings.
3. The facts rule – both sides will need to document what happened, especially as to a course of conduct.
4. Plaintiffs will have a real uphill fight in meeting the high threshold ("totally illegitimate animus") suggested by Judge Posner.
5. There will be more such claims by property owners, because the equal protection claim end-runs the need for a property interest and ripeness in a taking claim. Where you don't see good takings and due process cases, such as in rezonings and extension of utilities, you may see them now packaged as equal protection cases.
6. Clever, wannabe plaintiffs will stick their chins out and take sucker punches from their local officials to lay the foundation for vindictive actions in the future. Local governments will have to be more careful in dealing with the "habitual offenders" that cause them the most grief on a routine basis. The worst threat will be from the most irksome and frequent applicants, the types with poorly prepared and marginal applications. See *Thomas v. West Haven*, 249 Conn. 385 (1999).
7. This *Olech*-type of equal protection claim is beginning to look like the love child of a one-night liaison with a substantive due process claim—a bubbly "rational relationship" baby freed of any need to show a property interest. (The Supreme Court said: "Olech's complaint alleg[es] that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners…and that the Village's demand was 'irrational and wholly arbitrary' and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.")