ALI - ABA

LAND USE INSTITUTE

Coronado, California

August 25-27, 2005

SELECTED RECENT COURT DECISIONS

John J. Delaney*
Linowes and Blocher LLP
301.961.5115
jdelaney@linowes-law.com

---

* **The author gratefully acknowledges Dannel C. Duddy, a third year student at Washington and Lee Law School, Cary R. Kadlecek, a third year student at the University of Southern California Law School, and Andres H. Lopez, a third year evening student at the University of Maryland Law School, all of whom were Summer Associates at Linowes and Blocher LLP in 2005, for their substantial assistance in preparing this paper.**

Table of Contents

Table of Contents (cont'd)

Page

Table of Contents (cont'd)

Page

ALI-ABA LAND USE INSTITUTE: 2005
SELECTED RECENT COURT DECISIONS

By: John J. Delaney

U.S. SUPREME COURT DECISION*

Telecommunications Act: Sec. 1983 Does Not Provide Vehicle For Extra Damages For a TCA Violation

City of Rancho Palos Verdes v. Abrams, __ U.S. __, 125 S.Ct. 1453 (Mar. 22, 2005) (Cites are to the Supreme Court Report).

Congress passed the Telecommunications Act of 1996 (TCA) to promote competition and higher quality in American telecommunications services. To accomplish these goals, the statute limits the power of local governments to regulate the location, construction, and modification of facilities for wireless communications, including antenna towers.

Mark Abrams owned property that was ideal for radio transmissions because of its high elevation. In 1989, he obtained a permit from the City of Rancho Palos Verdes to construct a 52.5-foot antenna on his property for amateur use. He also placed several small tripod antennas on the property without permission from the City. He used these towers for commercial and noncommercial purposes. The city required a "conditional use" permit to enable Mr. Abrams to use the antennas for commercial purposes. Abrams applied for such permit. The city denied his application because granting permission to operate commercially would perpetuate adverse visual impacts from the existing antennas and would establish a precedent for similar projects in residential areas in the future.

Abrams filed suit against the City in the District Court for the Central District of California alleging that the denial of the permit violated the limitations placed on the city by the TCA. He sought injunctive relief, money damages and attorney's fees under 41 U.S.C. § 1983. The District Court ordered the City to grant Abrams' request for a conditional use permit, but refused to provide Mr. Abram's attorney's fees under § 1983. Upon appeal, the Court of Appeals for the Ninth Circuit reversed on the latter point and remanded for determination of money damages and attorney's fees.

---

* The following Supreme Court decisions are discussed elsewhere in the Course Materials: *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, **[Ten Commandments Display]**;---U.S.----, --- S.Ct. ----, 2005 WL 1498988, U.S.Ky., Jun 27, 2005; *Van Orden v. Perry*,--- U.S. ----, --- S.Ct. ----, 2005 WL 1500276, U.S., Jun 27, 2005 **[Ten Commandments Display]**; *Kelo v. City of New London, Conn.*,---U.S.----, --- S.Ct. ----, 2005 WL 1469529, U.S. Conn., Jun 23, 2005 **[Eminent Domain]**; *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.* **[Regulatory Takings – Standing]**,---U.S.----, 125 S.Ct. 2491, 18 Fla. L. Weekly Fed. S 403, U.S., Jun 20, 2005; *Lingle v. Chevron U.S.A., Inc.*, **[Regulatory Takings]**, ---U.S.----, 125 S.Ct. 2074, 73 USLW 4343, 35 Envtl. L. Rep. 20, 106, 05 Cal. Daily Op. Serv. 4301, 2005 Daily Journal D.A.R. 5868, 18 Fla L. Weekly Fed. 303, U.S., May 23, 2005.

The Supreme Court (through Justice Scalia) reversed and remanded, ruling that "§ 1983 does not provide an avenue for relief every time a state actor violates federal law." __ U.S. at __, 125 S.Ct. at 1458. The Court assumed without deciding that the TCA created individually enforceable rights. It focused on whether Congress intended for the judicial remedy expressly provided in the TCA to co-exist with the remedy available in § 1983. The Court noted that when a statute expressly provides a private means of redress, "it is ordinarily an indication that Congress did not intend to leave open the more expansive remedy" found in § 1983. *Id.* Although it declined to categorically hold that the availability of a private judicial remedy "conclusively" precludes § 1983 relief, it did not find any indication in the TCA that the remedy provided therein was meant to complement the remedies of § 1983. *Id.* at 1459. The Court pointed out that the remedies in both statutes in some instances contradicted each other. The crux of the Court's holding is that the TCA – by providing a judicial remedy different from § 1983 – precludes resort to § 1983.

FEDERAL COURT DECISIONS

Procedural Due Process: A Section 1983 Suit Lies for City's Failure to Provide a Hearing

Warren v. City of Athens, No. 03-3580, 2005 U.S. App. LEXIS 11232 (6th Cir. June 15, 2005).

In July 1999, the Warrens opened a drive-thru lane for their Dairy Queen, located within the City of Athens, Ohio. In response to neighborhood complaints about increased traffic, the City notified the Warrens that the City would build a curb to block access to the Dairy Queen drive-thru. The City then proceeded to place temporary curbing that prevented the use of the drive-thru. The Warrens filed suit alleging an arbitrary "taking of property without due process, and a violation of their right to equal protection, procedural due process and substantive due process." They also sought declaratory and injunctive relief, which the District Court granted, finding that the takings claim was ripe, and that the City had violated Warrens due process and equal protection rights.

The Sixth Circuit affirmed, although taking issue with the District Court's characterization of the Warrens' claim as a private use taking, stating that the City's actions were rationally related to conceivable public purposes of traffic, noise and accident control. Furthermore, the court held that a substantive due process claim, as asserted by the Warrens and found valid by the District Court, is not available to provide relief when "another provision of the Constitution directly addresses the type of illegal government conduct alleged by the plaintiff," namely, the procedural due process provision of the Fourteenth Amendment.

The court examined the City's actions as a procedural due process violation. It found that the Warrens were possessed of a property interest under Ohio law, namely a right or easement of ingress and egress to and from their property, and that this property interest was taken by the City without a predeprivation hearing, which would not have been impossible or impractical to provide. The court upheld the District Court's granting of a permanent injunction, based upon the City's violation of the Warrens' procedural due process rights.

Standing: Ripeness Rule Barred Federal Court Due Process Challenge Where No Final Decision Had Been Made by the Local Zoning Board Despite Lengthy Hearings

Ethan Michael, Inc. v. Union Township, 108 Fed. Appx. 43 (3d. Cir 2004).

Ethan Michael, Inc. ("EMI") owns six contiguous parcels of land in Union Township, Pennsylvania. On this land, EMI intended to develop a motor sports park and campground, or in the alternative, a residential subdivision, comprised of 338 single-family homes on 668 acres. EMI submitted its application seeking permission for the recreational use of the land because it was located in an area designated an Agricultural Preservation zoning district. The Zoning Hearing Board ("ZHB"), which was comprised of three members, conducted lengthy hearings. EMI predicted that at this rate the hearings would not end until 2006 or 2007.

While the hearings continued, the term of the ZHB chairman expired. In addition, several citizens formed a group to specifically oppose the project. The Township Board of Supervisors, which appoints members to the ZHB, refused to reappoint the chairman, although he sought reappointment. Instead, it appointed a member of the group who opposed EMI's application, Mr. Christopher Cuestas. In so doing, the Board of Supervisors did not follow the appointment process of seeking applications from residents who were interested in the position and did not interview any candidates.

EMI moved before the ZHB to have Cuesta recused, but Cuesta refused to recuse himself. EMI then filed a complaint with the trial court seeking equitable and injunctive relief, namely, Cuesta's recusal. The court granted EMI's request, and Cuesta complied with the court order. This left two ZHB members to hear EMI's appeal, requiring it to obtain a unanimous approval for its request instead of the normal majority vote. As a result, EMI filed a complaint in the United States District Court for the Eastern District of Pennsylvania against the Township, alleging that it had deprived EMI of procedural and substantive due process in violation of the 14th Amendment. The District Court dismissed both claims as not ripe because the ZHB had not reached a final decision on the application.

The United States Court of Appeals for the Third Circuit affirmed, holding that constitutional challenges to land-use decisions are not ripe unless the plaintiff gives local authorities the opportunity to render a final decision. The issues in this case were not ripe because the ZHB was still in the process of conducting hearings on the issues, and had not rendered a final ruling or rejection. It did not matter that the hearing process was extremely long. The court refused to carve out an exception to the finality rule, based on the facts of this case, for claims that the process itself has caused a concrete injury separate and distinct from any injury it might suffer upon the board's final decision.

Substantive Due Process: "Shock the Conscience" Standard Applied In Rejecting Claim Against The Local Government

Lindquist v. Buckingham Township, 106 Fed. Appx. 768 (3rd Cir. 2004), cert. denied 125 S.Ct.1072 (2005).

In 1994, the Lindquists sought to develop their farm as a cluster subdivision. Throughout 1994 and 1995, they worked with the Buckingham Township, its Board of Supervisors, its Planning Committee, and its consultant to develop the property. In 1996, the Lindquists submitted two plans to the Board, one which required several waivers of subdivision requirements, and another which met all requirements of the township's subdivision and land development ordinances, and thus would have to be approved "by-right" under the zoning ordinance. The second plan, however, required development of a parcel of land the Township desired to preserve. The Township directed the Lindquists to move forward with the first plan, consenting to grant all necessary waivers and stating that the plan would be processed under the August 24, 1994 Zoning ordinance as amended on December 13, 1995.

The Lindquists continued planning their development under the first plan. In early 1997, the Township enacted an amendment to the Zoning Ordinance, which eliminated cluster subdivisions as a "by-right" use. The Board of Supervisors then denied the Lindquists' first plan, subjecting any new proposal plans to the 1997 amendment. The Lindquists filed suit against the Board in the Court of Common Pleas of Bucks County. The suit was settled between the parties, the terms stating that the Lindquists would be permitted to submit revised versions of the first plan under the zoning ordinance as existing on December 13, 1995 (when cluster subdivisions were still a "by-right" use of the property). The Lindquists proceeded to file a revised version of their first plan. The Board of Supervisors, apparently attempting to deny the revised version of the first plan, passed a resolution referencing, and thus "re-denying," the Lindquist's original plan. Three weeks later (and past the statutory deadline for denying the plan), the Board realized its mistake and passed a resolution denying the Lindquists' revised version of the plan as well. The Board went on to state that any further revised plans would be subject to the zoning ordinances in effect at the time of their submission, including the 1997 amendment.

The Lindquists filed a mandamus action in the Court of Common Pleas of Bucks County, alleging that the revised plan should be "deemed approved" under § 508 of the Municipalities Planning Code, Pa. Stat. Ann. tit 53, § 10508. The Court of Common Pleas held the revised plan to be "deemed approved," stating that the Board's conduct had been "not only in violation of [the original settlement and court order for the parties], but also in violation of its own ordinances requiring review of subdivision applications." The Township appealed the Bucks County Court decision, and the parties eventually settled the state court litigation. However, the Lindquists were permitted to proceed with an action alleging violation of substantive due process. The District Court granted judgment for the Township and Board of Supervisors on the alleged substantive due process issue.

On appeal, the United States Court of Appeals for the Third Circuit affirmed, approving the District Court's application of the "shocks the conscience" standard to substantive due rights claims in land use disputes, in lieu of the "improper motive" standard in substantive due process

cases. The Third Circuit, joining other circuits, stated that "even a bad faith violation of state law, will not support a substantive due process claim in a land-use dispute… Rather, the governmental action must be so egregious and extraordinary that it 'shocks the conscience.'" While the Township may have been negligent and may have been acting with an improper motive of thwarting development of the Lindquists' property, its conduct did not shock the conscience. (*Id*. at 774.)

The dissenting judge noted that an equal protection claim would have been preferable in this case "because it avoids then cumbersome and subjective 'shocks the conscience' analysis.'" (*Id*. at 784, FN. 8, Rosenn, C.J., dissenting.)

STATE COURT DECISIONS

Accessory Uses: Access Road for Mining of Material for a Brick Manufacturing Business Located on Part of a Lot in the Agricultural District Not Permitted on the Residentially-Zoned Portion of the Same Lot

Capelle, et al. v Orange County, et al., 269 Va. 60, 607 S.E.2d 103 (Va. 2005).

General Shale Products, LLC (Shale) purchased a portion of a 139-acre lot in order to establish a mining operation as part of its brick manufacturing business. This portion was zoned for agricultural use. The remainder of the lot was zoned for limited residential use, and occupied by various landowners. Shale, with the other landowners' permission, applied for a special use permit to perform mining operations in the agricultural portion of the lot. However, along with the special use application Shale submitted a proposal to construct an access road across the residential portion of the lot. The Board of Supervisors of Orange County approved the application and related proposal. Neighboring landowners (the "Neighbors") appealed.

In limited residential zoning districts, Orange County Code § 70-332 provided for five by-right uses and "any customarily incidental accessory use." Shale contended that the proposed access road was an "accessory use", defined in the County Code § 70-1 as "a secondary and subordinate use or structure customarily incidental to, and located upon the same lot occupied by, the main use or structure." As the access road and the mining operation were to be located on the same lot, although in different zoning areas, Shale argued that § 70-332 permitted the construction of an access road as an accessory use. The lower court found that the road was permitted as an accessory use but remanded for a trial on the issue whether the transporting of mined materials over the access road was part of the mining activity or an accessory use to the mining activity.

In reversing, the Supreme Court of Virginia rejected Shale's argument and held for the Neighbors. Under principles of statutory construction, the court stated that the "customarily incidental accessory use[s]" contemplated by § 70-322 were those uses incidental to a limited residential zoning district. Thus, § 70-322 was not intended to "allow in a limited residential district any accessory use to a main use located on a differently-zoned part of the same lot, irrespective of the nature and intensity of that main use."

Development Agreements: Challenger Must Exhaust Administrative Remedies Before Seeking Judicial Relief

Queen Anne's Conservation Association, Inc. v. County Commissioners of Queen Anne's County, MD, 855 A.2d 325 (Md. 2004).

In 1995, the Maryland legislature enacted § 13.01 of Article 66B of the Maryland Code, which allowed governing bodies of local jurisdictions, by ordinance, to establish procedures and requirements for the consideration and execution of Development Rights and Responsibilities Agreements (DRRAs), including appointment of a public principal with the authority to negotiate and approve such DRRAs. The County Commissioners of Queen Anne's County later enacted an ordinance authorizing the execution of DRRAs and appointing themselves as public principal. Thereafter, following an August 6, 2002 public hearing on the proposed DRRA, the County Commissioners, on September 17, 2002, executed a DRRA with the developer of a proposed "active adult, age-restricted community" on Kent Island. The DRRA established a developer of proposed "active adult age restricted community on Kent Island. The DRRA established: "(1) limitations on allowable development including limitations on density and intensity; (2) detailed requirements concerning public improvements to be financed by [the developer] including a dedication of parkland, construction of park facilities, purchase of off-site parkland, construction and reconstruction of public roads and paths, and construction of public facilities both on-site and off-site; (3) timing for water and sewer allocation; (4) required substantial cash payments to the Kent Island Volunteer Fire Department and to the County; and (5) [a freeze on] the laws and regulations governing the use, density or intensity of the development as of the date of execution of the Agreement for the duration of the Agreement. The DRRA was recorded on 18 September 2002." (*Id*. at 332)

The Queen Anne's Conservation Association, Inc., and other plaintiffs filed suit for declaratory and injunctive relief, claiming, *inter alia*, that the execution of the DRRA was a legislative action amounting to illegal contract zoning. The lower court dismissed the action, stating that the County Commissioners had acted administratively in executing the DRRA, and thus the Conservation Association had failed to exhaust administrative remedies by failing to file an administrative appeal with the County Board of Appeals. The Association appealed.

The Court of Appeals of Maryland (highest court) affirmed. Noting the character of local governments, including boards of county commissioners, the court stated that, "in performing [their] various functions, [they exercise] legislative, quasi-legislative, executive, and quasi-judicial authority, sometimes in combination." In this situation, the County Commissioners had successively wielded two types of power: first, the legislative power to authorize DRRAs, and later, as public principal, the administrative/executive power to negotiate and execute individual DRRAs. The Association was not challenging the County Commissioners' power to enter into DRRAs (a power assumed through legislation), but rather the County Commissioners' particular application of that power, characterized by the court as "a discretionary executive act, not a legislative one." (*Id*. at 334). Thus, the court held that the Association should have sought an administrative remedy, namely an appeal to the County Board of Appeals before seeking a judicial remedy.

Eminent Domain: Transfer of Condemned Property to a Private Entity for Redevelopment Not a Public Use Under the State Constitution

County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (Mich. 2004).

Following the expansion of Metropolitan Airport in Wayne County, the County began acquiring nearby properties through voluntary sale as part of a noise abatement program. The program included a condition that the acquired properties be put to an economically productive use. Thus, the County developed the idea of constructing a large business and technology park to be transferred to private entities for their use. After the County acquired as many properties as it could through voluntary sale, it invoked the power of eminent domain over nineteen outstanding properties.

The remaining landowners challenged the County's action by claiming that (1) the County lacked statutory authority to exercise eminent domain in this manner; (2) the acquisition of the properties was not publicly necessary as statutorily required; and (3) the County's actions were unconstitutional under the state constitution because the project did not have a public use.

After ruling for the County on the first and second issues, the Supreme Court of Michigan held that this condemnation was not for a "public use," as that phrase is understood in the state's 1963 Constitution. Under the Michigan Constitution, the transfer of condemned property to a private entity was a public use when it possesses one of the three following characteristics. *First*, when the condemnations are essential to the existence of enterprises generating public good, such as railroads and other instrumentalities of commerce. *Second*, when the private entity remains accountable to the public in its use of the condemned property. *Third*, when the act of condemnation [as in condemning land to remove blight], not the later re-use, is the public use. Because the County's actions did not meet any of these three characteristics, the condemnations were in violation of the State Constitution's public use requirement. In so holding, the court overruled its *Poletown* decision from two decades earlier – which had upheld the very same type of condemnation – because of its inconsistency with the meaning of "public use" in the State Constitution. This decision applied retroactively to any pending case that raised an objection based upon *Poletown*.

First Amendment: Public Indecency Ordinance That Would Be Upheld as Valid Content-Neutral Regulation Under the U.S. Constitution, Struck Down Under the More Demanding State Constitution

Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 827 N.E.2d 180 (Mass. 2005).

Oliver's, a restaurant and bar, opened in 1983. Soon after, Oliver's obtained a live entertainment license, and began to present concerts and other such entertainment. In 1996, an airport located near Oliver's was closed. Oliver's, allowed as an accessory use to the airport, sought and obtained a zoning variance to continue operation.

In 1997, Mendoza, the lessee of Oliver's, applied for an adult entertainment license to present nude dancing. The licensing board of Fall River denied the application, stating that such a use was impermissible under the variance then held by Oliver's. Mendoza filed a second application

to expand the scope of Oliver's existing entertainment license to include nude dancing, which was also denied. During this period, the city enacted a "public indecency ordinance", banning public nudity in Fall River, including in bars and restaurants. Mendoza challenged the ordinance, and the licensing board's determination that Oliver's original variance did not permit nude dancing.

The Supreme Judicial Court of Massachusetts struck down the ordinance under art. 16 of the Massachusetts Constitution. Under the United States Constitution, the court noted, Supreme Court precedent would have upheld the ordinance as a valid content-neutral regulation of conduct, "virtually identical" to an ordinance upheld in *Erie v. Paps A.M.*, 529 U.S. 277 (2000). However, the court held that art. 16 of the State Constitution affords more protection to free expression, which, under Massachusetts precedent, included nude dancing. Although the city admittedly had legitimate interests in public safety, property values, and preventing criminal behavior, the ordinance was too narrowly drawn to protect those interests, as it eliminated all avenues for individuals to present nude dancing, a constitutionally protected activity, within the city. In addition the ordinance was overbroad in its reach, as it prevented various "works of unquestionable artistic and socially redeeming significance" from being performed in the city, including artistic works that in no way implicated the negative effects of concern to the city.

After striking down the ordinance, the court upheld the licensing board's determination that Oliver's original variance did not permit nude dancing, as the variance was intended to allow Oliver's to continue with preexisting entertainment activities, not to allow for new forms of entertainment. When construing variances, the court stated, doubt should be resolved against the holder of the variance. If Mendoza desired to present nude dancing, he would have to apply for a new variance.

Group Homes: State-licensed Group Home for Developmentally Disabled Children Entitled to Single-Family Residence Permit

In re Appeal of Bennington School, Inc., 176 Vt. 584, 845 A.2d 332 (Vt. 2004).

Bennington School, Inc. (BSI) is a state-licensed, residential-care facility for adolescent children with special educational needs, located in the Town of Bennington. BSI students reside either on one of two main campuses or in a number of the school's small residences. These small residences are designed to offer a small, family-type atmosphere to the students. No more than six students are assigned to a residence, with two staff members present during the day, and one staff member awake and present overnight.

BSI attempted to purchase a single-family home in the Town of Bennington for use as a small residence. Under 24 V.S.A. § 4409(d) (the "Statute"), which prohibits municipalities from excluding certain residential facilities and group homes from residential areas, BSI argued that it was entitled to a single-family residence permit. The Bennington Zoning Board of Adjustment (ZBA) disagreed, stating that the BSI's proposed residence was not a permitted group home and therefore required a conditional use permit. The Environmental Court, upon appeal, agreed with the ZBA, holding that the operation of the small residences was the functional equivalent of boarding school or college dormitories, and despite having met the requirements under the

Statute, they also needed a conditional use permit to operate, much like a dance studio or auto repair shop operating out of a single-family residence.

The Supreme Court of Vermont reversed, holding that under the plain language of the Statute, there are only four requirements for a group home to be considered a "by right" use of a single-family home: (1) the group home must be licensed or registered by the state, (2) it must serve no more than six people (3) with developmental or physical disabilities, and (4) it must be located more than 1000 feet from any other group home. BSI having satisfied these requirements, the ZBA and lower court were not permitted to look at considerations outside these factors, nor impose additional requirements upon BSI.

Group Homes: Halfway House for Recovering Transient Alcoholics Did Not Qualify as a Single Family Dwelling

Albert v. Zoning Hearing Board of North Abington Township, 578 Pa. 439, 854 A.2d 401 (Pa. 2004).

Dawn Albert filed a zoning application to operate a halfway house, the Waverly Retreat (the "Retreat") for recovering alcoholics and drug users on January 13, 2000, to be located on a thirty-acre tract of land owned by Albert and her siblings in North Abington Township. The Township's zoning officer denied the application, stating that the proposed use was incompatible with the property's R-1 Low Density Residential District zoning. The Township's Zoning Hearing Board (ZHB) approved the application with a number of conditions, including that Albert operate the Retreat through a non-profit corporation, stating that the use proposed would qualify the Retreat as a "single-family detached dwelling," permissible under the zoning ordinances. Upon appeal by nearby landowners, the trial court affirmed the decision of the ZHB, but struck down all conditions save the requirement that the Retreat operate as a non-profit. The appellate court agreed with the trial court.

The Supreme Court of Pennsylvania reversed. Although rejecting the neighbors' argument that the Retreat did not qualify as a non-profit entity, it agreed that the transient nature of the Retreat would not allow it to be described as a "single family dwelling unit." Albert's testimony was that residents of the Retreat would stay about two to six months before moving on to their normal lives. While the lower courts had focused on the "quality of the relationship during the period of residency rather than its duration," the high court, after acknowledging that it had never before "explicitly stated that transience is incompatible with the notion of a single-family," stated that the concepts of "family" or "single housekeeping unit" necessarily implied "a certain expectation of relative stability and permanence in the composition of the familial unit." (*Id*. at 409). Thus, while a "family" in the zoning context need not be related by blood or marriage, a group of unrelated individuals to be characterized as a family within a zoning context must function as a single housekeeping unity and also must not be able to be fairly characterized as purely transient.

Group Homes: Denial of State Licensed Group Home Special Exception for Substance Abusers, Based on Nearby Residents' Concerns About Safety and Decreased Property Values, Upheld

Municipal Funding, LLC v. Zoning Board of Appeals of the City of Waterbury, et al., 279 Conn. 447, 853 A.2d 511 (Conn. 2004).

Municipal Funding, LLC filed an application for a special exception to open a long-term, drug free residential treatment facility for young adults and adolescents with substance abuse problems. The facility would be operated by the APT Foundation, an affiliate of the Yale School of Medicine, and licensed by the department of public health and the department of children and families. The facility program would be identical to (and a continuation of) a program in Newtown, Connecticut, which had ceased when the State had acquired the property, forcing APT to find a new location. Residents of the program were to be referred to APT by various state agencies, school systems, and the department of corrections. They would generally remain in the program for six months to two years, not be permitted to have automobiles, and would not be allowed to leave the premises freely. However, there would be no locks on the doors or a security force in place beyond the twenty staff members who would be on duty at any given time. APT stated that the program in Newtown had been very successful, and that residents had rarely ever left the facility, but that if they had, they had returned to their respective homes. Furthermore, the program did not accept violent or sex offenders.

The zoning board of appeals of the city of Waterbury denied the application after hearing concerns from community members about neighborhood safety and the potential for a decrease in property values. The trial court found that the zoning board's decision was supported by sufficient evidence that the proposed facility would pose a threat to public safety in the area, and thus had not been an abuse of discretion or arbitrary. The appellate court reversed, stating that the evidence had not been sufficient to support a finding of a threat to public safety. The zoning board appealed to the Supreme Court of Connecticut, alleging that the appellate court had improperly substituted its judgment for that of the zoning board.

The high court reversed, agreeing with the zoning board, and noting that reviewing courts (such as the appellate court) are bound by the substantial evidence rule, under which "conclusions reached by [a zoning] commission must be upheld by the trial court if they are reasonably supported by the record." Quoting from *West Hartford Interfaith Coalition, Inc. v. Town Council*, 228 Conn. 498, 513, 636 A.2d 1342 (1994). The court, citing Connecticut General Statute § 8-2(a), stated that the issuance of a special exception was subject to the discretion of local zoning boards, which may take into consideration public health, safety and welfare. Upon review of the record of the proceedings before the zoning board, the court found that there was "substantial evidence that the proposed facility posed a threat to public safety in the neighborhood surrounding the facility," a proper consideration of the zoning board. Furthermore, the granting of special exceptions is necessarily fact and site specific; therefore, APT's history of success and safety in operating a similar program in another town was irrelevant to the determination at hand. Thus, the decision to deny APT's application was properly within the zoning board's discretion, grounded upon substantial evidence, and should not have been overturned by the appellate court.

Growth Management/Affordable Housing: Regional Agency's Plan Requiring Minimum Density Levels Trumps Local Government Comprehensive Plan Calling for Less Density

City of Lake Elmo v. Metropolitan Council, 685 N.W.2d 1 (Minn. 2004).

The City of Lake Elmo, a small rural community about 10 miles east of St. Paul, submitted its comprehensive plan to the Twin Cities regional planning organization, the Metropolitan Council, for review as statutorily required. The City's comprehensive plan sought to permanently limit development by providing for low-density [2 lots per acre] throughout the city, in contrast to the Council's plan of "high-density" [4 lots per acre] in a confined area. The Council disapproved, finding that the City's plan did not conform with the Council's system plan. Specifically, the Council found that the two plans differed substantially because Lake Elmo's plan would result in duplicative transportation and wastewater treatment infrastructure elsewhere to serve the population growth that would have otherwise settled in Lake Elmo under the Council's system plan. It required Lake Elmo to make nine modifications to its comprehensive plan that would allow for continued population growth in the city through the year 2040. Lake Elmo filed suit.

In upholding the Council's modification requirements, the state high court first found that the Council did have the statutory authority to require the City to modify its comprehensive plan. Lake Elmo argued that the Council lacked statutory authority to dictate its population density because control of the City's population density, more so than any other factor, can affect the essential character of the community. The Court disagreed, reasoning that the statutory scheme expressly empowered the regional agency, i.e., the Council, to devise plans for the metropolitan area and to revise local comprehensive plans in conflict with the Council's plan. The Council determined that Lake Elmo's comprehensive plan would cause an inefficient utilization of metropolitan transportation and sewer systems, and thus have a substantial impact on or constitute a departure from the Council's system plan. Therefore, the Council had the statutory authority to require Lake Elmo to revise its plan.

The court further held that the preponderance of the evidence supported the Council's contention that Lake Elmo's comprehensive plan conflicted with the system plan. The system plan made clear the Council's expectations for Lake Elmo's population density growth and the resulting services to be provided. The City's plan would result in an exhausted land supply by 2020 and essentially prohibit population growth beyond 2020. The court found that a preponderance of the evidence supported the Council's conclusion that Lake Elmo's comprehensive plan conflicted with its system plan for regional growth in a coordinated and orderly manner.

Growth Management: "Rate of Development" Ordinance of Unlimited Duration Unconstitutional

Zuckerman v. Town of Hadley, 442 Mass. 511, 813 N.E.2d 843 (Mass. 2004).

In a special meeting in October 1998, the Town of Hadley adopted a rate of development amendment to its zoning bylaws. The amendment limited the issuance of building permits to one-tenth of the number of dwellings permitted to be constructed or placed on a tract of land based upon the maximum permitted density. Thus, development of a tract of land for residential

purposes was phased in over a period of ten years. According to the town, the bylaw was adopted to preserve the agricultural nature of the town and to allow for a gradual phase-in of population growth in order to give the town time to plan and expand its public services. The amendment had been in place for fifteen years, and it was undisputed in court that the amendment was intended to be of unlimited duration. Since 1988, the town undertook various initiatives to respond to the pressures of population growth, but did not adopt many of the measures recommended in studies the town commissioned, including implementing a comprehensive land use plan, overhauling zoning bylaws, increasing minimum lot sizes, or hiring a full time planner.

Zuckerman owned approximately sixty-six acres of land in Hadley, which could accommodate a subdivision of approximately forty homes. However, under the zoning amendment, she was only allowed to develop four units per year. Claiming that it was not economically feasible to phase in development of her property over a ten year period, Zuckerman filed suit in the court seeking a declaration that the amendment was invalid and unconstitutional, or that it constituted a taking for which she must be compensated. The Land Court, relying on *Sturges v. Chilmark*, 380 Mass. 246 (1980), concluded that "time limitations on development must be temporary and must be dependent on the completion and implementation of comprehensive planning studies." Noting the amendment's perpetual duration and the failure of Hadley to implement any of the measures recommended by their studies, the court found the amendment to be unconstitutional. Hadley appealed.

The Supreme Judicial Court affirmed. It first conducted a due process analysis of the amendment, under which the amendment must bear a rational relation to a legitimate zoning purpose. Hadley argued unconvincingly that the unlimited duration of the amendment was a response and solution to the perpetual nature of the pressures of population growth. While acknowledging the right of towns to limit growth within reasonable time limits to allow for planning and preparation, the court noted that rate of development bylaws, such as the amendment in question, serve to reallocate population growth from one town to another, and thus can impose upon other communities the burden that the town seeks to avoid. The general welfare of the Commonwealth, which necessarily outweighs the welfare of individual towns (*Euclid v. Amber Realty Co.*, 272 U.S. 365, 390 (1926)), is not served by permitting individuals towns to shift the burdens of population growth upon other towns. Therefore, the court concluded, "*[r]estraining the rate of growth for a period of unlimited duration*, and not for the purpose of conducting studies or planning for future growth, is inherently and unavoidably detrimental to the public welfare, and therefore *not a legitimate zoning purpose* (emphasis added).

Non-Conforming Use: Time for Determining "Lawfully Existing Use" Status

47 Residents of Deering v. Town of Deering, 868 A.2d 986 (N.H. 2005).

Greene, a junkyard owner, had operated his junkyard prior to the Town of Deering adopting its zoning ordinance in 2001. The ordinance provided for the issuance of a license to a junkyard that lawfully existed on the date that the zoning ordinance was adopted. Accordingly, the board of selectmen issued Greene a license in 2001 that had to be renewed annually. Some residents of the town objected to the renewal of Greene's license in 2002 and appealed to the Zoning Board

of Adjustments (ZBA). The ZBA concluded that the junkyard had not lawfully existed at the time of the adoption of the zoning ordinance in 2001, and denied renewal of the license unless Greene satisfied additional requirements that did not exist at the time the zoning ordinance was adopted. Greene appealed to the superior court, which upheld the ZBA's denial.

The Supreme Court of New Hampshire reversed, noting that the selectmen had found Greene's use to be "grandfathered" when they issued the license in 2001, meaning that his junkyard lawfully existed at the time the zoning ordinance was adopted. The court disagreed with the ZBA's determination that the lawfully existing use must be reconfirmed each time the license is renewed. Thus, the 2002 and subsequent renewals of Greene's license "only required an evaluation of Greene's use during the license period" and not for the period prior to the 2001 license. Since the existing use lawfully existed when the initial license was granted in 2001, this issue did not have to be addressed again for the 2002 renewal.

Notice Requirements: Notices of Comprehensive Zoning Text Amendments Were Flawed Because They Failed to Include an Adequate Descriptive Summary of the Proposed Zoning Action

Gas Mart Corporation v. Board of Supervisors of Loudoun County, 269 Va. 334, 611 S.E.2d 340 (Va. 2005).

On January 6, 2003 the Board of Supervisors of Loudoun County enacted comprehensive amendments to the Loudoun County Zoning Ordinance and Zoning Map. In reaction to this, over two hundred suits in equity were filed challenging the validity of the amendments. The various suits were consolidated and a Litigation Steering Committee (LSC) was formed to represent the complainants. The LSC contended that the public hearing notices did not satisfy the requirements of Virginia Code § 15.2-2204(a), which provided that plans or ordinances, or amendments, recommended or adopted under the powers conferred under the Code need not be advertised in full, but may be advertised by reference. Furthermore, every advertisement must "contain a descriptive summary of the proposed action and a reference to the place or places within the locality where copies of the proposed plans, ordinances or amendments may be examined." The County twice published lengthy legal advertisements and twice mailed written notice to 64,000 landowners informing them of the specific district proposed for their properties and advising the location where copies of the proposed amendments were available for review. The trial court found that these notices did not violate the state code.

In reversing, the Supreme Court of Virginia held that a notice must "describe an object for the knowledge and understanding of others". The County's notices provided general descriptions of the affected areas, but did not specify landmarks or geographic boundaries that would allow landowners to know if their property was subject to the proposed amendments. Furthermore, the amendment referenced certain named plans that were to be implemented, but did not describe what those plans entailed. Stating that there was no indication that the state legislature "expected affected citizens to engage in legal research in order to decide whether to participate in the hearing or to decide what their interests may be in a proposed amendment", the court concluded that the descriptive summary of the proposed amendments was inadequate.

Notice Requirements: Notice of Referenda for Adoption of Local Government Comprehensive Land Use Plans Was Misleading

Advisory Opinion to the Attorney General Re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, Nos. SC04-1134 & SC-04-1479 (Fla. March 17, 2005).

In an advisory opinion to the Florida Attorney General issued on March 17, 2005, the Supreme Court of Florida ruled that a proposed amendment to the Florida Constitution violated Florida law concerning the wording of direct voter referenda and should not be placed on the ballot. The political action committee Florida Hometown Democracy, Inc., pursuant to the process outlined in article XI, section 3 of the Florida Constitution, obtained enough signatures to place the proposed amendment on the ballot for the next general election. Under Florida law, only the summary of the proposed amendment would appear on a ballot. The title of the proposed amendment was "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans." The summary for the proposed amendment stated:

> Public participation in local government comprehensive land use planning benefits Florida's natural resources, scenic beauty, and citizens. Establishes that before a local government may adopt a new comprehensive land use plan, or amend a comprehensive land use plan, the proposed plan or amendment shall be subject to vote of the electors of the local government by referendum, following preparation by the local planning agency, consideration by the governing body, and notice. Provides definitions.

The court held that while the proposed amendment did not violate the single-subject requirement of article XI, section 3 of the Florida Constitution, even considering the many-faceted complexity of zoning, the summary, as worded, ran afoul of Florida Statute § 101.161(1), which requires that the summary "state in clear and unambiguous language the chief purpose of the measure." Specifically, the court took issue with the first sentence of the summary, which it characterized as more of an editorial than an informative statement that states the purpose of the measure. The court also found the first sentence to be misleading in its focus on "scenic beauty" and "natural resources" when addressing zoning matters, which involve numerous considerations such as transportation issues, finances, housing, public buildings, preservation, etc., and are not limited solely to environmental or aesthetic considerations.

Rezoning: Local Ordinance Provision Operated As an Improper Delegation of the Governing Body's Zoning Authority to the Planning Board

In re: The Application for Zoning Change v. Bingham County Commissioners, 96 P.3d 613 (Ida.2004).

The appellants, Jerry and Connie Brower, owners of real property in Bingham County, Idaho, petitioned the County Commissioners (the "Commissioners") to have it rezoned so they could subdivide it. The planning and zoning board recommended approval and the Commissioners thereupon considered the request. One commissioner, a cousin of Jerry Brower, recused himself,

leaving only two commissioners available to act upon the request. The County zoning ordinance provided that the Commissioners "shall accept the recommendation of [the Planning and Zoning Board] *unless rejected by majority vote*" (*Id.* at 615) (Emphasis in original). The two remaining commissioners met to consider the recommendation. One moved to accept it, but the motion died due to a lack of a second. The other commissioner moved to reject the recommendation, but that motion also died for lack of a second. As a result, the Commissioners denied the requested zoning change. The Browers filed for judicial review.

The Supreme Court of Idaho in affirming the trial court, upheld the denial of the zoning change. In so doing, it focused on whether the provision in the County ordinance conflicted with state laws. If so, the ordinance would be unenforceable. State law required the Commissioners, the governing body of the county, to either adopt or reject an amendment to the zoning ordinance. Brower's requested change could only become effective if the Commissioners adopted an ordinance amending the current zoning regulations. The Commissioners could not delegate their authority to adopt or reject the ordinance to the planning board. Thus, in these circumstances, the provision in the ordinance requiring the board to accept the planning board's recommendation unless rejected by a majority vote, operated as an improper delegation to the planning board of the Commissioners' authority to amend the zoning ordinance, thus placing the provision at odds with state law. Accordingly, the zoning ordinance provision could not be enforced in these circumstances because the dissenting commissioner would be required "to abandon his own discretion" and adopt the planning board's recommendation. (*Id.* at 616).

Variances: Use Variance for Modular Housing Upheld

Harrington v. Town of Warner, 872 A.2d 990 (N.H.2005).

Wyman owned a 46-acre parcel on which 26 acres were occupied by 33 manufactured homes. Wyman sought to expand the manufactured home development by adding 26 homes on the remaining 20 acres of the parcel. The Town of Warner's zoning ordinance stated that manufactured housing parks shall "consist of a minimum of 10 acres and at least two lots. The maximum number of sites shall not exceed 25." Because the Town was unsure whether Wyman's proposal was permitted under the zoning ordinance, Wyman sought a variance. The Zoning Board of Adjustment (ZBA) granted the variance, but limited the expansion to 5 lots per year. Abutting landowners appealed the ZBA's decision.

In upholding the ZBA, the New Hampshire Supreme Court first determined that this was a use variance, as opposed to an area variance, because the limit on the number of manufactured housing sites revealed an intent in the zoning scheme to segregate land by use and not by the physical attributes of the property. A use variance requires a greater showing of hardship than an area variance because of the potential impact on the overall zoning scheme, but the ZBA acted reasonably in granting the variance. In proving unnecessary hardship, Wyman satisfactorily demonstrated, first, that the zoning restriction interfered with a reasonable use of his property because a lack of road frontage prevented him from subdividing his property. Second, Wyman proved that the hardship resulted from unique property conditions largely derived from the lacking road frontage, and that the expansion of the development would not adversely affect the character of the area because of the ZBA's limit of 5 lots per year. The court disagreed with the opponents' argument that Wyman's purchase of the property after the enactment of the zoning

scheme was a self-created hardship. Thus, Wyman was not precluded from seeking the variance. Finally, because manufactured home parks were a permitted use under the ordinance, the variance did not detract from its spirit and would promote affordable housing and improve a dilapidated area of the town.

Zoning Merger: Use of Two Contiguous Lots as One Lot by Prior Owner to Conform With Setback Requirements Trumps Later Approval of Two Lots Under Subdivision Regulations

Remes v. Montgomery County, 874 A.2d 470 (Md. 2005).

The original owner of two adjacent lots built a house on one lot (Lot 12) and a swimming pool [as an "accessory use"] on the other lot (Lot 11). Further, a driveway was built across both lots to serve the house on Lot 12. Some years later, the original owner constructed an addition to the house that violated the setback requirements on Lot 12, but which was ameliorated by encroaching onto Lot 11. Until 2003, the two lots had been assessed as one under a single address. The original owner ultimately deeded the lots to his son, who thereafter sold the lots separately to the Remes (Lot 12) and Design-Tech Builders (Lot 11). Before the son executed the deed to Design-Tech, the County issued Design-Tech a building permit for a single-family home on Lot 11. The Remes challenged the sale of Lot 11, contending that Lot 11 and Lot 12 had merged. The Board of Appeals found that the lots had not merged, and the Circuit Court affirmed.

The Maryland high court reversed, holding that the lots had merged for zoning purposes. The court first engaged in a discussion of zoning merger. As it is recognized in Maryland, zoning merger is the merger, for zoning purposes, of two or more lots held in common ownership where one lot is used to service one or more of the other lots to satisfy zoning requirements. Zoning merger, the court continued, may be derived from the owner's intent, which is ascertained from the facts. Although the County contended that merger arises only from a formal replatting, the court disagreed. Zoning merger is not a resubdivision; it is an adjustment of zoning requirements and has no effect on subdivision. The court found that the facts in this case indicate that the original owner intended to use the two lots as one for zoning purposes, and had in fact used them to service one another. Lot 11 could not be used alone, absent zoning variances, because the two lots had always been used as one, and the structures on both lots, individually, would violate the zoning ordinance.

The County also contended that zoning merger is intended to combine substandard or nonconforming lots, not to rectify setback encroachments, and that merger of this nature is not available in the County unless it involves a formal subdivision process. The court disagreed, explaining that simply because a formal combination of Lots 11 and 12 did not occur [as required in the County Code], does not mean that the lots are not subject to zoning merger. The issue, the court maintained, is not one of a wrongfully approved building permit or subdivision, but of zoning merger. Zoning concerns one's use of the land, not how it is divided. The County's requirement of formal resubdivision to combine lots is not applicable when, as in this case, the issue is about using two contiguous lots to satisfy zoning regulations and not about simply redrawing the boundaries of the lots.