and argued that they had acquired a vested right in the "buildable" status of their vacant lot, and that therefore, the village should have granted the variance.[13] The court, in a 4-to-3 decision, agreed—emphasizing traditional notions of individual property rights.

The court explained that zoning laws "are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled," and therefore, zoning laws are "ordinarily" construed in favor of the property owner.[14] Further, because zoning authority is a police power and "interferes with individual rights," any use of the police power "must bear a substantial relationship to a legitimate government interest and must not be unreasonable or arbitrary."[15] With these precepts in mind, the court determined that the denial of the "area" variance had resulted in "practical difficulties,"[16] including the greatly reduced value of the vacant lot, and concluded that the variance should have been granted.[17]

The majority identified "three pillars" supporting its conclusion: (1) the buildable status of the Boices' vacant lot should have been grandfathered-in; (2) the difference between the 35,000-square-feet requirement and the vacant lot's 33,000 square feet was de minimis; and (3) the Boices had been subject to disparate treatment, as they were the only property-owners who had been denied similar variances.[18]

Discussing the first factor, the majority returned to its earlier theme of individual property rights. Here, the majority relied on *Norwood v. Horney*,[19] the Ohio Supreme Court's landmark decision that prohibited the use of eminent domain for solely economic-development purposes.[20] In particular, the *Boice* majority cited *Norwood*'s discussion of the "Lockean notions of property rights" that were incorporated into the Ohio Constitution, thereby demonstrating "the sacrosanct nature of the individual's 'inalienable' property rights," which are to be held "forever 'inviolate.' "[21]

On these grounds, the majority rejected the argument that "until construction has begun on a lot, the lot has no legal 'use,' and the property owner can have no expectations about the future use of the property. . . ."[22] Otherwise, property would be "subject to gov-

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Powers v. State of Wyoming: Separation of Powers and the Role of the Judiciary

*By Stephen R. Klein**

In its 2013 General Session, the Wyoming Legislature passed Senate File 104, or Senate Enrolled Act 1 ("SEA 1").[1] The bill reassigned most of the duties of the state superintendent of public instruction to a director of education, to be appointed by the governor.[2] On the very day Wyoming Governor Matt Mead signed the bill into law, state Superintendent of Public Instruction Cindy Hill sued, claiming the law violated the Wyoming Constitution.[3] One year later, the Wyoming Supreme Court ruled that SEA 1 was unconstitutional in its entirety.[4] The case is of particular interest here because the extensive decision in *Powers v. State of Wyoming* contributes to discussions of separation of powers and the role of the judiciary.

Cindy Hill's lawsuit was quickly certified by the state district court to the Wyoming Supreme Court, with four questions. The Court's majority found one question dispositive—whether SEA 1 violated Article 7, Section 14 of the Wyoming Constitution—and declined to address the other three.[5] The majority found that SEA 1 deprived the superintendent of exercising her constitutional duty of "the general supervision of the public schools," noting that the law "amends a total of 36 separate statutes and substitutes 'director' for 'state superintendent' in approximately 100 places[,]" and that "the Act transfers the bulk of the Superintendent's previous powers and duties to the Director."[6] The court based its interpretation of the state constitution on the language of the constitution, constitutional history, and legislative history.

Article 7, Section 14 of the Wyoming Constitution has read as follows since Wyoming became a state in 1889:

> "The general supervision of the public schools shall be entrusted to the state superintendent of public instruction, whose powers and duties shall be prescribed by law."[7]

The State and Hill took opposing positions on the

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Minnesota. Minn. Stat. § 4623.357, subd. 1e (a). But, the City contends that the campground only remained a "lawful" non-conforming use to the extent it remained in compliance with the 1984 permit—without which the City contends the campground would have been *illegal*. White v. City of Elk River, 822 N.W.2d 320, 324 (Minn. Ct. App. 2012), *review granted* (Jan. 15, 2013), *rev'd*, 840 N.W.2d 43 (Minn. 2013).Yet this seems to beg the question of what legal effect the 1984 permit had in the first place?

9 In addition to addressing the City's authority to revoke the Family's right to continue campground operations on their land, the Supreme Court also addressed the Family's asserted statutory right to rebuild and maintain an essential facility that burned in a 1999 fire. That issue—though an interesting question of land-use law as well—is beyond the scope of this article.

10 *See Hooper*, 353 N.W. 2d at 140; *Freeborn Cnty.*, 295 Minn. at 99.

11 The record is unclear as to whether the Family was prompted to do so at the behest of city officials.

12 The City argued that the Family was foreclosed from contesting the validity of the 1984 permit at this juncture because it failed to prosecute this argument in the lower court; however, the Supreme Court dismissed that argument because it was set forth in the Family's early pleadings. *White*, 840 N.W.2d at 50.

13 *See* Cnty. of Morrison v. Wheeler, 722 N.W. 329, 334 (Minn.App., 2006) (noting municipalities have broad discretion to make zoning decisions); *but see* Koontz v. St. Johns River Management Dist., 2013 WL 3184628, 7 (U.S., 2013) (applying heightened scrutiny where the exercise of constitutional rights are conditioned on the receipt of discretionary land use approvals).

14 *See White*, 822 N.W.2d at 325 (the court of appeal interpreted Minnesota law to allow for revocation of non-conforming uses in order further the legislative purposes in advancing the general welfare of the public).

15 *White*, 840 N.W.2d at 49.

16 *White*, 840 N.W.2d at 51.

17 The Court refused to accept the City's assertion that intent can be inferred by acquiescence to the City's requirement to obtain a permit. This makes sense because, as *amici* MVRA and NFIB pointed out, a landowner might accept such a permit to avoid the threat of enforcement actions without intent to actually waive any preexisting property rights.

18 *Id*. at 51 (also noting that it is possible for a landowner to freely waive property rights in entering an agreement with a land use authority).

Powers v. State of Wyoming: Separation of Powers and the Role of the Judiciary

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controlling language of the section, with the State arguing that the Wyoming Legislature may proscribe or remove duties at will, while Hill argued that the powers to generally supervise the public schools must have some limiting effect and that the duty could not be transferred to an appointee of the governor. Reviewing the section's language, the court's majority first compared it to provisions in other state constitutions as interpreted in their respective high courts. Specifically, these interpretations arose in cases from Arizona, Idaho, Minnesota, and New Mexico.[8] The majority also distinguished a case from North Dakota that the state relied upon in its arguments.[9] All of these cases supported Hill's contention that, "[w]hile the legislature can prescribe powers and duties of the superintendent, it cannot eliminate or transfer powers and duties to such an extent that the Superintendent no longer maintains the power of 'general supervision of the public schools.'"[10]

The majority also looked at constitutional history, specifically the minutes of the Wyoming constitutional convention. "The delegates envisioned that the scope of the Superintendent's duties would be statewide and would involve a broad array of concerns."[11] From there, the majority examined legislative history, or how the superintendent's duties had changed since 1889. Of particular importance was a law passed in 1917 that "transferred nearly all of the powers and duties of the Superintendent to a Commissioner of Education and the Board of Education."[12] After examination by the state attorney general, "[t]he legislation was repealed two years later amid concerns about its constitutionality."[13] The majority concluded that "[i]f legislative history is a relevant consideration in constitutional interpretation, it reflects legislative action consistent with our interpretation of the plain language of Article 7, Section 14 . . . ."[14]

After determining that the Wyoming Constitution reserves responsibilities to the superintendent, the court then considered whether SEA 1 violated this edict. In a cut-and-dry fashion, the majority said that SEA 1 is unconstitutional. "The 2013 Act relegates the Superintendent to the role of general observer with limited and discrete powers and duties."[15] With limited exceptions, SEA 1 stripped the superintendent of nearly all of her powers and duties under the law. "In the Act,

'director' is substituted for 'superintendent' in nearly every statutory provision in which the word 'superintendent' previously appeared."[16] In short, though SEA 1 made a nod to the Wyoming Constitution by claiming the superintendent would have general supervision of schools, the court concluded that "[t]he reservation of the power of 'general supervision' . . . is illusory."[17]

The dissent, nearly as long as the majority opinion,[18] largely relies on previous legislation to illustrate the varying nature of the superintendent's duties throughout the history of Wyoming and to conclude SEA 1 is constitutional.[19] Of particular concern to the two dissenting judges is the sweeping nature of the majority's ruling, and its impact on current and future educational efforts.[20] "If the legislature cannot validly transfer 68 duties from the superintendent to the director of education, can it constitutionally transfer 45 duties? Or can it only properly transfer two?"[21] The majority responds by reserving this question for another day: "The certified questions addressed to this Court involved the constitutionality of SEA [1], not the constitutionality of any other legislation or potential legislation."[22] Following the *Powers* decision, though the court overturned the law in its entirety the lower court ruled that five minor portions of the law assigning new duties to the superintendent were constitutional.[23]

The lynchpin of the *Powers* decision rests on separation of powers between the executive and legislative branch and also within the executive branch. Although the majority opinion in *Powers* alludes to the lynchpin of SEA 1's unconstitutionality, it is the short concurrence[24] by two of the three justices in the majority that emphasizes "the constitutional convention delegates' decision to fragment executive power[.]"[25] With five elected executives in Wyoming, and so much power already concentrated in the position of the governor, the entire structure of the executive branch in the Wyoming Constitution would be undermined if SEA 1 withstood the challenge. The majority may have upheld SEA 1 if it had simply removed numerous duties from the superintendent instead of reassigning them to the appointed director of education, which in fact placed them under the control of the governor.[26] Even then, respecting traditional separation of powers between the legislative and executive branch, the majority is clear that the superintendent must have some duties under the law.

"We must attempt to give meaning to all words and phrases so that no part [of the Wyoming Constitution] 'will be inoperative or superfluous.'"[27] *Powers v. State* is a lengthy decision that overturned an omnibus law. Its ruling is narrow yet far-reaching, and will likely be considered in not only future legislation regarding the responsibilities of the state superintendent but of the four other elected executive offices in Wyoming. The opinion may also provide valuable insight to other states with numerous elected executive offices and re-affirms that in our federalist system our state constitutions matter.

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Endnotes

1 http://legisweb.state.wy.us/2013/Enroll/SF0104.pdf; *see also* http://legisweb.state.wy.us/2013/Digest/SF0104.htm

2 *See generally* SEA 1.

3 *Wyoming Gov. Mead signs superintendent bill into law; Hill sues*, Casper Star Trib., Jan. 29, 2013, *available at* http://trib.com/news/state-and-regional/govt-and-politics/wyoming-gov-mead-signs-superintendent-bill-into-law-hill-sues/article_82f29db5-e566-504a-b70a-7fcfe7f60b94.html.

4 Powers v. State of Wyoming, 318 P.3d 300 (Wyo. 2014). Hill sued along with Wyoming residents Kerry and Clara Powers.

5 *Id.* at 302.

6 *Id.* at 302–03.

7 Wyo. Const. art. 7, § 14.

8 *Id.* at 308–10.

9 *Id.* at 311–12.

10 *Id.* at 313.

11 *Id.* at 316.

12 *Id.* at 317.

13 *Id.* at 318.

14 *Id.* at 319.

15 *Id.* at 321.

16 *Id.* at 320.

17 *Id.* at 320.

18 *Id.* at. 326–51.

19 *Id.* at 332–342.

20 *Id.* at 350.

21 *Id.*

22 *Id.* at 323.

23 Ben Neary, *Judge's order: Most of Hill bill is unconstitutional*, Casper Star Trib., Apr. 18, 2014, *available at* http://trib.com/news/state-and-regional/judge-s-order-most-of-hill-bill-is-unconstitutional/article_a3a0de9f-b9b0-5d7b-bdc4-539eca6c7c66.html.

24 *Powers*, 318 P.3d at 323–36.

25 *Id.* at 325.

26 This scenario is unlikely, however, as it would have probably entailed eliminating the state department of education, an action that might implicate other provisions of the Wyoming Constitution. *See generally* Wyo. Const. art. 7.

27 *Powers*, 318 P.3d at 313 (citing Geringer v. Bebout, 10 P.3d 514, 520 (Wyo. 2000)).