NO. CV 08 4007374S	:	SUPERIOR COURT
CADLEROCK PROPERTIES JOINT VENTURE, L.P.	:	JUDICIAL DISTRICT OF WINDHAM
V.	:	AT PUTNAM
TOWN OF ASHFORD	:	DECEMBER 1, 2009

MEMORANDUM OF DECISION

The plaintiff, Cadlerock Properties Joint Venture, L.P. (Cadlerock), brings this eleven-count complaint challenging the valuation of $1,080,000 placed upon its property located in the town of Ashford (town) by the town's assessor for the revaluation year of October 1, 2007.

Cadlerock is the owner of a ten-lot tract of unimproved land containing approximately 284 acres located on Route 44 (a/k/a Squaw Hollow Road). In count eleven of its complaint, Cadlerock alleges that the subject property is encumbered by an August 15, 1997 cleanup order issued by the commissioner of the Connecticut Department of Environmental Protection (DEP) regarding contamination located on the subject property. Cadlerock further alleges therein that it took title to the subject premises having notice of the contamination but not of the cost of remediation. The United States Environmental Protection Agency estimated the cost to cleanup this contamination at $2,230,000, which is far in excess of the assessor's value of the subject property.

The town concedes that Cadlerock did not cause the pollution on the subject property and that it existed prior to Cadlerock taking title. However, at the time Cadlerock acquired title from Cadle Properties of Connecticut, Inc. on or about November 15, 1996, Cadlerock was aware of the contamination.

Cadlerock sought to obtain a reduction in the assessed value of the subject premises on the revaluation year of October 1, 2007 on the basis that the contamination greatly reduced the property's value as determined by the assessor.

The assessor rejected Cadlerock's request for a reduction in the assessed value of its property relying on General Statutes § 12-63e which provides, in relevant part, that "the assessors of a municipality shall not reduce the value of any [commercial] property due to any polluted or environmentally hazardous condition existing on such property if such condition was caused by the owner of such property or if a successor in title to such owner acquired such property after any notice of the existence of any such condition was filed on the land records in the town where the property is located."

In *Cadlerock Properties Joint Venture, L.P.* v. *Ashford*, 98 Conn. App. 556, 563, 909 A.2d 964 (2006), the court found that § 12-63e applied whether the property owner took title before or after the recording of any notice of the existence of a polluted or environmentally-hazardous condition on such property so long as the property owner had actual knowledge of the environmentally-hazardous condition existing on the property at

the time of taking title.

Cadlerock and the town have filed cross-motions for summary judgment, claiming that as to count eleven, each is entitled to judgment as a matter of law.

Cadlerock challenges the constitutionality of § 12-63e as applied to itself. Cadlerock points out that § 12-63e permits a landowner, who was unaware of environmental factors contaminating the subject land, to claim for tax assessment purposes that the fair market value of his or her property has been reduced in value. On the other hand, Cadlerock contends that § 12-63e deprives this same right if the landowner, not having caused the contamination, takes title to the property with knowledge of its contamination.

Cadlerock raises this comparison for the purpose of claiming a disparity of treatment between one who takes title with knowledge and one who takes title without knowledge. Section 12-63e does not make this particular distinction. It only deals with a property owner who causes the contamination or takes title to property knowing that it was contaminated.

Section 1 of the fourteenth amendment to the United States constitution, the federal equal protection clause, provides, in relevant part, as follows: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Article first, § 20, of the constitution of Connecticut, as amended, provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

Hellerstein and Hellerstein noted that "[t]he U.S. Supreme Court has construed the Equal Protection Clause of the Fourteenth Amendment as prohibiting the states from making unreasonable classifications for tax and other purposes. Beginning with its early decisions interpreting the Equal Protection Clause, however, the Court established that the clause affords the states broad leeway in drawing classifications for tax purposes: In its exercise of taxation . . . it is competent for a State to exempt certain kinds of property and tax others, the restraints upon it only being against clear and hostile discriminations against particular persons and classes. . . . As the Court subsequently observed: Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. State tax statutes do not ordinarily involve any suspect classification or the deprivation of any fundamental constitutional right that gives rise to special scrutiny under the Equal Protection Clause. Accordingly, the only equal protection inquiry in tax cases is generally whether the State's classification is rationally related to the State's objective." (Internal quotation marks

omitted.) 1 J. Hellerstein & W. Hellerstein, State Taxation (3d Ed.) § 3.02.

"[The rule of equality of the Fourteenth Amendment] does not require . . . exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances . . . . All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned." *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 300-301, 18 S. Ct. 594, 42 L. Ed. 1037 (1898).

Certain general principles apply to all equal protection clause cases. For instance, a validly enacted statute carries with it a "strong presumption of constitutionality." *Honulik* v. *Greenwich*, 293 Conn. 641, 647, 980 A.2d 845 (2009). The Supreme Court explained the steps of their analysis as follows: "[I]n evaluating [a] . . . challenge to the constitutionality of [a] statute, we read the statute narrowly in order to save its constitutionality, rather than broadly in order to destroy it. We will indulge in every presumption in favor of the statute's constitutionality . . . . It is an extreme act of judicial power to declare a statute unconstitutional. It should be done with great caution and only when the case for invalidity is established beyond a reasonable doubt." Id. (Citations omitted; internal quotation marks omitted.)

Turning to the issue in this case, the question is whether Cadlerock, when it was denied the benefit of a reduction in its property's value for tax assessment purposes,

pursuant to § 12-63e, having knowledge of contamination existing on the property at the time it took title, was subjected to discriminatory treatment, when compared to a property owner similarly situated taking title to contaminated property without knowledge of contamination who would not be denied such a benefit.

When considering the equal protection clause, as applied to tax cases, the court in *Lublin* v. *Brown*, 168 Conn. 212, 222, 362 A.2d 769 (1975), noted that the equal protection clause "imposes no iron clad rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. . . . To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." (Citation omitted; internal quotation marks omitted.)

The *Lublin* court further noted that "[i]t has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." (Internal quotation marks omitted.) Id., 223.

Citing to *Stuart* v. *Commissioner of Correction*, 266 Conn. 596, 601-602, 834

A.2d 52 (2003), Cadlerock claims that, under the equal protection clause, it must show that the group being favored and the group being discriminated against are similarly situated. Cadlerock identifies two groups: "(1) those who contaminated their property after they took title, and (2) those whose properties were already contaminated at the time they took title." (Plaintiff's memorandum of law, dated February 24, 2009 (hereinafter plaintiff's 2/24/09 MOL), p. 10.)

However, Cadlerock does not go far enough in its analysis because the governing statute, § 12-63e, does not center on those who took title not knowing the property was contaminated. Section 12-63e only deprives two categories of landowners of a reduction in assessment value: landowners who caused the contamination of their property and landowners who took title knowing that the property had been previously contaminated.

Cadlerock argues that there is no rational basis for treating property owners, such as itself, differently from property owners who took title to their property without knowledge of the contamination. In support of this position, Cadlerock points to the legislative history of § 12-63e to show that the legislature had no rational basis for the "discrimination permitted under Section 12-63e." (Plaintiff's 2/24/09 MOL, p. 12.)

Cadlerock contends that § 12-63e was enacted by the legislature to deal with one specific instance in which the Upjohn Company (Upjohn) of New Haven contaminated its property and intended to move its operation to Michigan. According to Cadlerock, the

legislature did not want Upjohn to seek a reduced assessment prior to moving to Michigan. The legislative history indicated that this "would allow the corporation to benefit from its own misdeeds. Such a result would unfairly deprive a municipality from tax revenue it would have otherwise received, and there would be no incentive for owners of contaminated commercial property to abate the pollution." (Plaintiff's 2/24/09 MOL, p. 15.)

Cadlerock further claims that since § 12-63e was intended to prevent owners of contaminated property from passing along reduced assessments to "friendly" buyers, the present statute was not intended to address the issue of a person taking title to contaminated property when the property was already contaminated. On this basis, Cadlerock cites to *Heller* v. *Doe*, 509 U.S. 312, 324, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993), and argues that there was no rational basis for enacting § 12-63e. Interestingly, *Heller* v. *Doe* does not support Cadlerock's position.

Heller v. *Doe* was a Kentucky case challenging a Kentucky statute dealing with an involuntary commitment procedure for a class of mentally retarded and mentally ill individuals. The *Heller* court found that there was a rational basis for Kentucky to provide for a higher scrutiny standard for mentally ill individuals. The Supreme Court noted that "[w]e many times have said . . . that rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor

does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (Citations omitted; internal quotation marks omitted.) Id., 319-320.

In the present case, Cadlerock contends that since § 12-63e was enacted to prevent a landowner who had contaminated its property from selling the property before cleaning up the contamination, the statute was not intended to penalize a subsequent purchaser who did not create the contamination. Such a narrow construction of § 12-63e flies in the face of the actual language of the statute itself, that specifically provides that a successor landowner taking title with knowledge of the environmentally-hazardous condition cannot benefit from a reduction in value to its property for tax assessment purposes.

Although the Upjohn case focused the legislature's attention on the issue of a property owner benefitting from his or her own wrongdoing, General Statutes § 1-2z requires that the meaning of a statute "shall . . . be ascertained from the text of the statute

itself[.]"[1] Here the text of § 12-63e specifically divides the property owner of contaminated property into two categories: (1) where the property owner caused the contamination and (2) where the property owner acquired title to contaminated property knowing that the property was contaminated. Under either of these two situations, the legislature has denied the property owner the benefit of a reduction in property value, and therefore, a reduced assessed value, due to contamination. See *Cadlerock Properties Joint Venture, L.P.* v. *Ashford*, supra, 98 Conn. App. 562, where the court found that "[s]ection 12-63e plainly and unambiguously prohibits the reduction in value of contaminated property if the owner caused the contamination or a successor in title acquired it after notice of the contamination was filed on the town land records."

When it enacted § 12-63e, the legislature went beyond the Upjohn scenario by creating two classes of property owners: one who caused the contamination and the other who took title knowing of the property's contamination. Here, the rational basis for the classification is the desire of the legislature to treat the property owner who did not cause the contamination, but who took title with knowledge of the existing contamination, in the same way it treats one who caused the contamination while owning the property.

Cadlerock fits into the category of one taking title to contaminated property with knowledge of the prior existence of the contamination, although not causing the

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[1] General Statutes § 1-2z provides as follows: "**Plain meaning rule.** The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

contamination. This is not unequal treatment since § 12-63e applies to all property owners who take title to contaminated property with knowledge, not just to Cadlerock. As noted in *Heller* v. *Doe*,[2] supra, 509 U.S. 320, "a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (Internal quotation marks omitted.)

This classification cannot run afoul of the equal protection clause because there is a rational relationship between the state's interest in requiring a property owner to abate a hazardous condition caused by the property owner, as well as not benefitting a property owner taking title, with knowledge of the contamination, with a lower valuation for tax purposes. This is a legitimate governmental purpose rather than the creation of a disparity between one who takes title with knowledge versus one who takes title without knowledge.

In the cross-motions for summary judgment, two additional issues were raised that should be addressed.

First, Cadlerock claims that this court should analyze its equal protection claim under the application of six factors set forth in *State* v. *Geisler*, 222 Conn. 672, 685, 610

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[2]

The legislature has not seen fit to relieve a property owner acquiring realty by foreclosure when the property has been previously contaminated as it has when a lender does so. See General Statutes § 22a-452f (2) providing that "[a] lender who did not participate in management of a property . . . but acquires right, title or interest in a property . . . by foreclosure, shall not be liable for any damage, assessment, fine or other costs imposed by the state for the containment, removal or mitigation of such a spill or discharge . . . ." It is apparent that one who acquires title to property knowing that it has been previously contaminated does so by assuming the risk of the cost of remediation. See *Visconti* v. *Pepper Partners Ltd. Partnership*, 77 Conn. App. 675, 683-84, 825 A.2d 210 (2003).

A.2d 1225 (1992). "[I]n *State* v. *Geisler* . . . we set forth six factors that, to the extent applicable, are to be considered in construing the contours of our state constitution so that we may reach reasoned and principled results as to its meaning. These factors are: (1) the text of the operative constitutional provision; (2) holdings and dicta of this court and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations, including relevant public policies." (Internal quotation marks omitted.) *Honulik* v. *Greenwich*, supra, 293 Conn. 648.

The constitutional issue in the *Geisler* case dealt with the exclusionary rule under article first, § 7, of the Connecticut constitution which is similar, but not identical to the fourth amendment to the U.S. constitution (unreasonable searches and seizures). See *State* v. *Geisler*, 222 Conn. 686. The court developed the *Geisler* factors to aid in the process of analyzing whether the exclusionary rule should be invoked to suppress evidence under the state constitution rather than under the fourth amendment of the federal constitution.

Second, Cadlerock claims that this court should also consider the analysis of the constitutional issue in *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008). However, *Kerrigan* did not deal with the exclusionary rule of the state constitution but dealt with the issue of whether the equal protection clause of our state and federal constitutions applied to same-sex couples having the right to marry in Connecticut. In conducting this analysis, the *Kerrigan* court noted that when dealing with an analysis of the equal protection clause, the "initial inquiry is not whether persons are similarly situated

for all purposes, but whether they are similarly situated for purposes of the law challenged." (Internal quotation marks omitted.) Id., 158.

The law being challenged here is whether § 12-63e, as applied to Cadlerock, prohibits it from claiming a reduction in the value of its Ashford property for the contamination on the property. The plaintiff's references to *Geisler* and *Kerrigan* do not require the court to engage in this type of analysis since the issue here, a tax issue raised under the equal protection clause, can be resolved by determining whether or not a rational basis exists for the enactment of § 12-63e as applied to Cadlerock.

Furthermore, the town pleads a special defense of res judicata/collateral estoppel as to count eleven of the plaintiff's complaint. The town argues that Cadlerock could have raised the issue of the constitutionality of § 12-63e in the 2004 appeal challenging the assessor's valuation as to the subject property as of the Grand Lists of October 1, 2002, 2003 and 2004. See *Cadlerock Properties Joint Venture, L.P.* v. *Ashford*, Superior Court, judicial district of Windham at Putnam, Docket No. CV 04 0072796S (October 14, 2005, *Aronson, JTR)*, aff'd, 98 Conn. App. 556, supra.

"Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . ." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 58, 808 A.2d 1107 (2002).

In the present case, the issue of the constitutionality of § 12-63e was never raised in the 2004 case and was never raised at the appellate level. For this reason, the special defense of collateral estoppel cannot prevent the litigation for the first time of the issue of

equal protection in the present action. As noted in *Lyon* v. *Jones*, 291 Conn. 384, 406, 968 A.2d 416 (2009), "[a]n issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered. If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action." (Citations omitted; emphasis in original; internal quotation marks omitted.)

In summary, Cadlerock has not sustained its heavy burden of proof, beyond a reasonable doubt, that its claim of discrimination, as set forth in count eleven, that the legislative enactment of § 12-63e, creates a classification that runs afoul of the equal protection clause.

Accordingly, as to count eleven, the town's motion for summary judgment is granted and the plaintiff's motion for summary judgment is denied.

Arnold W. Aronson
Judge Trial Referee