The Rocky Mountain Land Use Institute:
Sixth Annual Land Use Conference

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By

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Update on Planning and Land Use Regulatory Decisions

1. United States Supreme Court Decisions
2. Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997)
3. Tahoe Regional Planning Compact: The Tahoe Regional Planning Agency (TRPA) Plan governs the development of Suitum's property. There are several relevant elements of the Plan:
4. Individual Parcel Evaluation System (IPES)
5. The TRPA assigns a numerical score to each residential lot depending on each lot's environmental suitability for development.
6. The TRPA annually established a numerical level: a lot with a score above this level can be developed; a lot with a score below this level cannot be developed.
7. Property owners with lots which receive a score lower than the established level can only develop their property in the event that the level is lowered by the TRPA.
8. Stream Environmental Zones (SEZ)
9. An SEZ is an area which conveys surface water from upland areas in to Lake Tahoe and its tributaries.
10. The TRPA Plan allows no new land coverage or other permanent land disturbance within the SEZs, except for limited public uses.
11. Criteria for development: the TRPA will allow construction of a single-family structure upon satisfaction of four criteria:
12. an IPES score above the numerical level established for development in that calendar year
13. a residential development right
14. adequate land coverage
15. a residential allocation
16. Transfer of Development Rights (TDR) Program
17. This program allows for transfer of
18. land coverage,
19. residential development rights, and
20. residential allocations.
21. Land coverage:
22. A property owner may transfer land coverage to a receiving parcel within the same hydrological zone, which allows for the construction of a larger project on the receiving parcel.
23. For property within an SEZ, the property owner is allowed to transfer 1% of the total property area. Suitum's property is 18,300 square feet: she is allowed to transfer 183 square feet of land coverage to another parcel.
24. Residential development rights: Subject to county approval, the use of the receiving parcel, and the density eligibility of the receiving parcel, residential development rights may be transferred to other property anywhere in the Lake Tahoe Basin.
25. Residential allocations: property owners may transfer a residential allocation from a parcel with a low IPES score to any parcel with an IPES score above the annual IPES level for allowable development.

26. The Property
27. Suitum purchased the property in 1972 and first attempted to develop the property in 1989 when she obtained a "residential allocation" from Washoe County for the construction of a house.
28. The TRPA determined that the property was located entirely in an SEZ, and assigned the property a zero IPES score.
29. Land coverage and residential development right: Suitum has one residential development right and 183 square feet of land coverage which may be transferred to other property.

1. Residential allocation: The residential allocation which she received in 1989 was not used, and it therefore reverted back to the County. Following this reversion, Suitum did not apply for another residential allocation.
2. TRPA evidence which was admitted by the district court was that without a residential allocation right, Suitum's transferrable development rights were valued at $10,000 to $21,500 or more. With an allocation right, the value of the development rights would be $30,000.
3. **Suitum has not applied to transfer the development right or available land coverage under the TDR program.** When she brought the section 1983 action in federal court alleging a taking, violation of substantive due process and equal protection, the district court and court of appeals held that her failure to apply for these transfers rendered her claims unripe for adjudication.
4. Ruling
5. Ripeness Doctrine: The Court completely reaffirmed its earlier rulings regarding the ripeness doctrine as applied to land-use taking claims.
6. Agins v. City of Tiburon, 447 U.S. 255 (1980): the failure to submit a development application under the currently applicable zoning ordinance means that there is "no concrete controversy regarding the application of the specific zoning provision at issue."
7. Hodel v. Virginia Surface Mining & Reclamation Assn. Inc., 452 U.S. 264 (1981), "toughened our nascent ripeness requirement" by requiring a landowner to seek a variance from the facial requirements of the applicable zoning ordinance in order to ripen a takings claim.
8. Williamson Regional Planning Commission v. Hamilton Bank, 473 U.S. 170, 186, 194 (1985): a takings claim is inherently a factual question involving examination of the economic impact of the regulation and interference with a property owner's reasonable investment-backed expectations. Nevertheless, despite these inherent factual questions, these factors "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."
9. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986): where a developer receives a denial of a single development application and immediately files suit, the takings claim is not ripe for adjudication. The application of a zoning ordinance on the

value of property cannot be measured until a final decisions is made as to how the regulations will be applied to the developer's property, including the request for a variance and intermediate rezoning requests from the applicable zoning ordinance.

10. Final Decision: A final decision had been rendered in this case by the TRPA (no development was allowed), and the agency had no discretion to exercise over Suitum's right to use her land. Therefore, "no occasion exists for applying Williamson County's requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel." Suitum at 1667.
11. Value of TDR Rights: Although the value that would be attached to the TDR rights had not been conclusively determined, this did not render the case unripe. "The valuation of Suitum's TDRs is therefore simply an issue of fact about possible market prices, and one on which the District Court had considerable evidence before it." Suitum at 1668.
12. Administrative Ripeness: The administrative ripeness doctrine applied by the Supreme Court to an administrative agency decision in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), does not apply to in the land use dispute presented by this case. In Abbott, drug companies challenged the authority of the FDA to adopt labelling requirements, whereas in this case Suitum did not challenge the authority of the TRPA to adopt the development or TRD regulations at issue. "[T]o the extent that Abbott Laboratories is in any sense instructive in the disposition of the case before us, it cuts directly against the agency: Suitum is just as definitively barred from taking any affirmative steps to deelop her land as the drug companies were bound to take affirmative steps to change their labels." Suitum at 1670.
13. Prinz v. United States, 65 U.S.L.W. 4731, No. 95-1478 (1997). Under the Brady Handgun Violence Prevention Act, chief law enforcement officers were required to perform a "reasonable" check of the background of each person applying to purchase a handgun. A county sheriff challenged the background-check requirement on the basis that a local law enforcement officer cannot be required to enforce a federal law. (A companion cases decided with Prinz posed the same legal issue.) The Supreme Court reversed that Ninth Circuit and held that the background check requirement violates the principles of dual federal/state soverignty established by the Constitution. The majority cited to New York v. United States, 505 U.S. 144 (1992), for the proposition that the government may not compel the states to enact or administer a federal regulatory program.
14. Babbitt v. Youpee, 65 U.S.L.W. 4069, No. 95-1595 (1997). Does a federal law that requires small shares of Indian reservation land owner by the individual members of a tribe to revert to the tribe when the owner dies violate the Fifth Amendment's guarantee of just compensation for tha taking of private property for public purposes? The Supreme COUrt said yes by a vote of 8-1. Justice Ginsburg wrote the opinion which held that the 1984 amendment to the Indian Land Consolidation Act, 25 U.S.C. 2206, is unconstitutional because it severely restricts the righ of an individual to direct the descent of his or her property. Justice Stevens dissented, arguing that the legislative systems was justified because it minimized the fractional ownership of Indian lands and paved the way to productive develoment of their property.
15. City of Boerne v. Flores, 65 U.S.L.W. 4612, No. 95-2074 (1997).

16. Religious Freedom Restoration Act: The Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. section 2000bb *et seq*., was enacted in response to the Supreme Court's decision in Employment Division, Oregon Dept. of Human Resources v. Smith, 494 U.S. 872 (1990). In Smith, the Court rejected the claims of Native American Church members that they should be exempted from Oregon's criminalization of the use of peyote under the Free Exercise Clause of the First Amendment. RFRA applied to all levels of government, and required that all laws, rules or regulations that substantially burden religious conduct must satisfy strict scrutiny -- the law or rule must be supported by a compelling state interest and constitute the least restrictive means of achieving the compelling interest.
17. Facts: The City of Boerne maintains a Historic Landmark Commission to protect historic landmarks and districts. The Catholic Church, through Archbishop Flores, applied for a permit to expand a church located within a historic district, and which was itself a historic building. The Historic Landmark Commission denied the permit. The lawsuit alleged a violation of RFRA and the strict scrutiny test set forth therein.
18. Holding: The Court held that insofar as RFRA purports to establish a new interpretation of the Free Exercise Clause, it is beyond the authority of Congress. The Court relied on Marbury v. Madison 5 U.S. 137 (1803), for the proposition that it is the duty of the judiciary to "say what the law is," and therefore not the job of Congress to determine what the Free Exercise Clause prohibits. The Court also examined the purpose of RFRA, and determined that it was not aimed at legislation that was hostile to religion but rather at neutral legislation enacted for otherwise valid health and safety reasons. The Court then concluded that imposing strict scrutiny analysis upon otherwise neutral legislation, when a party establishes a substantial burden on the free exercise of religion, amounts to a substantial intrusion into the daily operation of state and local governments.
19. The United States Supreme Court recently decided two cases that allow claims that a permit was denied for partisan political reasons to be analyzed under free speech doctrine: Board of County Commissioners v. Umbehr, 116 S.Ct. 2342 (1996) and O'Hare Truck Service, Inc. V. City of Northlake, 116 S.Ct. 2353 (1996). Although neither decision involved land use, their holdings could easily apply to such decisions. Because free speech is a vigorously enforced constitutional guarantee, applicants whose land use plans have been frustrated by partisan politics now have a stronger argument to obtain redress based upon these decisions.

In Board of County Commissioners v. Umbehr, 116 S.Ct. 2342 (1996), Umbehr had held a contract for years with the county for trash hauling. He was a critic of the board of its policies. The board terminated Umbehr's contract. The Court held that the First Amendment protects independent contractors from the termination of their at-will government contracts in retaliation for their exercise of the freedom of speech. In O'Hare Truck Service, Inc. V. City of Northlake, 116 S.Ct. 2353 (1996), the city maintained a list of companies to provide towing services. The city's policy was to remove companies from the list only for cause; however, O'Hare was removed from the list after its owner refused to contribute to the mayor's

reelection campaign. The Court held that independent contractors are entitled to the same First Amendment rights as government employees.

Unlike government employees and independent contracts, applicants for land use permits have no continuing economic relationship with government. Nonetheless, Umbehr and O'Hare may mean that denying an application for a land use permit because of partisan politics violates the First Amendment rights of the applicant.

1. State and Lower Federal Court Zoning Decisions
2. Federal Decisions
3. Villas of Lake Jackson, Ltd. V. Leon County, 121 F.3d 610 (11th cir.1997).

Facts: Concerned with the high intensity of development surrounding a lake, Leon County officials rezoned a 30 acre parcel of property from intense development, allowing 43.6 units per acres, to single family residential. The owner of the property brought suit against the county for the rezoning, alleging deprivation of a vested right due to reliance upon the prior regulatory activities of the state.

Holding: The eleventh circuit held that there is no such thing as a substantive due process "takings" claim. The right to a specific use of property must be considered under the Fifth Amendment.

1. SK Finance SA v. La Plata County, 126 F.3d 1272 (10th Cir. 1997).

Facts: SK Finance took title to 196 lots of a subdivision in lieu of a foreclosure. It brought suit against La Plata County in federal court based on a fifth amendment takings claim and diversity of citizenship, along with state law claims: the impairment of vested rights and inverse condemnation under the Colorado Constitution. The lower court granted La Plata County's Motion to Dismiss.

Holdings: Applying Suitum, the court of appeals affirmed the lower court's decision, holding that SK Finance did not obtain a final decision from the County regarding provision of sewer service and that SK had obtained no vested right to construct a particular type of sewer system.

1. Clajon Production Co. v. Petera, 70 F.3d 1566 (10th Cir. 1995).

Facts: Plaintiffs are ranchers. They filed a §1983 action challenging Wyoming's hunting licensing scheme. Defendants, an environmental group, intervened in the suit. The district court upheld the licensing scheme as an effort to advance a legitimate state interest -- the preservation of wildlife. Further, the court held that the licensing scheme did not destroy the beneficial use of

the property, failing to result in a regulatory taking. The Court of Appeals affirmed the lower court's decision.

Holding: Clajon Production Corporation lacked standing to bring its claim since it has suffered no injury in fact. Citing Dolan, the court held that a landowner can expect the use of this land to be limited from time to time. In this case, the licensing scheme did not constitute a regulatory taking because no complete physical occupation resulted as was involved in both Dolan and Nolan.

1. Gosnell v. City of Troy, 59 F.3d 654 (7th Cir. 1995).

Facts: Plaintiffs, developers of a residential subdivision, brought a §1983 action in state court against the City of Troy for an alleged due process violation in connection with the city's opposition to the creation of a lagoon within the development. Plaintiff's final plat did not include the creation of a lagoon. The lagoon was dug as an attempt to prevent a drainage swell from filling with spring water. The District Court granted Summary Judgment to the City.

Holding: Municipal regulations that diminish the value of property do not always violate a developer due process rights. Substantive due process doctrine was largely abolished in the 1930's and the plaintiffs received notice and an opportunity to be heard.

1. Macri v. King County, 126 F.3d 1125 (9th Cir. 1997).

Facts: Pursuant to the County's denial of their application to subdivide, Plaintiff filed a claim against the county in district court for statutory damages for arbitrary agency action, inverse condemnation and a §1983 violation. The County denied Plaintiff's application because of inadequate access since the property in question was located adjacent to a dead end street. The County removed the matter to federal court. The federal court dismissed the claim for damages and the § 1983 violation, remanding the inverse condemnation claim back to the state courts. On appeal, the 9th Circuit Court of Appeals ruled against plaintiff on all three counts.

Holding: A taking did not occur because Plaintiff could not prove that the county had denied the subdivision without advancing a legitimate state interest or had denied them any economically viable use of their property. Further, the court held that Plaintiff's federal claim was not ripe for adjudication because the state had an adequate procedure for reimbursement for the taking of property.

1. FM Properties Operating Co. v. City of Austin, 93 F.3d 167 (5th Cir. 1996).
2. Facts: A developer filed a site plan application proposing a multifamily complex in Austin. The developer later amended the site plan to a smaller number of units, and because of the delay received final subdivision plat approval the day after the site plan application expired, the site plan was denied. The City then amended its regulations applicable to water quality protection associated with a nearby creek. When the developer submitted

a new site plan application for the property, the city denied that application based on the new water quality protection regulation. The developer sued the city for a violation of substantive due process, and a jury granted a verdict for the developer and awarded $113,888 in damages.

3. Holding: The Fifth Circuit reversed the jury verdict for the developer and held that the new site plan application was governed by the revised water quality regulation, and therefore properly denied. The court relied on the Texas vested rights statute, which provides that , "If a series of permits is required for a project, the orders, regulations, ordinances, or other requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project." Tex. Govt. Code Ann. § 481.143(a) (West 1990). Under the statute, the court held that (1) the application for a preliminary subdivision plat approval is the first in a series of necessary permits for subdivision approval, and that (2) a site plan application is the first in a separate series of permits required for approval of construction on the property. The City had implemented a policy of separately considering site plan permits (vertical constriction on the property) and subdivision permits (division of the land into two or more parcels). Separate consideration of these "series of permits" meant that the expiration of the site plan application, as one of two series of permits, allowed the city to apply the revised water quality ordinance.
4. Del Monte Dunes at Monterey, Ltd. V. Monterey, 95 F.3d 1422 (9th cir. 1996). Del Monte Dunes owned 37.6 ocean-front acres in Monterey, California, which was zoned for multi-unit development. At the time of purchase, an application for a 190-unit development was pending. The City has previously denied application for higher density development. It also denied the 190-unit application. Although Del Monte sold the property to the State of California for $800,000 more than it paid, the sale did not preclude a finding that there was no economically viable uses for the property. The court emphasized that the focus of the economically viable use inquiry is primarily on use, not value; and, there was ample support in the record to find that the City's actions had left Del Monte with no economically viable use for the property, thereby effecting a taking.
5. California

Landgate, Inc. V. California Costal Commission, 61 Cal.Rptr.2d 196 (CAL.Ct.App. 1997). Landgate purchased a 2.45 acre lot and applied for and received county approval to build a single-gamily home on the property. However, the California Coastal Commission denied the application. In a subsequent action, the landowner prevailed and the court required issuance of the permit by the Commission. The permit was not issued by the Commission for a period of two years after the original denial. Landgate then sought damages, alleging that the Commission's permit denial constituted a taking of property under the Fifth Amendment. The court found that compensation is proper where a regulation compels a property owner to suffer a physical invasion of his property or denies an owner all economically beneficial or productive use of its land. The court held that the Commission's permit denial left the landowner unable to use its

land or negotiate for a different project for a period of two years (after the original denial). The permit denial therefore deprived the landowner of all economically viable use of its land for two years, for which the landowner was entitled to compensation.

1. Wyoming

Ford v. Board of County Commissioners of Converse County, 924 P.2d 91 (Wyo. 1996). Ford owned a parcel of land designated as "rural residential" by the land use plan. However, the county had never adopted any zoning resolutions for the area. Ford began operating a fireworks stand on the subject parcel without approval from the county. A comprehensive land use plan is merely a policy statement which implemented by zoning enactment. It is the proper zoning enactment which has the force and effect of law; and the county never adopted any zoning resolutions. The comprehensive plan lacked the legal effect of zoning laws and was insufficient to regulate the use and occupancy of lands in the unzoned areas of the county. Consequently, the Board of County commissioners had no regulatory authority over the use of Ford's property.

1. South Dakota

Cary v. City of Rapid City, 559 N.W.2d 891 (S.D. 1997). Rezoning of property from general agricultural classification to a medium density residential classification was challenged based on a plebiscite provision which stated that if 40% of the neighboring landowners objected to the rezoning it would not become effective. 40% of the neighboring landowners objected and the rezoning was denied. Subsequently, the statute allowing for the landowner protest was challenged.

The court held that the statute failed to establish guidelines or standards for protesting an adopted ordinance, thereby allowing for unequal treatment in violation of the due process clause. In addition, there was no legislative bypass to allow for review of the plebiscite proceeding. Accordingly, the court held that the statutory provision was unconstitutional.

1. Colorado

Anderson v. Board of Adjustment, 931 P.2d 517 (Colo.App. 1996). Property owners brought an action for judicial review and a declaratory judgment action against the decision of a board of adjustment which allowed a neighboring property to continue accessory uses on the property as a nonconforming use. The city had allowed an automated car wash as an accessory use to a gas station, where the gas station originally existed as a noncomforming use in the B-1 zone. The court held that the installation of the car wash constituted the illegal expansion of a non-conforming use. The court rejected the adoption of the "Modern Instrumentalities Doctrine" from Pennsylvania, which would allow the expansion of nonconforming uses by replacing older methods of operation with newer methods.

1. New Jersey

East Cape May v. State of New Jersey, 1997 WL 205815 (N.J. Super.A.D. April 29, 1997). East Cape May alleged a taking and a temporary taking after being denied a permit to develop 100 acres or wetland property on the east side of a state road. The developer's principal also owner 100 acres on the west side of the road, which had already been developed. The government claimed that the denominator for purposes of analyzing the taking was the entire 200 acre parcel, and therefore no taking had occurred since the developer had not been denied all beneficial use. The government also claimed that the developer had failed to exhaust administrative remedies because a state safety valve provision had not been used which allowed the government to relax its regulations and reconsider its denial of the permit.

The court held that a taking could only have occurred after the developer had exhausted its remedies. The court also found no delay in the administrative process which created a temporary taking. Regarding the denominator for the parcel, it remanded the case back to the trial court to determine: what entities own or owned the property west of the road and their exact relationship to East Cape May; what they built on the west parcel and were any parts disposed of; when and for what consideration was any of the property acquired; the differences in zoning on the east and west sides; and finally whether the development on the west side was restricted in anticipation of more stringent regulation on the east side.

1. New Mexico

Old West Town Neighborhood Association v. City of Albuquerque, 927 P.2d 529 (1996). The City of Albuquerque annexed land to the city, and adopted a sector plan for the area (a component of the city's comprehensive plan) which rezoned certain property when it was annexed into the city. A neighborhood group challenged the rezoning of a six acre parcel on the grounds that the city was required to follow the quasi-judicial procedures for the rezoning of a single parcel in New Mexico. The court agreed and found that the automatic rezoning of the parcel upon annexation and adoption of the sector plan was illegal.

1. Maryland
2. Board of County Commissioners of St. Mary's County v. Potomac River Association, 688 A.2d 515 (Md.App. 1997). Landowners sued a the county seeking a declaration that the county's 1991 adoption of an ordinance amending its subdivision regulations by postponing "parcels of record" date from 1978 to 1990 exceeded the county's statutory powers. The court upheld the trial court's grant of summary judgment to the landowners, and held that the postponement of the effective date of the subdivision was actually the retroactive application of the county ordinance. The controlling state statute required that once a county adopted a comprehensive plan and subdivision regulations, the effective date of the subdivision regulations was not subject to change. "The effect of the retroactive repeal would be to validate all non-complying parcels

without knowledge of the nature of each subdivision and how it fits into the regulatory scheme. . . ." Id at 522.

3. Sycamore Realtry Co. v. People's Counsel of Baltimore County, 684 A.2d 1331 (Md. 1966). A property owner sued Baltimore County for a ruling that the downzoning of the property was illegal. The property owner had proposed to the County to build townhouses. The County subsequently "reserved" the property, pursuant to state statute, for future acquisition by the Baltimore County Department of Recreation and Parks. During this reservation no development may occur on the property, and if the property is not acquired by the county, the property owner may recover any actual damages sustained as a result of the reservation. During the reservation, the county downzoned the property. The court held that, because the property owner had not obtained a vested right prior to the downzoning, the county was not prohibited from downzoning the property. The Maryland high court also held that the property owner could not prevent the downzoning by through an estoppel theory, discussed also rejected the lower court's formulation of a narrower version of the estoppel test. The opinion relied heavily on an article that appeared in THE URBAN LAWYER. See David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, URB.L.ANN. 63 (1971).

1. Florida

Chung v. Sarasota County, 686 So.2d 1358 (Fla.App. 1996). Sarasota County's settlement agreement in zoning litigation, under which the county agreed to rezone property subject to numerous conditions, constituted illegal contract zoning. The settlement bypassed more stringent notice and hearing provisions for rezoning, rendering the settlement illegal and not in compliance with state statute.

1. Connecticut

Bauer v. Waste Management of Connecticut, Inc., 686 A.2d 481 (Conn. 1996). A town zoning and enforcement officer sought to enjoin a landfill officer from violating zoning regulations that established height limitations and from expanding nonconforming uses associated with landfill. The trial court ordered an injunction and required the removal of waste above the established height limitation. The court of appeals upheld the injunction and order, finding that the trial court's action was supported in part by evidence of a willful violation by the landfill operator, based upon statements that the operator would never comply with the city's order unless a court issued the same order requiring compliance with the city height limitations.

1. Massachusetts

Beale v. Planning Board of Rockland, 671 N.E.2d 1233 (Mass. 1996). A landowner appealed a decision of the city planning board which denied a subdivision application, which concluded the extension of a road for the creation of a shopping center. The property lied partially inside the City of Rockland and partially within the City of Hingham. The shopping center was proposed for construction in Hingham, and the Rockland plan commission only needed to approve the road connection to the shopping center site. The Rockland planning board found that the proposed shopping center use, although not within Rockland, violated the allowable uses on the parcel for which the road was proposed. The basis of this decision was the rule that the use of land in one zoning district for an access road to another zoning district is prohibited where the road would provide access to uses that themselves are barred if they had been located in the first zoning district (where only the road is located).

1. Virginia
2. Richardson v. City of Suffolk, 477 S.E.2d 512 (Va. 1996). The citizens of Suffolk brought an action challenging the city's approval of a conditional use permit for an automobile racetrack in the city. The court upheld the grant of the CUP, declaring that its issuance was fairly debatable, based on the evidence that the city ordinance permitted CUPs in the business district for commercial recreational uses, the proposed racetrack qualified as a commercial recreational activity, and the city granted the permit subject to a number of conditions such days and times that the racetrack would be allowed to operate as well as specific security measures.
3. City of Chesapeake v. Gardner Enterprises, Inc., 482 S.E.2d 912 (Va. 1997). The Supreme Court of Virginia affirmed a municipality's implied right to prohibit the construction of additional facilities to support a nonconforming use. Further, the Court held that the statute must be judged by a standard of rationality to preserve rights in existing lawful buildings and uses of land. Therefore, the owner of a cemetery was prohibited from constructing new buildings to support the nonconforming use since such uses are not favored.
4. Georgia

City of Atlanta v. Watson, 475 S.E.2d 896 (Ga. 1996). Apartment owners in Atlanta brought a suit against the city alleging a nuisance, inverse condemnation and a violation of equal protection for the city's policy of purchasing single-family residential property, but not multi-family property, as part of the Airport Noise Abatement Program. The court found that the purchase of single-family homes around the airport to the exclusion of multi-family units bore a rational relationship to legitimate government interest. The Texas Supreme Court found that the purchase of only single-family homes served the purpose of reducing land usage incompatible with airport noise in a sound fiscal manner while simultaneously avoiding the virtual elimination of the surrounding residential base. The required purchase of multi-family residential structures with the single-family structures would have cost the city in excess of $900 million, and would have destroyed the ability of the city to develop the former single-family property for commercial uses that were compatible with the airport noise. The initial

purchase of only one type of property allowed the city to achieve the goals of state and federal noise reduction programs in phases.

1. New York

Toys "R" Us v. Silva, 89 N.Y.2d 411, 676 N.E.2d 862 (1996). The New York Court of Appeals found that the substantial discontinuation of a nonconforming use, as opposed to the complete discontinuation, for a 2 year period results in a forfeiture of that use. The court also held that the good-faith intentions of the owner is irrelevant to the determination of forfeiture. The Ne York zoning ordinance at issue defined discontinuance as something less than complete abandonment, and this was supported by the policy disfavoring nonconforming uses.

1. Michigan

Paragon Properties Co. v. City of Novi, 550 N.W.2d 772 (Mi. 1996). A property owner brought an inverse condemnation suit, arguing that the city's failure to rezone the property was an unconstitutional taking. The Michigan Supreme Court held that the denial of the rezoning request did not inflict an actual, concrete injury, and this combined with the failure to request a variance rendered the claim unripe for judicial determination. This decision comports with Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997), which reaffirmed all of the United States Supreme Court cases upon which the Paragon court relied.

1. Ohio
2. Schenck v. City of Hudson Village, 937 F.Supp. 679 (N.D. Ohio 1996). The Court granted a preliminary injunction against a growth management ordinance which placed an annual quota on the amount of zoning certificates issued by the city based upon a point system. The quota is based on a point system based upon, *inter alia*, infrastructure availability, adequate public facilities, protection of wetlands and stream banks, stormwater management, tree conservation, public amenities provided by the developer, finalization of subdivision build-out, and job/housing balance. The court found that the magnitude of growth in this case did not approach that of other cities in which growth control programs have been approved, citing Construction Industry Association of Sonoma County v. City of Petaluma, 552 F.2d 897 (9th Cir. 1975), cert denied, 424 U.S. 934 (1976) (San Francisco suburb grew 25 percent in two years.

Because only a preliminary injunction is involved, the court has not made a final ruling as to the merits of the system. The court found that the cases support growth control ordinances only if they are (1) limited in duration and (2) tied to a specific and prompt plan for those corrective actions needed to lift the growth control, citing Ulmquist v. Town of Marshan, 308 Men. 52, 245 N.W.2d 819 (1976), Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, app. dismissed, 409 U.S. 1003 (1972), and Conway v. Town of Strata, 120 N.H. 257, 414 A.2d 539 (1980). [The court ignored the fact that the Golden case involved a permanent

growth management ordinance designed to control the timing of growth. The court seems to confuse permanent ordinances regulating development timing with temporary ordinances such as interim development controls.]

1. Mishr v. Board of Zoning Appeals, 667 N.E.2d 365 (Ohio 1996). The Village of Poland adopted a comprehensive zoning ordinance in 1978, zoning the property at issue "Professional Office and Service District." In 1990, the village rezoned the property at the request of the property owner to the "Village Commercial Center District." In 1991, the village repealed the 1990 rezoning by ordinance, but failed to redesignate the original Professional Office and Service 1978 zone as the applicable zone. The Ohio Supreme Court ruled that the intention of the 1991 ordinance was to return the zoning classification to the Professional Office and Service District, and not to leave the property unzoned. The failure of the village to redesignate the proper zone in 1991 was not fatal to the village's ordinance.

Sections III through V analyze decisions decided after Dolan v. City of Tigard, 512 U.S. 374 (1994), which announced the "rough proportionality" test for municipal exactions. The state and lower federal courts continue to struggle with a variety of issues that remain unresolved after Dolan.

1. Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996): extending the "rough proportionality test" to an as-applied development fees challenge
2. Facts

Between 1973 and 1975, plaintiffs acquired 2.4 acres of vacant land and obtained approval to develop the property as a tennis club and recreational facility. The city amended its zoning and general plan ordinances from R-1 (single family residential) and C-2 (retail commercial) to C-3 (commercial). The property was operated by various owners as a recreational facility until 1988, when plaintiff closed the facility due to financial loss. Plaintiff applied for a zoning change and plan amendment to allow construction of a 30-unit condominium complex valued at $10 million.

The city expressed an interest in acquiring the property as public recreational facilities, but in April 1989 decided not to purchase the property due to financial and other constraints. The application for a condominium development was also turned down over concerns of loss of recreational land uses in the city. In subsequent discussions, the development was approved. In lieu of placing four tennis courts on the property, the plaintiff was required to pay $280,000 to be used by the city for additional recreational facilities at another location (recreation fee). Plaintiff was also required to pay an exaction based on the city's "Art in Public Places" program, which totaled $33,200 (art fee).

Plaintiff challenged both the art fee and recreation fee under the California Mitigation Fee Act, and also alleged an unconstitutional taking through these fees. Plaintiff paid the recreation fee

under protest, received building and other permits to proceed with the development, and preserved the right to challenge the fee through the lawsuit. Residential units were then sold to the public.

1. Procedural Facts

The case arrived to the California Supreme Court through a long procedural history. The trial court originally ruled that the recreation fee was invalid, but that the art fee was not unconstitutional. The Court of Appeals initially affirmed the trial court judgment in its entirety, but than reversed that portion of the judgment invalidating the recreation fee. Upon certiorari, the United States Supreme Court vacated that decision and commanded the Court of Appeals to review its decision in light of Dolan. Upon remand from the Supreme Court, a divided Court of Appeals reached the same result. The California Supreme Court has now reversed the Court of Appeals insofar as it determined that the recreation fee was roughly proportional to the impact caused by the proposed condominium development. The Court of Appeals had applied the proper test, the Supreme Court decided, but case has been remanded to the trial court for fact finding to determine if the exaction if roughly proportional.

1. Holdings

Four separate opinions were filed by the seven justice panel. A plurality of the Court held:

1. The Nollan/Dolan analysis applies to impact fees and other forms of monetary exactions.
2. four justices (Arabian, Lucas, George & Werdegar) agreed that the heightened scrutiny of Dolan applies not just to permit conditions which require the dedication of land, but to **any permit condition in which the city attempts to use its police power as "leverage"** to force the property owner to surrender a benefit. The use of this leverage must in turn offset an impact created by the proposed development. Nollan and Dolan quintessentially apply "where the individual property owner-developer seeks to negotiate approval of a planned development" with the municipality, and the municipality attached conditions to permit approvals.
3. The Supreme Court in Dolan stated that the heightened scrutiny applies to dedications of land that implicate the property owner's **right to exclude** people from the land. The California Supreme Court applied a broader standard, and stated that heightened scrutiny is triggered when there is a **"risk that the local permitting authority will seek to avoid the obligation to pay just compensation,"** and not merely when the right to exclude people from the property is at issue.
4. The case should be remanded to determine the proper amount of the recreation fee that the city could impose. While a plurality decided that rough proportionality should be used to test the recreation fee, it also determined that it could not conclude -- based on the facts before the Court -- whether the amount of $280,000 was fair and was based on an "individualized findings" from the increased costs the city would face due to the loss of

the plaintiffs recreation land. The plurality did give strong indications of how the city could prove that the fee was roughly proportional. The recreation fee could be based on:

5. Additional administrative expenses incurred in redesignating other property within Culver City for recreational use, or
6. public costs in approving the condominium project, in the form of diminished ability to attract private recreation development, and greater costs in attracting a developer of suitable recreational facilities because the subject property is no longer available for public use.
7. As an alternative to imposing the fee, the court suggested that the city could require the plaintiff to transfer the restricted land use (recreation facilities) to a comparable site owned by the plaintiff, which would return the city to the status quo as it existed prior to approval of the condominium project. The city could then impose a fee in lieu of this unique "recreational use transfer," thus justifying a fee that would serve the same purpose as reserving plaintiffs land for recreational facilities at an alternative site.
8. The California Mitigation Fee Act embodies the "reasonable relationship test" as validated by the U.S. Supreme Court in Dolan (which is called "rough proportionality").
9. The art fee is constitutional and should not be tested under the Nollan/Dolan framework.

1. **Dolan Application to Land Dedications vs. Impact Fees and Other Exactions**

There is debate among the federal and state courts and literature regarding whether the "rough proportionality" requirement of Dolan applies to all development exactions, or merely to an exaction that requires a developer to deed portions of his property to the government.

1. Cases that Apply Dolan only to Land Dedications

Although many of the post-Dolan cases hold that Dolan applies to a dedication requirement, often the court was not faced with the issue of whether Dolan applies only to dedications, or should instead be extended to other forms of exactions. In other words, simply because the court applied the Dolan test to a challenged dedication of land, this does not mean that the court would not use the same analysis if faced with a challenge to another type of exaction, such as an impact fee system. This section covers both types of cases, however, where the court explicitly held that Dolan applies only to dedications, and where the court was not faced with that particular issue.

1. Homebuilders Assn. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997)
2. The City adopted a "Water Resources Plan 1985" which concluded that Scottsdale lacked sufficient water for the future and that it would need to raise capital to acquire new supplies of surface water and to construct a system to transport that water. The plan proposed the adoption of a development fee for all new real estate developments. The

city council adopted an ordinance imposing a fee of $1,000 per single family residence, $600 per apartment unit, and $2,000 per acre foot of estimated water consumption for other new uses. The fees are imposed as a condition on the approval of new developments.

3. Held: the Dolan analysis does not apply to water service fee imposed as a condition prior to issuing building permit, but rather is limited to dedications of land imposed in an adjudicatory fashion. Dolan is inapplicable to this case for two reasons.
4. First, Dolan involved a city's adjudicative decision to impose a condition tailored to the particular circumstances of an individual case. The Scottsdale case involves a generally applicable legislative decision by the city. The risk of regulatory leveraging does not exist when the exaction is embodied in a generally applicable legislative decision.
5. Second, Scottsdale seeks to impose a fee, a considerably more benign form of regulation than an easement (citing Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir.1991)).
6. Because the reasonableness of the amount of the fee was not raised in the trial court, the court did not address whether there was a reasonable relationship between the amount of the fee and the community burden. "The Supreme Court's opinions in Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and Dolan have occasioned a great deal of speculation whether ultimately the Court will hold that the Takings Clause demands a higher degree of scrutiny than has traditionally been applied in land regulation cases. See Jonathan M. Block, Limiting the Use of Heightened Scrutiny to Land-Use Exactions, 71 N.Y.U. L. REV. 1021, 1024 n.154 (1996). Nothing in the Court's opinions requires us to plunge into the thicket of the levels of scrutiny in this case."
7. Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995)

"[B]efore conducting the governmental interest inquiry, we must first determine whether the 'essential nexus' and 'rough proportionality' tests apply at all to regulatory takings claims. Based on a close reading of Nollan and Dolan, we conclude that those cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking or its equivalent. . . . Thus, we believe that Nollan and Dolan are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., possession of one's physical property) through a conditional permitting procedure."

1. Pringle v. City of Wichita, 917 P.2 1351 (Kan.App. 1996). Dolan does not apply to a decision of the City of Wichita to close a portion of a street pending completion of an expressway. The court noted that plaintiffs have not been required to deed property to the city, and that cases regulating traffic fall within the category of legislative decisions and not adjudicative decisions subject to Dolan. The court noted that "Dolan requires an examination of the relationship between the conditions imposed by the city and the impact of the owner's proposed development, not as plaintiffs here mistakenly state, the impact on the development."

2. Sparks v. Douglas County, 904 P.2d 738 (Wash. 1995)

Dolan test applied to dedications of right-of-way for road improvements. No discussion of whether Dolan would apply to other forms of exactions, but the court stated: "Under Dolan, a land use regulation does not effect a taking if the local government shows by individualized determination that its exaction is 'roughly proportional' to the impact of the development." Id. at 746 (emphasis added).

1. Parking Assn. of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (1994), cert. denied, 115 S. Ct. 2268, reh'g denied, 116 S. Ct. 18 (1995)
2. Georgia Supreme Court Decision

An association of companies who managed and owned parking lots challenged the city's ordinance requiring curbs, landscaping, and trees for these parking lots. The Georgia Supreme Court held that the ordinance was not a taking of property. The court held that this ordinance did not physically take or occupy the property of the parking lot owners.

1. United States Supreme Court denial of certiorari

The legislative versus adjudicative debate after Dolan was energized by Justice Thomas' dissent from the denial of certiorari (joined by Justice Connor) in Parking Association of Georgia, where he stated:

"It is hardly surprising that some courts have applied Tigard's rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."

1. Kottschade v.. City of Rochester, 537 N.W.2d 301 (Minn. Ct. App. 1995),

The court found that a right-of-way dedication met both the "essential nexus" and "rough proportionality" standards.

1. Cases that Apply Dolan to Fees and Other Exactions
2. Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (discussed extensively above)

Dolan applies to impact fees and other forms of monetary exactions in which a municipality attempts to use its police powers to leverage exactions from the developer, which are imposed pursuant to the approval of building and other permits, and where the municipality threatens denial of the permit if the exaction is not satisfied. (detailed extensively supra)

1. Loyola Marymount University v. Los Angeles Unified School District, 53 Cal.Rptr.2d 424 (Cal.App. 1996)

The rough proportionality analysis conducted in Ehrlich is strictly limited to those types of fees that are imposed in an adjudicative and discretionary manner in which the local government threatens to deny the development or permit application if the fee is not paid (use of leverage and the police power to exact a fee). Ehrlich does not apply, Loyola holds, to the general category of development fees that are imposed legislatively, assuming those fees are properly calculated and imposed.

1. Northern Illinois Home Builders Association v. County of Du Page, 649 N.E.2d 384 (Ill. 1995)

The court considered a transportation impact fee imposed on new development. Dolan noted that Illinois has always adhered to the "specifically and uniquely attributable test." Dolan explicitly rejected this test as too exacting of a requirement, instead opting for the middle-ground "reasonable relationship" (rough proportionality) test. The Northern Illinois court nevertheless applied the "specifically and uniquely attributable" test to the transportation impact fee (pursuant to statutory requirement), and found that the impact fee passed the test. The impact fee would therefore, by necessary implication, pass the Dolan test. Dolan is cited throughout the opinion. This case is particularly useful to analyze the legislative validity of a municipal transportation impact fee ordinance, and the structure of the impact fee system

1. impact fees can only be charged for the road improvements made necessary by the additional traffic generated by new development
2. the new development paying the impact fee must receive a direct and material benefit from the improvement financed by the impact fee
3. the impact fee must comply with generally accepted traffic engineering practices
4. impact fees cannot be used for improvements outside the transportation district in which they are collected
5. a carefully drawn district system must be established to limit geographic areas so that the fee payer receives a direct and material benefit from the fee
6. Garneau v. City of Seattle, 897 F. Supp. 1318 (W.D. Wash. 1995)

Landlords brought suit against an ordinance that required them to pay relocation costs for displaced low-income tenants. The court held that the ordinance was not a taking. In

applying Dolan, the court found that a rough proportionality exists "between the redevelopment of plaintiffs' property and the economic hardship placed on low-income tenants by displacement resulting from this redevelopment." Id. at 1326. Earlier in the opinion, the court stated that the ninth circuit had limited the application of Dolan to dedications of land in adjudicative settings -- but nevertheless went on to analyze the regulation under Dolan.

1. Southeast Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 8884 (N.D. 1995)

Costs associated with maintenance of railroad near bridges and culverts to provide continued and adequate drainage did not fall under the Dolan takings analysis because duty to assume these costs was imposed upon railroads by general legislative mandate; by implication, Dolan would apply to expenses associated with railroad maintenance if such duty were imposed in an adjudicative manner.

1. **Dolan Application in Adjudicative vs. Legislative Settings**

One of the focal points of the Dolan holding was that the City of Tigard was attempting to exact a dedication of land from the property owner in an adjudicative manner. That is, the City was not applying a generally formulated legislative policy, but rather decided to exact the land upon the landowner's application for a building permit.

As a result, the courts considering the question have almost uniformly held that the rough proportionality requirement only applies to an adjudicative decision by a local government, and not to analysis of legislative requirements. However, there may be room for a carefully crafted argument, in the proper case, that the rough proportionality requirement should apply to the study and evaluation which precedes the enactment of a legislative standard for some form of exaction. For example, the courts have not yet been faced with a challenge to an impact fee system wherein the property owner argues that the rough proportionality analysis, and possibly heightened scrutiny, should be applied to the local government's study that precedes the enactment of an impact fee formula, which is in turn applied to individual property owners at some stage in the development process.

1. Dolan Limited to Adjudicative Settings
2. Homebuilders Assn. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997)

A water service fee did not fall under Dolan scrutiny because ordinance allowed no discretion in setting the fee uniformly across identified classes of development. Dolan involved adjudicative, staff level discretion, while Scottsdale ordinance was uniformly applied to all property.

1. Arcadia Development Corporation v. City of Bloomington v. City of Bloomington, 552 N.W.2d 281 (Minn. App. 1996)

Dolan held not to apply to city ordinance which required mobile home park owners closing their parks to pay relocation costs to park residents. The court held that the Dolan analysis "applies only to adjudicated determinations that condition approval of a proposed land use on a property transferred to the government, which, standing alone, would clearly constitute a taking." The court held that the Dolan analysis is confined "to adjudicative land-dedication situations or to classic 'subdivision exaction' cases." 552 N.W.2d at 286.

1. Loyola Marymount University v. Los Angeles Unified School District, 53 Cal.Rptr.2d 424 (Cal.App. 1996)

As discussed above, the court ruled that the Ehrlich holding is strictly limited to adjudicatively imposed fees, and not property formulated development fees.

1. San Mateo County Coastal Landowners Assn. v. County of San Mateo, 38 Cal. App. 4th 523 (1995)

The court held that the Dolan rough proportionality test did not apply to a legislative determination of mandatory agricultural and open space easement requirements for entire county "*Dolan* makes it clear that it does not reach the type of legislative determination classifying entire areas of a county . . . . Rather, its reach is limited to adjudicative decisions conditioning permit applications on particular parcels." Id. at 131. However, the court noted that an adjudicative decision would arise when the property owner submitted an application to subdivide land in the coastal zone. At that time, an adjudicative decision would be made as to the appropriateness and extent of the easement. *Id.* at 132.

1. Parking Assn. of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), cert. denied, 115 U.S. 2268 (1995) (discussed above)

Dolan did not apply to general legislative requirement that parking lot owners install landscaped areas and one tree for every eight parking spaces.

1. Dolan Applied in Legislative Setting
2. Steel v. Cape Corp., 677 A.2d 634 (Md.App. 1996)

The court applied the rough proportionality test to an adequate public school facilities ordinance to find that the ordinance did not result in a facially unconstitutional taking of private property. The factual circumstances of this case were very unusual. Through a misunderstanding regarding the ownership of the property in question, the parcel was "mistakenly" rezoned to OS Open Space in the 1970s. The OS zoning allowed no development,

and was reserved for those parcels that contained environmentally sensitive or recreational lands upon which development was intended to be prohibited. (The OS District, the court notes, was originally intended to be applied only to public or community associations' property, and not private property -- its application to the subject property was a "mistake," but nevertheless binding.) In 1994, the property owner requested rezoning to the R5 Residential District. The rezoning was denied because the new residential development allowable in the R5 District would not satisfy requirements under the adequate public school facilities ordinance.

After stressing that the Dolan rough proportionality test was nothing more than a reformulation of the "reasonable relationship" test adopted by the Maryland courts in Howard County v. J.J.M, Inc., 482 A.2d 908 (Md. 1984), the court held that, "[T]he statutory scheme [adequate public facilities ordinance] satisfied the reasonable relationship test. The regulation itself involves a regulatory area that may be a reasonable application of the police power." Id. at 642.

The court went on to hold that, although the adequate school facilities ordinance facially passed muster under the reasonable relationship test, the denial of rezoning based on the adequate facilities ordinance, as applied to the property, was an unconstitutional taking of property because it denied all economically viable use under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

1. National Assn. of Home Builders v. Chesterfield County, 907 F.Supp. 166 (E.D.Va. 1995)

Facial validity of an ordinance was challenged, requiring "proffers" for capital improvements, akin to an impact fee system. The court held that the ordinance was valid under Dolan because the court could envision no circumstance in which rough proportionality could not theoretically be met, assuming the proper study and analysis, under the terms of the ordinance. Dolan was therefore effectively applied to a legislative enactment, but the court's analysis was more in accord with what would be conducted in an as-applied challenge.

1. Santa Monica Beach, Ltd. v. Superior Court, 50 Cal.Rptr.2d 726 (Cal.App. 1996), review granted and opinion superseded, 917 P.2d 623, 53 Cal. Rptr.2d 784 (Cal. 1996).

The court allowed plaintiff to challenge Santa Monica's rent control law on the grounds that it has the effect of harming the low-income persons it is designed to help, thereby violating the "substantial advancement" test articulated in Nollan v. California Coastal Commission, 483 U.S. 825, 834- 37, 107 S.Ct. 3141, 3147-3148, 97 L.Ed.2d 677 (1987). Citing Ehrlich, the court stated that "the trend toward more far-reaching (and numerically more) socially engineered land-use regulations as supports our interpretation of Nollan and our holding that its rules apply to the type of regulatory taking at issue in this case." 50 Cal.Rptr.2d at 734. The court attempted to limit the extension of Blue Jeans Equities West v. City and County of San Francisco, 3 Cal.App.4th 164, 171, 4 Cal.Rptr.2d 114 (1992) in which the court rejected a challenge to transit

impact fees under Nollan by stating that Nollan is limited to possessory rather than regulatory takings cases. Santa Monica Beach has been superseded by the California Supreme Court.

1. Individualized Determination Requirement
2. Art Picullell Group v. Clackamas County, 142 Or.App. 327, 922 P.2d 1227 (Or.App. 1996)

The court considered findings relating to the sufficiency of dedication and road improvement requirements. An incorrect understanding of the location of certain public facilities tainted the findings and necessitated remand.

1. Kiewit Construction Group v. Clark County, 920 P.2d 1207 (Wash.App. 1996)

The court upheld a condition to a conditional use permit for a proposed asphalt manufacturing plant which required either a supplemental EIS or the construction of freeway ramps to mitigate traffic conditions. Noting that the record was not sufficient to determine whether the access ramp condition was reasonably related to the asphalt plant, the court noted that "this is precisely the problem the Board faced and for which it ordered a supplemental EIS." In other words, the burden may be placed on the **applicant** to **provide the information needed to formulate the "individualized determination" required by Dolan**.

1. City of Jamestown v. Leevers, 552 N.W.2d 365 (N.D. 1996)

The City's findings in an urban renewal case were found to be sufficient. Discussing Dolan, the court noted that no precise mathematical calculation is required and indicated that the court in Dolan "suggested the City's finding would have been cured with an equally conclusory finding the pathway system will, or is likely to, off-set some traffic demand." 552 N.W.2d at 371-72.

1. Grogan v. Zoning Board of Appeals of Town of East Hampton, 633 N.Y.S.2d 809 (A.D. 1995)

The court found that the individualized determination was sufficient to require land owners to grant a scenic and conservation easement as a condition of approving the construction of an addition to their home. The court noted that the environmental assessment form "discusses the specific environmental impacts of the proposed construction and the best manner by which to ameliorate them." The court noted that the easement is an appropriate measure to address the specific environmental impacts of the proposal, and augments the city's ability under other legislation to preserve the restricted area.