ALI-ABA

LAND USE INSTITUTE

Planning, Regulation, Litigation, Eminent Domain and Compensation

August 17-19, 2000
Boston, Massachusetts

Selected Recent Cases of Significance to Landowners

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EQUAL PROTECTION: Claim Can Be Maintained By A "Class Of One"
Village of Willowbrook v. Olech, 120 S.Ct 1073 (2000)
Homeowner brought suit asserting Equal Protection violation of the Fourteenth Amendment. The Village demanded that Olech build a 33 foot easement to connect her property to the municipal water supply, while similarly situated property owners were required to

build a 15 foot easement. Olech objected and after a three month delay the Village agreed to provide water service with a 15 foot easement. Olech sued the Village, claiming a violation of equal protection because the Village's actions were "irrational and wholly arbitrary" and motivated by ill will resulting from an unrelated successful lawsuit which the Olechs had won against the Village. Olech also sought damages for the injury caused by the delay in receiving water. The Supreme Court, in a per curiam opinion, affirming the Seventh Circuit Court of Appeals, held that a "class of one" can bring an equal protection cause of action, and where there was no rational basis for discriminatory behavior, two similarly situated people can not be treated differently.

federal court decisions

CLEAN WATER ACT: Citizens' Suit Barred By Laches
Allens Creek/Corbetts Glen Preservation Goup v. Caldera, 88 F.Supp.2d 77 (W.D.N.Y. 2000)
Residents brought an action against the defendant challenging the construction of a site being developed for a mixture of light industrial and office uses as violative of the Clean Water Act by the United States Army Corps of Engineers (which authorized the issuance of a permit for the filling of a wetland site) and by a developer for its modifications to the site. The plaintiffs claimed the issuance of the permit was arbitrary and capricious. The District Court held it was barred by laches because the plaintiffs knew of the construction schedule and did not commence action until over eight months after the federal permit was issued and after the construction of new wetland system was almost complete. Defendant's motion for summary judgment was granted.

DUE PROCESS: Suspension Of Building Permit Violated Procedural Due Process
Tri County Industries, Inc. v. District of Columbia, 200 F.3d 836 (D.C.Cir. 2000)
Owner (Tri County) sued defendant alleging that suspension of a building permit deprived it of property without due process under the law. The jury had returned a verdict of $5,000,000 at the first trial and then, a nominal award of $100 at the second trial. The trial court granted D.C.'s motion for a new trial. Tri County then challenged the court's order that granted the new trial and requested reinstatement of the $5,000,000 award, and in the alternative asked for a new trial because of erroneous evidentiary rulings which occurred during the second trial. The District Court stated that the three reasons for grant-ing a new trial were Tri County's failure to mitigate, the speculativeness in Tri-County's projections of future profits and the grossly excessive jury verdict. The appellate court reviewed the District Court's grant of a new trial for abuse of discretion. The issue before the appellate court was solely determining what damages should be awarded to compensate for a violation of the plaintiff's due process rights. The appellate court found that the District Court had abused its discretion and reinstated the original jury verdict.

ENDANGERED SPECIES ACT: No Take of an Endangered Species
Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 2000)
Environmental groups appeal the District Court's order lifting a temporary restraining order and denying their motion for a permanent injunction to stop the construction of a

new school on property which the groups claim contains a potential habitat of a species of endangered owl (listed under Endangered Species Act). The District Court found that the proposed construction would not force the owl out of the habitat or harm it and that the facts of the case do not clearly support the groups' contentions. Therefore, it denied the permanent injunction. The appellate court affirmed, finding that the evidence was not strong enough to support the claim that the construction of the school would endanger the owl; and that the trial court did not abuse its discretion in excluding certain expert testimony or in denying a motion for a new trial on the basis of newly found evidence.

FAIR HOUSING ACT: Ordinance Requiring Minimum Habitable Space Requirements Did Not Discriminate Based on Family Status

Fair Housing Advocates Association, Inc. v. City of Richmond Heights, 209 F.3d 626 (6th Cir. 2000)

Fair Housing Advocates Association ("FHAA") brought this action against three cities alleging discrimination based on family status. The cities had enacted ordinances establishing minimum habitable space requirements based on the number of people in a particular dwelling. FHAA claimed that such restrictions were unreasonable and that since the cities are seeking FHA exemptions, they bear the burden of showing that the ordinances are reasonable. However, the cities countered that since the ordinances were enacted to limit occupancy, the FHAA bears the burden. The court found that the cities bear the burden of proving the requirements to be reasonable and in fact did meet that burden. The ordinances were reasonable since they applied equally to all residents of dwelling units and were enacted "'to protect health and safety by preventing dwelling overcrowding,' not to impermissibly limit the family composition of dwellings." 209 F.3d 626, 636.

FIRST AMENDMENT: Outdoor Advertising Of Tobacco Products Not Preempted By FCLLA

Greater New York Metropolitan Food Council, Inc. v. Giuliani 195 F.3d 100 (2nd Cir., 1999)

New York enacted legislation prohibiting outdoor advertising of tobacco products within 1000 ft. of school, playgrounds, and youth centers and indoor advertising in same areas that can be seen from street. The District Court found that the statute was preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). Second Circuit held that the "tombstone" provision of the Act, which restricted advertising information in restricted areas to black and white signs with specific language, was a requirement based on smoking and health with respect to advertising and therefore was preempted under § 1334(b) of the FCLAA. However, the court held that the remainder of the statute, which regulated physical placement of advertising, did not implicate the same concerns about Congress' program to control cigarette advertising information and therefore was valid and not preempted. The court remanded the case as to whether the statute restricted commercial speech in violation of the First Amendment.

GROUP HOMES: FHA Trumps Denial Of Care Home For Handicapped Adolescent Males

Keys Youth Services, Inc. v. City of Olathe, Kansas 52 F.Supp.2d 1284 (Kan. D.C. 1999)
Non-profit corporation Keys brought suit alleging violation of the Fair Housing Act based on the denial of a special use permit to allow for the building of a residential care facility for abused adolescent males in a residentially zoned area. The plaintiff argued in their motion for summary judgement that some of the individuals to be housed in the home would qualify as "handicapped" under the FHA because they would exhibit learning disabilities, antisocial behavior and emotional disturbances requiring intensive services, all of which would limit their life activities. The court held that some residents might qualify as "handicapped" under the FHA; that the issue whether the City intentionally discriminated against potential residents because of their handicap was a question for the jury; that the City was not entitled to summary judgement based on the argument that there was a "direct threat" to public safety; and that the question of the FHA disability reasonable accommodation claim was one for the jury. Keys also argued that because the home would have legal custody of most of the potential residents, the home was protected from familial discrimination under the FHA. The court concluded that Keys children would fit into the definition of "familial status" and that when the City denied the permit to Keys it relied on an ordinance which discriminated against Keys on the basis of famil-ial status. The court held that this ordinance was invalid under FHA § 3602(k) and that Keys was entitled to summary judgement on its claim of familial status discrimination. Keys also argued that the City violated equal protection when it refused to issue the per-mit, but the court granted the City summary judgement on the equal protection claim be-cause Keys failed to allege that it had been treated any differently than group homes for non-handicapped residents. Finally, the court decided that the City was entitled to sum-mary judgement on Keys' due process claim because Keys had not demonstrated that the denial of the permit had lowered the value of the property or denied its economic use. The court ultimately permanently enjoined the City from proceeding with its designs and using its power of eminent domain in condemning the property.

LOW INCOME HOUSING: Delay In Approving Subdivision Application Violated Applicant's Protected Property Interest, Giving Rise To A Substantive Due Process Claim

Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3rd Cir. 2000)
Developer's subdivision plan for low income housing met all of the standards required for such housing, yet it was rejected by the Stroud Township Planning Commission. The Commission delayed approximately six months before denying the application, stating that applicant should have applied for a Planned Unit Development application rather than a subdivision plan. Due to the delay in this decision, the developer could not meet its deadline and lost the funding for the project. The developer brought this action for a substantive due process violation under § 1983, arguing that it had a protected property right to approval of the plans. The Court of Appeals held that the right to approval was a protected property interest under the Fourteenth Amendment because the submitted plan met all of the requirements and under the ordinance the Commission's discretion regarding approval is substantially limited. The court concluded that along with this property interest, the Developer must show that the Commission's action was arbitrary and irrational, which, the court reasoned, was a jury question. The court held that the Township may be held liable for damages under §1983 due to the substantial delay and remanded

the case for further proceedings consistent with their opinion.
See Also: *Tandy Corp. v. City of Livionia*, 81 F.Supp 2d 800 (2000)

REGULATORY TAKING: Application Of "Rails To Trails Act"Effected A Taking
Glosemeyer v. United States 45 Fed. Cl. 771 (Fed. Cl. 2000)
Missouri landowners who owned fee interests in lands underlying railroad lines challenged the classification of "railbanking" (preservation of otherwise abandoned railroad easements for possible future use by interposition of interim trail use) as a railroad purpose under Missouri Law. The landowners claimed that but for the application of the Rails-to-Trails Act, their reversionary interests would extinguish the railroad easements, and therefore the application of the Act constituted a taking. The court found the railroads had abandoned their easements and that the development of hiking and biking trails was completely unrelated to the operation of a railway. The court concluded a taking had occurred.

REGULATORY TAKING: Army Corps Of Engineers' Denial Of Clean Water Act Wetlands Permit, Followed By Issuance Of A Permit Several Years Later, Amounted To A Compensatory Taking
Cooley v. United States, 46 Fed. Cl. 538 (Fed. Cl. 2000)
Plain-tiffs purchased a 33 acre tract with the intent of subdividing and improving it by con-structing roads, utility access and parking areas, but did not begin improvements imme-diately after purchase. Sometime thereafter, the federal government imposed regulations prohibiting development in wetlands before obtaining a permit from the Army Corps of Engineers ("ACE"). About twenty years later in 1992, plaintiffs applied for the permit, which ACE ultimately denied in 1993. Plaintiffs then filed a claim asking for compensation for a regulatory taking. The government conducted its own analysis of alternate locations for development on plaintiffs' property and in 1996, ACE issued a permit authorizing development on 14 of the 33 acres. However, a memorandum authored a few months later by ACE's Assistant Chief Counsel for Regulation concluded that the plaintiffs' wetlands were degraded and thus were not subject to certain regulations. Simultaneously with the distribution of this memorandum, ACE issued a permit authorizing development of the entire tract. The issue as stated by the court was whether "after an owner has been deprived of its property, must it accept the return of the property even though time and circumstances have put it in a different position and acceptance may be subject to legal challenge by third parties?" 46 Fed. Cl. 538, 542. The plaintiffs questioned the validity of the ultimate approval of the permit that had the effect of giving the "taken property" back. The court stated that the plaintiffs "must concede the validity of the government action that took their property in order to seek just compensation in the Court of Federal Claims." *Id*. at 543. The court found that the initial denial of the application in 1993 constituted a regulatory taking and that plaintiffs were entitled to damages even though the permit was ultimately granted.

REGULATORY TAKING: Denominator Parcel
Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000)
Landowners claim that the United States effected a regulatory taking of their property

when the Army Corps of Engineers refused to grant a permit to dredge and fill in the property. The parcel in question comprised a 50.7 acre portion of a 311 acre tract. The 50.7 acre parcel consisted of 1.4 acres of shoreline wetlands and 49.3 acres of submerged land next to the wetlands. The Court of Federal Claims granted the Government's motion for summary judgment and found there was no regulatory taking. The United States Court of Appeals for the Federal Circuit vacated the judgment below and remanded for further proceedings. A motion for summary judgement is properly granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court cited *Lucas* when it stated, "if a regulation categorically pro-hibits all economically viable use of the land-destroying its economic value for private own-ership-the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a categorical taking." If there is a categorical taking, the Govern-ment's available defense lies in demonstrating that the "property owner's rights are sub-ject, as a matter of basic property law, to the Government's asserted regulatory imposi-tion". An issue that the court decided was whether the 49.3 acres of land was subject to the "navigational servitude" defense, derived from the Commerce Clause of the Consti-tution, thus giving the U.S. Government the power to regulate the waters of the U.S. in the interest of commerce. The court held that since the piece of land lay below the high water mark, it is subject to the navigational servitude. The court determined that the 50.7 acre parcel (out of approximately 311 acres) was the denominator (the economically rele-vant) parcel and that without the dredge and fill permits, the entire 50.7 acres had little or no value. Therefore, there was a categorical taking. The court also held that the United States could assert federal navigational servitude as defense against a regulatory takings claim.

REGULATORY TAKING: Partial Taking

*Florida Rock Industries, Inc. v. United States ("**Florida Rock V**")* 45 Fed. Cl. 21 (Fed. Cl. 1999)

Florida Rock Industries purchased 1,560 acres of land specifically for the subsurface lime-stone, which it intended to mine. Subsequent to the purchase, Congress passed the Clean Water Act Amendments of 1972. When Florida Rock began mining, the Army Corp. issued a cease and desist order on the basis that Florida Rock needed a permit for their activities. When Florida Rock applied for a permit for 98 of the acres (what it could mine in three years), it was denied. Florida Rock brought this action claiming that the denial of the permit constituted a taking. On the issue of partial taking, the court noted:

> The notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of ir-ra-tionality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how ser-iously injured, we would certainly think it odd, if not barbaric. Yet in tak-ings trials, we have the govern-ment trying to prove that the patient has a few breathes left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems

to ignore the point of the Takings Clause.

The court considered: (i) the regulation's economic impact on the claimant; (ii) the regulation's interference with claimant's distinct investment-backed expectations; and (iii) the character of the governmental action. The court concluded that there was a severe economic impact on Florida Rock, that the denial significantly impeded its ex-pectations, and that while the interest protected by denial of the permit was a legitimate public one, Florida Rock was being forced to bear a much greater burden than other members of the community. The court held that the 73.1% of the value of the land was diminished and accordingly, that a compensable regulatory taking had occurred that entitled Florida Rock to just compensation.

REGULATORY TAKING: Permit Denial Might Also Effect A Taking Of Adjacent Acreage

Florida Rock Industries, Inc. v. United States 2000 WL 331830 (Fed. Cl. 2000)
Same facts as above. Court reasoned that while plaintiff had lost ability to mine 98 acres, it had also lost the ability to apply for other permits to mine the remaining acreage. The court stated that waiting to see whether mining another parcel would be approved was not practical in this case, given the improbability of the application being approved. The court held that plaintiff deserved a determination as to whether the permit denial amounted to a taking of the remaining 1,462 acres and granted an immediate appeal, noting that this case was exceptional.

RIPENESS: Due Process And Equal Protection Claims Treated Differently

Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000)
Landowners filed suit claiming the defendant Village wrongfully interfered with their development of a tract of land. The District Court dismissed the action without prejudice holding that the landowners' claims were not ripe. On review the appellate court accepted all well pleaded allegations in the complaint as true and drew all reasonable inferences in favor of the plaintiff. Under the ripeness doctrine, it is only appropriate to dismiss the case when it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief. Furthermore, a complaint should not be dismissed unless it is impossible to prevail under any set of facts that could be proved consistent with the allegations. Under *Williamson County Reg. Planning Commission v. Hamilton Bank*, 87 L.Ed.2d 126 (1985), the Supreme Court "articulated a special ripeness doctrine for constitutional property rights claims which precluded federal courts from adjudicating land use disputes until: (1) the regulatory agency has had an opportunity to make a¼ de-ci-sion, and (2) the property owner exhausts available state remedies from compensation." Although there is the potential for a plaintiff to maintain a substantive due process claim in the context of land use decisions, in this case, the due process claim falls within the frame-work for takings claims. Therefore, the court held that landowners' due process claims are subject to the ripeness (final decision) requirement and they must pursue their state court remedies before federal courts have jurisdiction to hear their case.

Regarding the landowners' equal protection claim, the court held that absent a funda-

men-tal right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the landowners must show there was governmental action that was "impossible to relate to legitimate governmental objectives". The appellate court found that the land-owners' demonstrated a bona fide equal protection claim; that it was independent from the takings claim and, thus, did not need to satisfy the ripeness requirement. The court had previously held that a bona fide equal protection claim arising from land-use deci-sions can be made independently from a takings claim and not be subject to the ripeness requirements. Here, the landowners' equal protection claim alleged that the defendants obstructed and caused delay to their subdivision development. However, the landowners' did not utilize all their state law remedies. Therefore, the appellate court held that the due process and takings claims were not ripe and affirmed the District Court, but reversed and remanded with regards to the equal protection claim.

TELECOMMUNICATIONS TOWERS: Denial Of Special Use Permit Upheld

360 <<degrees>> Communications Company of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79 (4th Cir. 2000)

Plaintiff is a cellular service provider which sought a special use permit to construct a tele-communications tower near the top of a mountain that would exist 40 to 50 feet above the tree-line. Community members opposed the construction and the Board of Super-visors of Albemarle County (the "County Board") ultimately denied the application. The County Board claimed that since alternatives to building such a tower were available, the denial did not prohibit wireless services in violation of the Telecommunications Act of 1996. The Fourth Circuit noted that the plaintiff had a heavy burden to show that the Board's denial of a special use permit for a specific site constituted a prohibition of service. In its opinion, the court held that this burden was not met and that the plaintiff failed to demonstrate that denial of the permit was "tantamount to a prohibition of service." 211 F.3d 79, 88. The court stated that the plaintiff must establish "not just that this application has been rejected, but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." *Id*. (quoting *Town of Amherst v. Omni-point Communications Enterprises, Inc*., 173 F.3d 9, 14 (1st Cir. 1999)). The Fourth Cir-cuit also found that the Board's decision was supported by substantial evidence.

STATE COURT DECISIONS

ACCESSORY USES: "Bed And Breakfast" Found To Be An Accessory Use In Moderate Density Zone

Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment, 749 A.2d 1258 (D.C. 2000)

The Dupont Circle Citizens Association (DCCA) opposed an order by the District's Board of Zoning Adjustment ("BZA") granting a special exception for a bed and break-fast, which the Board found to be an accessory use. The surrounding neighborhood was zoned "a moderate density[,]¼permitting the widest range of urban residential develop-ment and compatible institutional and semi-public buildings, as well as diplomatic chan-ceries." 749 A.2d 1258, 1259. The court held that this was a valid accessory use given

the types of other uses in the neighborhood (apartment buildings, hotels, private clubs, etc.) and the fact that it would not adversely impact the neighborhood. Specifically, the court concluded "that the BZA's interpretation of the Zoning Regulations to permit as accessory uses activities that are customarily incidental and subordinate to accessory uses is reasonable and must be upheld." *Id*. at 1263.

ACCESSORY USES: Caretaker's Apartment For Beach Club Upheld

Incorporated Village of Altantic Beach v. Zoning Board of Appeals of the Town of Hempstead, 702 N.Y.S.2d 573 (N.Y. 1999)

The Village sought review of a decision by the Township's Zoning Board of Appeals to allow a sundeck of a beach club to be enclosed for use as a caretaker's apartment. The appellate court upheld as reasonable a determination by the Zoning Board that a zoning ordinance prohibition concerning lodging and sleeping facilities applied to a beach club and not to a caretaker's apartment which was a permitted accessory use. The zoning board found that a caretaker's apartment was a permitted accessory use because of the size of the beach club and the likelihood for vandalism when the club was not in use.

ACCESSORY USES: Convenience Store Held To Be Accessory Use To A Gas Station

Eastern Service Centers, Inc. v. Cloverland Farms Dairy, Inc., 744 A.2d 63 (Md. App. 2000)

Cloverland Farms obtained a zoning [court does not specify what kind of permit] permit from the Zoning Board to construct a gas station with a convenience store attached. Eastern Service Centers, which owns a gas station near Cloverland Farms' proposed site, filed this claim challenging the Board's decision that a convenience store attached to a gas station constitutes an accessory use. The court dismissed the case because Eastern lacked standing, yet discussed the substantive issues and concluded that even if Eastern had stand-ing, it would not prevail. The court based its judgment on the fact that the Board's decision to grant the permit was based on "substantial evidence in the record and that reasoning minds could reach the conclusion that Cloverland's proposed convenience store is an accessory use to the gasoline station." 722 A.2d 63, 68-69. The court also noted that convenience stores attached to gas stations were an emerging trend.

ACCESSORY USES: Court Interprets What Qualifies

Hannigan v. City of Concord, 738 A.2d 1262 (N.H. 1999)

The plaintiffs appealed an order of the Superior Court affirming the decisions of the Concord Planning Board and the Zoning Board of Adjustment allowing the intervenor, Concord Country Club, to construct a golf course maintenance building (the accessory use) and granting a special exception to construct an access way in residential districts abutting the plaintiffs' properties. Plaintiff's contended that the trial court erred in finding the maintenance building was a permitted accessory use, affirming the granting of a special exception to build the access way, ruling that there was sufficient frontage for maintaining the building and driveway and affirming the planning board's findings that a protected watercourse did not flow over the proposed site. The Supreme Court of New Hamp-shire affirmed, noting that it will uphold the lower court's decision [affirming the Board's decision] unless it is unsupported by the evidence or is legally erroneous. How-

ever, "the interpretation of a zoning ordinance and the determination of whether a particu-lar use is an accessory use are questions of law for this court to decide." The rule of acces-sory use responds to the "impossibility of providing expressly by zoning ordinance for every possible lawful use." The rule recognizes that owners may employ land in ways an ordinance does not expressly permit because, by definition, an accessory use is not ex-pressly permitted by an ordinance.

COMPREHENSIVE PLAN: Failure To Comply With State Planning Act Invalidates Local Ordinance

Sprenger, Grubb & Associates, Inc. v. City of Hailey 986 P.2d 343 (Idaho 1999)

Landowner challenged the Council's rezoning of its property from a Business "B" desig-nation to a General Residential "GR" designation, arguing that the ordinance was invalid because the City's comprehensive plan, upon which the ordinance was based, did not contain all of the State's Local Land Use Planning Act (LLUPA) requirements. The court concluded that LLUPA makes particular components necessary for a comprehen-sive plan and that because the City's plan contained neither a land use map nor a property rights component, both of which are required under LLUPA, the ordinance was invalid.

CONDITIONAL USES: Denial Of Special Permit For Motel Improper

Eismeier v. Planning & Zoning Commission of the Town of Guilford, 2000 WL 486870 (Conn. Super. Ct. April 4, 2000)

Landowners with property abutting or within one hundred feet of a proposed motel appealed from the Planning & Zoning Commission's decision to grant an application for a special permit to allow the operation of the motel, located partly in a C-3 commercial zone and partly in a R-3 residential zone. However, the construction would only take place on the commercially zoned area. Judicial review of the Commission's decision is limited to a determination of whether the decision was arbitrary, illegal or an abuse of discretion. The Commission is vested with a large degree of discretion and the burden of showing that it acted improperly rests upon the party asserting it. When considering an application for a special permit, a zoning authority has no discretion to deny it if the requi-site Town regulations and statutes for such use are satisfied. The reviewing court must agree with the agency's decision if there is substantial evidence in the record to support that decision. The court concluded that the plaintiffs failed to meet their burden and the Commission had substantial evidence to support its findings.

CONDITIONAL USES: Standard For Approval

Jesus Fellowship, Inc. v. Miami-Dade County, 2000 WL 201221 (Fla. Dist. Ct. App., February 23, 2000)

The District Court of Appeal of Florida held that a church was entitled to approval of a zoning application for "special exceptions and unusual use" to permit the operation of a private school. An applicant seeking special exceptions and unusual uses needs to show that its proposal is consistent with the County's land use plan; that the proposed uses are allowed as special exceptions and unusual uses in the zoning district; and that its requests comply with zoning code standards of review. Unless a party opposes the application by showing that the requests do not meet requisite standards and are adverse to the public interest, the application must be granted.

CONDITIONAL USES: Standard For Approval

Sunnyside Up Corporation v. City of Lancaster Zoning Hearing Board, 739 A.2d 644 (Pa. Commw. Ct. 1999)

Challengers appealed from an order of the trial court affirming the Zoning Hearing Board's decision granting a special exception to the City of Lancaster to construct a juvenile detention facility. Once the applicant for a special exception meets the burden of persuading a zoning hearing board that the proposed use satisfies the objective requirements of the ordinance, a presumption arises that the proposed use is consistent with the health, safety and general welfare of the community. The burden then shifts to the objectors to rebut that presumption by proving to the zoning hearing board that there is a high degree of probability that the proposed use will have a substantial adverse effect upon the health, safety and welfare of the community to a greater extent than what is normally expected from that type of use (and not just speculation of possible harms). The Commonwealth Court affirmed.

CONDITIONAL USES: Spray Irrigation Constitutes "Farming"

R.L. Hexum & Associates, Inc. v. Rochester Township Board of Supervisors, 609 N.W.2d 271 (Minn. Ct. App. 2000)

Hexum and Associates own property adjacent to Seneca Foods Corporation ("SFC"), which maintains a canning plant. SFC obtained a conditional use permit from the planning commission to irrigate its land with wastewater from its canning plant. The wastewater would be channeled to the "sprayfields" on SFC's land. Hexum opposed the granting of the permit because of environmental risks and its concern that the sprayfields would result in groundwater contamination. After much debate and several hearings, the Township Board of Supervisors affirmed the planning commission's grant of the conditional use permit to SFC claiming that the use of the land for sprayfields was "similar to" farming. The court's decision turned upon what constituted "farming" or agricultural activities. The court found the Board's decision qualifying SFC's activities as "farming" to be reasonable, since SFC cultivated plants and grasses on its land, and these activities also constituted farming.

CONTRACT ZONING: Pud Rezoning Was Not Contract Zoning

Old Canton Hills Homeowners Association v. Mayor and City Council of the City of Jackson, 749 So. 2d 54 (Miss. 1999)

Land developer applied for the rezoning of a 150 acre parcel of land from single-family residential to a planned unit development. The City Council approved the application, contingent upon 23 requirements. The Homeowners Association challenged the granting of the application, stating that it amounted to "contract zoning." The court rejected this argument, stating that the Council was under no obligation to approve the rezoning, that the conditions set forth were inherent in Planned Unit Developments, and reflected the concerns of the residents. Finally, the court held that the area surrounding the property had undergone sufficient change to warrant its rezoning and therefore, there was no basis for ruling that the Council's decision was arbitrary and capricious.

DUE PROCESS: Planned Unit Development

Beca of Alexandria, L.L.P. v. County of Douglas Board of Commissioners, 607 N.W.2d 459 (Mo. Ct. App. 2000)

A limited partnership purchased two parcels of land to develop two residential planned unit developments (PUDs). A vendor and purchaser challenged the decision of the County Board prohibiting all docks, rafts, buoys, or mooring facilities as a condition for granting conditional use permits for the 2 parcels. The court held that as long as there is a legally sufficient reason for the Board's decision, the court will not impose its own decision. A legally sufficient reason is one "reasonably related to the promotion of the health, safety, morals and general welfare of the community." The Board's stated reason for plac-ing the restrictions was said to be "due to concerns for the aquatic ecosystem¼and the shallow depth of the water in the proposed area." The court found that the Board's action, which placed significant restrictions on a right which is generally reserved to riparian owners, did not have any basis because it relied solely on comments of lake resi-dents and a letter from a fisheries supervisor. The court reversed the Board's imposition of the condition of no docks, rafts, buoys, or mooring facilities as to one parcel of land's entitlement to a conditional use permit and ordered the permit to be issued. As to the other parcel, the court remanded part of the Board's decision to determine the number of "mooring slips that would be compatible with public health, safety and welfare". The court noted that when reviewing a county board's decision on a writ of certiorari, the court's inquiry is limited to questioning whether the board had jurisdiction, whether the proceedings were fair and whether the board's decision was unreasonable, arbitrary or fraudulent. A court gives great deference to a county's land use decision and will only overturn it when rational basis for it is lacking.

EXCLUSIONARY ZONING: Sudden Initiation Of Eminent Domain Process To Acquire Industrial Park On Planned Afford-able Housing Site Thwarted

Avalonbay Communities, Inc. v. Town of Orange 2000 WL 226374 (Conn. Feb. 9, 2000)

Avalonbay purchased 9.6 acres in a light industrial district which specifically allowed for a planned residential development, including affordable housing projects. When Avalonbay filed for an application for a permit and site plan approval for an apartment complex, a percentage of which would qualify as affordable housing, the Town Commission denied the applications and thereafter issued a moratorium on all planned residential develop-ments in the county. Soon after, the Commission revealed a plan for a hi-tech industrial park that would involve the taking of the Avalonbay property by eminent domain. Ava-lon-bay challenged the plan, arguing that the taking of the site for an industrial park was not a public purpose, would only benefit private individuals, and that the taking of its land was not necessary for the completion of the park. The court first held that an indus-trial park may be a public purpose and then addressed whether the condemnation of the site was proper. The court agreed with Avalonbay's argument that the plans for the in-dus-trial park were intended to stop the building of affordable housing in the area, citing the sparsity of detail and lack of a historical time frame of the plan. The court noted that the plans for the industrial park were developed after the affordable housing application was filed and that the Town initiated eminent domain proceedings before the project plan was complete, suggesting undue haste. The court reasoned that the timing and lack of de-tail of the plan seemed a pretext to thwarting affordable housing on

the site and granted Avalonbay permanent injunctive relief. Avalonbay also presented a Fair Housing Act challenge to the Town's actions, arguing that the Town's move to condemn the property was motivated in part by a desire to prevent an increase in school-age children in the County. The court rejected this argument, stating that while some facts suggested out-right prejudice, there was not enough cumulative evidence to establish a fair housing action against the Town under a disparate treatment theory.

GROUP HOMES: Denial Of Conditional Use Permit For Group Home For Sociologically Disabled/Substance Abusers Improper

Light of Life Ministeries, Inc. v. Cross Creek Township, 746 A.2d 571 (Pa. 2000)

A non-profit organization (Light of Life) which sought to provide shelter, food, clothing and basic medical care to emotionally and sociologically disabled individuals and substance abusers, applied for a conditional use permit to expand a group home in an area classified as agricultural. The Township Planning Commission and the Board of Supervisors granted the application, finding that it satisfied the provisions of the zoning ordinance governing such a use. However, numerous conditions and restrictions were imposed on the conditional use. Light of Life appealed to the trial court which affirmed in part and reversed in part. The Commonwealth Court reversed the trial court and denied the application for conditional use entirely. The Supreme Court of Pennsylvania held that the Commonwealth Court erred in its interpretation of the zoning ordinance when it concluded that a group or residence home consisting of five or more unrelated persons is not a permissible use. The Commonwealth Court concluded that the proposed use fell outside the definition of a group home because the ordinance used the word "dwelling". Since this was a singular noun, The Commonwealth Court concluded that a group home was only allowed to consist of one building and comply with the definition of a "single family dwelling". The high court disagreed with this interpretation, holding that zoning ordinances are to be liberally construed to allow the broadest possible use of land. Group homes or institutional residences are explicitly defined in the ordinance as an approved conditional use. The Commonwealth Court should have construed the ordinance in accordance with the plain and ordinary meaning of its words. The court reversed and remanded to determine a Fair Housing Act issue which had not been addressed.

GROUP HOMES: Denial Of Halfway House Special Exception For Ex-Offenders Not Supported By The Evidence

Bannum, Inc. v. City of Columbia, 516 S.E.2d 439 (S.C. 1999)

The South Carolina Supreme Court reversed the affirmation by the Circuit Court of the City Zoning Board of Adjustment's decision to deny a special exception permit needed in order to operate a residential care facility for federal ex-offenders in a C-3 commercial district. The court will not disturb the finding of the board unless it is arbitrary, illegal or results from an abuse of discretion. The court found the Board's decision to be arbitrary in that it disregarded or discounted all evidence offered in favor of issuing the permit, including evidence submitted by a private investigator who had monitored the site as well as a traffic assessment which concluded that the proposed use would generate less traffic than the existing use. The Board lacked evidence to support its decision because it relied solely on factors introduced by the opponents of the permit (testimony regarding increased traffic on the street of the proposed project and a study concerning recidivism

rates of ex-offenders), which, the court found to be unfounded and speculative.

GROUP HOMES: Rezoning For Elderly Housing Upheld

Fondren North Renaissance v. Mayor and City Council of the City of Jackson 749 So.2d 974 (Miss. 1999)

Neighborhood residents challenged City Council's decision to rezone a tract of land from special use for a school to a Planned Unit Development as a residence for the independent elderly. The court considered whether the character of the neighborhood had changed to the extent to justify reclassification. Court found that the change in the character of the neighborhood was fairly debatable, and therefore found no basis for overturning the Board's decision. The residents also challenged the vote of the board, arguing that 20% or more of the residents of the area protested the rezoning. The court found that the resi-dents did not meet their burden of proof on this allegation and that therefore the majority vote of the Board was sufficient for the rezoning.

IMPACT FEES: Impact Fee Ordinance Upheld Under *Nollan* - *Dolan* Nexus Analysis

Home Builders Association of Dayton and the Miami Valley v. Beavercreek, 729 N.E.2d 349 (Ohio 2000)

The City of Beavercreek enacted an ordinance imposing an impact fee on developers of real estate, which was challenged as a taking by the plaintiff Home Builders. The trial court found that the ordinance was enacted to help the City recover the costs of new construction of roadways. The ordinance was intended to "assure that new development bears a proportionate share of the cost of capital expenditures necessary to provide roadways and related traffic facilities in the impact fee district". The plaintiffs alleged that the ordinance was invalid under several constitutional provisions. The case went to trial on the issue of whether the ordinance violated substantive due process and equal protection rights and also whether it constituted a taking without just compensation under the United States and Ohio Constitutions. The trial court upheld the ordinance while the appellate court reversed, stating that the ordinance was invalid because it did not have a matching funds provision.

The Ohio Supreme Court held the ordinance to be constitutional. The important factor is whether the ordinance is unduly burdensome in application. The court held that there was no requirement that an ordinance which imposed an impact fee on developers of real estate needed to contain a matching funds provision in order to be held constitutional. However, the presence or absence of a matching funds provision may be considered as a factor in deciding on the constitutionality of an impact fee. The applicable test in a takings clause challenge to an impact fee ordinance is whether the fee is in proportion to the "developer's share of the City's costs to construct and maintain roadways that will be used by the general public". The court cited the *Nollan* and *Dolan* "dual rational nexus" test which first requires a determination whether there was a reasonable connection with "the need for additional facilities and the growth in population created by the subdivision." If a connection (nexus) exists, there must also be one between the "expenditure of the funds collected through the imposition of an impact fee and the benefits accruing to the subdivision." This is a middle level of scrutiny test which balances the needs of the

community against the impact upon the developer. Under this test, the local government must show that its exaction is directly attributable to the created need. Furthermore, the test gives property owners a strong level of protection while leaving little discretion for local government to enact legislation. In this case, the court found the City had a legitimate interest in the new construction, and that there was strong evidence to support the trial court's decision.

INVERSE CONDEMNATION: "Public Use Requirement" Satisfied in Suit Against Privately Owned Public Utility for Fire Loss

Barham v. Southern California Edison Company, 74 Cal. App. 4th 744 (Cal. Ct. App. 1999)

Property owners brought a claim for inverse condemnation, negligence, trespass and nuisance against Southern California Edison Company ("SCEC") resulting from a fire that broke out after SCEC's overhead power line equipment failed. The SCEC is a privately-owned public utility company that provides electric power. The court reiterated that inverse condemnation actions can only be sustained when one's property is taken for public use. The court then reasoned that even though the SCEC was privately owned, it was a public agency that provided a public use. Relying on a California Supreme Court decision as well as other California rulings, the court found that "a public utility is in many respects more akin to a governmental entity than to a purely private employer." 74 Cal. App. 4th 744, 753 (citing *Gay Law Students Association v. Pacific Telegraph & Telephone Company*, 24 Cal3d 458 (Cal. 1979)). The court concluded that "the transmission of electric power through the facilities which caused damage to the Barhams' property was for the benefit of the public." *Barham*, 74 Cal. App. 4th at 754.

INVERSE CONDEMNATION: Owner of Life Estate Has Standing to Sue

Larrabee v. Town of Knox, 744 A.2d 544 (Me. 2000)

Plaintiff Larrabee owned land which she conveyed as a future interest to her two sons while retaining a life interest for herself. Larrabee brought an inverse condemnation claim against the Town for damage to her property due to construction on a Town road adjacent to her land. The court found that even though Larrabee was only a holder of a life estate in the property, she was entitled to damages for property taken for public use. In addition, others holding future interests are necessary parties to the claim and must be joined. The court noted that although Larrabee was unwilling to seek joinder, the trial court should have ordered it on its own initiative.

MOBILE HOME PARKS: Denial of Special Use Permit Invalidated

Clark v. City of Asheboro, 524 S.E.2d 46 (Ct. App. N.C. 1999)

Plaintiffs wanted a special use permit to develop a mobile home park on a 26-acre property. The City Council denied plaintiffs' application after hearing much testimony oppos-ing the development from residents living near the proposed mobile home park site. The Council based its denial on the plaintiffs' failure to comply with "General Standards" No. 1 and 4 of the Asheboro Zoning Ordinance. General Standard No. 1 states that the "use will not materially endanger the public health or safety if located where proposed and de-veloped according to the plan as submitted and approved." 524 S.E.2d 46, 49. Standard No. 4 states that "the location and character of the use if developed according to

the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the plan of development of Asheboro and its environs." *Id*. The appellate court, affirming the lower court's reversal of the Council's action, pointed out that the denial must be based on findings that are supported by "competent, material, and substantial evidence" and that the Council did not follow this process. In-stead, the Council relied primarily on testimony from area residents and did not properly consider the plaintiffs' plans for the mobile home park which ensured that the surround-ing area would not be subject to a health risk (water treatment system, sewage system, garbage pickup, etc.).

MOBILE HOME PARKS: Public School Impact Fee Improperly Imposed on Mobile Home Park for Adults Only

Volusia County v. Aberdeen at Ormond Beach L.P., 2000 WL 633052 (Fl. May 18, 2000)

Aberdeen operates a mobile home park that has restrictive covenants prohibiting anyone under 18 years from living there and qualifies for the "housing for older persons" exemption of the FHA. In 1997, Volusia County imposed a public school impact fee on Aberdeen and Aberdeen filed suit contending that the imposition of the impact fee upon it was unconstitutional because there was no potential to generate students in the park. The court found that Aberdeen did not increase the need for new schools or benefit from their construction, and thus the impact fee was unconstitutional as applied to the park.

NONCONFORMING USES: Expansion of Adult Use Improper

Town of Seabrook v. Vachon Management, Inc., 745 A.2d 1155 (N.H. 2000)

Defendant Adult Video, Inc. (d/b/a "Leather and Lace") started out as an adult video store, but then served as a bachelor party site that provided mud wrestling in "unit one" of an office building. In 1994, the Town of Seabrook enacted a zoning ordinance directed at sexually oriented businesses and prohibited their operation within a certain distance from places of worship, residences and Town boundaries. In 1996, the Town discovered that Leather and Lace had expanded its business to provide live nude dancing in "fantasy booths" in "unit two," which used to house a retail computer store. The Town argued that Leather and Lace, which was located near a church, a residence and the Town border, vio-lated the 1994 ordinance by providing live nude entertainment. The Town further averred that such a use was not nonconforming. In deciding that the change of use was not a lawful nonconforming use, the court stated that "the proper comparison would in-volve the prior use of unit two for computer retail sales and its subsequent use for live entertainment; not between existing activities in unit one and subsequent activities in unit two." 745 A.2d 1155, 1159.

PUBLIC TRUST DOCTRINE: Statute Establishing "High Water Mark" Trumped by State Common Law

Purdie v. Attorney General, 732 A.2d 442 (N.H. 1999)

The New Hampshire legislature enacted a statute granting its citizens public trust rights in all shorelands up to the high water mark. The "high water mark" was defined as "the high-est 'syzygy' line or 'the furthest landward limit reached by the highest tidal flow' over the nineteen-year tidal cycle, excluding 'abnormal' storms." 732 A.2d 442, 444. Plaintiffs were beach front property owners who alleged that the statute effected an un-

constitutional taking of their property without just compensation. The court noted that the Separation of Powers Doctrine, outlined in the New Hampshire Constitution, delegated the authority to determine common law questions to the judiciary and not the legislature. The court conceded that while the public does have a right to tidewaters up to the high water mark, that mark was established by New Hampshire common law "at the level of mean high tide." *Id*. at 445. The court held in favor of the plaintiffs, concluding that the New Hampshire legislature exceeded the common law definition of the "high water mark" by "extending public trust rights to the highest high water mark." *Id*. at 447.

REGULATORY TAKING: "Exactions" distinguished from "regulations"

City of Annapolis v. Mareen Waterman, 745 A.2d 1000 (Md 2000)

The court rejected a takings challenge arising from a subdivision approval, finding that the challenged "exactions" cited by the landowner (precluding use of one of several proposed lots for a dwelling, and requiring other areas to be common recreational areas for use by community residents) were not in fact exactions, triggering a *Nollan-Dolan* proportionality review, but were instead "regulations" to be analyzed under the economic deprivation/total take standards set forth in *Lucas*. The court found that the landowner was not precluded from excluding the general public from his property. The court further found that the term "exactions" encompasses both possessory and non-possessory imposi-tions, including a variety of easements and dedications, construction of public facilities and a number of fees including impact fees, mitigation fees and fees in lieu of dedications for parks, playgrounds and schools.

NOTE: For further discussion of this case see Delaney, *Applicability of Nollan-Dolan Rough Proportionality Requirements to Non-Possessory Exactions and Exactions Imposed by Legislative Enactment,* elsewhere in these course materials.

REGULATORY TAKING: Denial of Demolition Permit Constitutes Tempor-ary Taking

Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458, *petition for cert. filed* (June 27, 2000)

Owner of a hotel destroyed by fire sought a demolition permit from the City to destroy the remaining structure and sell the land. The City withheld its permission because it thought Ali's hotel was a single-room occupancy (SRO) hotel, the destruction of which was prohibited by a City ordinance. The ordinance prohibited demolition of such housing unless: "(1) it was infeasible to repair; or (2) the owner agreed to replace it with similar housing, or (3) the owner established extreme hardship for an exemption." 91 Cal. Rptr. 2d 458, 459. The City ultimately granted the permit more than a year and a half after Ali applied for it. In finding in favor of Ali, the court held that the City's actions in delaying the granting of the permit violated the Ellis Act, "which provides that no public entity may compel the owner of any residential real property to offer or to continue to offer accommodations in the property for rent or lease." *Id*. at 460. The court further stated that the City's delay was unreasonable and arbitrary and constituted a temporary regulatory taking requiring compensation.

REGULATORY TAKING: denial of economically viable use, coupled with a lack of investment backed expectations, does not amount to a

taking

McQueen v. South Carolina Coastal Council 2000 WL 419828 (S.C. April 17, 2000)
Landowner was denied permits to build bulkheads on his lots to prevent further erosion on the basis that the proposed bulkheads were located within a tidelands critical area, where backfill would adversely affect environment. Landowner claimed that the denial of these permits amounted to a taking. The court stated that this case was distinguishable from *Lucas* because the landowner had neglected his property for thirty years. The court then examined whether there was a denial of economically viable use of the property as a result of the permit denials, whether the owner had an investment-backed expectation, and whether the interest taken was vested in the owner and thus not within the power of the state to regulate. While the court found that there was a denial of economically viable use of the property, it concluded that the landowner's prolonged neglect of the property and failure to seek developmental permits demonstrated a lack of investment-backed expectations and therefore held that no taking had occurred.

REGULATORY TAKING: *Dolan* rough proportionality applied to legisla-tion

Isla Verde International Holdings, Inc. v. City of Camas 990 P.2d 429 (Wash. Ct. App. 1999)
Developer challenged the city's open space set aside ordinance and the City's condition of approval that a secondary access road to the development be constructed. When exam-ining the imposition of the condition, the court examined i) whether the regulation was aimed at achieving a legitimate public purpose; ii) whether it used means that were rea-son-ably necessary to achieve the goal; and iii) whether it was unduly oppressive to the landowner (considering the nature of the harm to be avoided, the availability of less dras-tic measures and the economic loss). The court concluded that there was substantial evi-dence that the secondary road was necessary for the safety of residents and that the condi-tion was therefore not unreasonable. As to the set aside requirement, the court concluded that under the *Dolan* standard there was a violation of the Fifth Amendment Takings Clause because there was insufficient evidence that the set aside ordinance was roughly proportional to the impact of the development.

REGULATORY TAKING: Ordinance Requiring Applicant To File Rough Proportionality Report Did Not Violate *Dolan*

Lincoln City Chamber of Commerce v. City of Lincoln City 991 P.2d 1080 (Or. Ct. App. 1999)
Landowners contended that the City of Lincoln City's enactment of amendments to its zoning ordinance, which required an applicant to include a rough proportionality report prepared by a qualified civil or traffic engineer if they could not provide easements and improvements specified by the statute as conditions of building and site plan approval, were facially unconstitutional. The landowners argued that under *Dolan v. City of Tigard*, 512 U.S. 374, the burden of proof should be on governmental bodies to show rough proportionality between the dedication and developmental conditions and the im-pact of the proposed development. The landowners argued that in the contested ordi-nance, the burden of proof was shifted to the applicant. The court concluded that *Dolan* and its progeny were not concerned with the burden of proof in that sense and that the "rough proportionality report" at issue was simply an application requirement that did not

necessarily diminish the ultimate responsibility of the City to show proportionality.

REGULATORY TAKING: Refund Of Property Taxes Required For 14 Year Taking

Lopes v. City of Peabody, 718 N.E.2d 846 (Mass. 1999)

Landowner appealed to the Supreme Judicial Court of Massachusetts from a decision of the lower courts denying damages resulting from the City's claimed temporary regulatory taking of landowner's property through an overly restrictive zoning provision on part of his lot. The issues raised on appeal are whether the landowner is entitled to be reimbursed for real estate taxes paid during a temporary regulatory taking of his property and whether the plaintiff can "receive prejudgment interest on an award of damages for the temporary loss of the use of his property when the jury were already instructed to include interest as part of the damage award". The court concluded that the plaintiff was entitled to the same reimbursement of real estate taxes that he would have received if his land had been taken by eminent domain but that he was not entitled to additional prejudgment interest and the court remanded the case to the Superior Court to award the plaintiff reimburse-ment for the real estate taxes he paid, plus interest. The court noted that since all of the value of the owner's land was taken for fourteen years, "principles of basic fairness compel the same type of refund of property taxes that he would have received if his land had been permanently taken."

REGULATORY TAKING: Confiscation of Property Pursuant to a Drug Nuisance Statute Held to be a Taking

City of Seattle v. McCoy, 997 P.2d 985 (Wash. Ct. App. 2000)

Seattle filed a complaint against the McCoys, alleging that their restaurant/lounge was the site of illegal drug activity and thus was a drug nuisance. The trial court agreed that the lounge constituted a drug nuisance and ordered the restaurant to be closed for one year. After the court order shutting down the lounge, the property was placed in the court's cus-tody as a result of state law provision that when buildings where illegal drug activity took place are closed down, the buildings are to remain in the custody of the court. The McCoys subsequently filed this claim, arguing that the statute was unconstitutional because it called for a taking without just compensation, violated due process, and was vague. The court found that the nuisance exception to a takings situation did not apply in this case because there was no proof that the McCoys knowingly encouraged illegal activ-ity. On the contrary, there was evidence indicating that the McCoys did cooperate with police and attempted to curb the drug activity in their lounge. The court held that the statute was unconstitutional for authorizing the taking of property without just compensa-tion.

REGULATORY TAKING: Physical Invasion Must be Permanent to be Compensable

Rohaly v. New Jersey Department of Environmental Protection and Energy, 732 A.2d 524 (N.J. Super. 1999)

In 1988, plaintiff Rohaly acquired real property on which three groundwater monitoring wells already existed. The wells were installed by the Department of Environmental Protection (DEP) in 1987 to detect ground water contamination near the property. Plain-

tiff averred that the installation of the wells on his property represented an unconstitutional taking and that he was entitled to compensation. The wells were similar to metal pipes and measured approximately 8 inches in diameter and 3 feet in height. The court, in deciding that this constituted a physical invasion, stated that the size of the invasion did not affect the plaintiff's right to compensation. However, the court also acknowledged that not every physical invasion constitutes a taking. The invasion must be of a permanent nature to warrant compensation. In this case, there was insufficient evidence to reach a determination as to permanence. The court also noted that the plaintiff could collect compensation, despite the fact that he had prior notice of the wells' existence since he acquired the property after the wells had been installed.

SUBDIVISION: Denial Of Subdivision Improper When Waiver Or Variance Was Available To Correct Minor Problems

Green Meadows at Montville, L.L.C. v. Planning Board of Township of Montville, 746 A.2d 1009 (N.J. Super. Ct. App. Div. 2000)

The Township Planning Board denied the developer's application to subdivide an undevel-oped tract of land into eight lots for construction of one-family homes. The developer appealed to the Law Division which reversed the Planning Board's decision with instruc-tions for the Board to grant the subdivision approval, variances and exceptions in accord-ance with the plans. The Superior Court of New Jersey affirmed. In all respects except the requirement of a sidewalk, the developer's plan fully conforms to the material re-quire-ments of the Township's zoning and subdivision ordinances and regulations. Of the Board's reasons for denying the application, only two were based on the subdivision plan's deviations from the requirements of specific provisions of municipal zoning ordi-nances or subdivision regulations. The court considered whether the need for a waiver of the sidewalk requirement and for a depth variance justified denying approval of the sub-division plan. The court held that all of the other justifications which the Board offered for its actions were generalizations which amount to a statement of the Board's opinion that the plan as submitted did not conform to a satisfactory standard of land use. General-izations do not provide a legally sustainable basis for rejection of a subdivision. The court affirmed the decision of the Law Division judge when it found that the Board's re-fusal to recognize that granting the variances would cause no detriment and that the Board's action was arbitrary and unreasonable.

VARIANCES: Use Variance Runs With The Land - May Be Transferred

The Stop & Shop Supermarket Company v. Board of Adjustment of the Township of Springfield, 744 A.2d 1169 (N.J. 2000)

The issue presented to the Supreme Court of New Jersey concerned the extent to which a previously granted use variance to an applicant conducting a retail business use binds the municipality to permit the applicant's transferee, engaged in a different retail business use, to succeed to the rights conferred by the use variance. In this case, Stop & Shop filed suit challenging the Board's determination that Stop & Shop, which wanted to open a retail supermarket on property previously owned by Saks Fifth Avenue, cannot rely on use variances granted by the Board in 1956 to permit parking on a residentially-zoned por-tion of the lot, and later to permit construction of an addition to the store on the same part of the lot. The trial court reversed the Board holding that the Stop & Shop did not

need a new use variance to operate a supermarket on the property. However, the appellate court reversed the trial court holding that a use variance must not be "substantially changed without further application to the board of adjustment". The Supreme Court of New Jersey also held that the 1956 variance permitting Saks to use the residentially zoned portion of its property for parking accessory to its department store use, and a later vari-ance permitting Saks to expand its building into the residentially-zoned property, are appli-cable to and may be relied on by Stop & Shop in its proposed use of the property for a retail supermarket. The court commented that "variances are not personal to the owner, but run with the land". The decisive factor in this case was that the municipal ordinance in effect when Stop & Shop submitted its application treated the two uses identically. The municipality classified both retail department stores and retail food stores under the same permitted use category in its zoning ordinance.

VARIANCES: Utilizing variance to waive conditional use standards problematical
Belvoir Farms Homeowner's Association, Inc. v. North, 734 A.2d 227 (Md 1999)
County Board of Appeals decision granted petitioner's (Belvoir Farms) request for a variance from Chesapeake Bay Critical Area zoning regulations. The Board had granted peti-tioner a special exception to operate a community pier, together with a variance to permit more than the four boat slips allowed under Critical Area regulations. In reversing this ac-tion, the court held that variances are to be granted "sparingly" (*Id.* at 236), and that the Board mistakenly applied the practical difficulties standard. The case was remanded to allow the Board to apply the "unwarranted hardship" standard which is applicable to use vari-ances. The court stated that the unwarranted hardship standard or similar standards are "less restrictive than the unconstitutional taking standard." *Id*. at 240. The court further noted that there was a problem with using variance procedures to remove ordinance con-ditions attached to conditional uses. Noting that the proposed project could not meet the requirements of the ordinance established for the granting of the conditional use, the appli-cants were in effect "attempting to eliminate the conditions by obtaining variances therefrom." *Id.* at 230, n.2. While not reaching the question of combining a variance re-quest with an application for conditional use, the court stated that this created a "problem-atic issue." *Id.*

VARIANCES: Anticipatory Denial Of Use Variance Improper
Nadell v. Horsley 694 N.Y.S.2d 421 (S.Ct. App Div 1999)
Zoning Board of Appeals found that applicant's subdivision increased a nonconforming lot area in violation of the Town Code and concluded that continuance of the use of the three-family residence required a use permit. The Board did not advise the applicant until after a hearing that it had determined the prior nonconforming use of the property was invalid and that a use variance was necessary. Court held that because applicant was denied the opportunity to submit evidence in support of a use variance, the decision by the Board to deny the use variance was improper and remanded the case for a proper hearing.

VARIANCES: Condition Precluding Rental Upheld
Gangemi v. Zoning Board of Appeals of the Town of Fairfield 736 A.2d 167 (Conn. App. Ct, 1999)

Board granted plaintiff's variance of setback requirements to enlarge his home under condition they would not rent property. Plaintiff thereafter rented property and filed an application to invalidate the no rental condition to reverse an order to comply, which was denied. On appeal, the Superior Court held that it did not have subject matter jurisdiction because plaintiff had not met deadline for appeal of Board's decision. Plaintiff argued that jurisdiction existed because the condition was personal and therefore subject to collateral attack. Court held that condition was not personal and that no subject matter jurisdiction existed. Court also disagreed with plaintiff's argument that the "no rent" condition placed unnecessary restraint on the alienation of the periodic tenancy in the property in perpetuity. The court ruled that the condition was related to public health, safety, and welfare of community.

VARIANCES: Denial Arbitrary Where Nearby Identical Request Was Approved
Through the Looking Glass, Inc. v. Zoning Board of Adjustment for the City of Charlotte 523 S.E.2d 444 (N.C. Ct. App, 1999)
Zoning Board denied variances for elimination of 10 foot Class C buffer requirement which was zoned to allow driveway to remain in place and elimination of 5 foot setback from driveway. Variances sought were identical to those sought by property owner across the street. Court held that while Board was not required to grant a variance simply because it granted another, where variances sought are nearly identical, a denial of the subsequent application without sufficient evidence is arbitrary and capricious. The court reversed an earlier decision upholding board's decision and remanded the case to the Board for further proceedings consistent with its opinion.

VARIANCES: Denial Arbitrary Where Use In Harmony With Neighborhood
Buckley v. Amityville Village Clerk 694 N.Y.S.2d 739 (S.Ct. App. Div., 1999)
Planning Board denied application to subdivide lot because it did not meet 75-foot frontage requirement, even though majority of lots in neighborhood did not meet this requirement, and Zoning Board denied variance request to reduce frontage to 70 feet. The court concluded that there was not substantial evidence to support the denial, rather the evidence established that the requested variance would have a minimal impact on the neighbor-hood. The court also noted that the evidence suggested that the use of the proposed lots would be in harmony with the neighborhood and that no evidence was presented that the subdivision would have any adverse effects on community. The court held that reliance on specifications of zoning code and generalized objections by members of the community were not enough to support the Board's decision.

VARIANCES: Denial Of Nursing Home Variance Arbitrary In View Of Ordinance Criteria
Meridian Hospitals Corporation v. Borough of Point Pleasant, 739 A.2d 999 (N.J. Super. Ct. App. Div. 1999)
The plaintiff appealed from the denial of its application for a "special reasons variance" to use two floors of a hospital for a nursing home. The Superior Court of New Jersey held that the denial of the variance was arbitrary and capricious because instead of focusing on the positive and negative criteria associated with the proposed nursing home use, the Board stressed Meridian's plan to phase out acute care at the hospital. The court

found that the applicable zoning principles are well settled. A board of adjustment is authorized to grant a variance and permit a nonconforming use of zoned property in particular cases for special reasons. The board must find that "special reasons" exist for the variance (positive criteria) and that the variance can be granted without substantial detriment to the "public good" and will not substantially impair the intent and purpose of the zone plan and zoning ordinance (negative criteria). The court noted that the "positive criteria test" is generally satisfied if the applicant proves that the "use promotes the general welfare because the proposed site is particularly suitable for the proposed use."

VARIANCES: Denial Of Use Variance, Instead Of Conditional Approval, Was Arbitrary

Scholastic Bus Co. Inc. v. Zoning Board of the Borough of Fair Lawn 740 A.2d 657 (N.J. Super. Ct. 1999)

Board, while admitting that use was inherently beneficial, denied request of Scholastic for a use variance to locate school bus parking and maintenance facility in an I-1 industrial zon-ing area solely because of the effect on off-site traffic coupled with ingress and egress difficulties on site. Court held that decision was arbitrary and capricious because Board did not consider imposing conditions to reduce detrimental effect. Court directed Board to balance the positive and negative criteria to determine if grant of variance would cause substantial detriment to the public good.

VARIANCES: Reliance On Planning Board Report Appropriate

Soho Alliance v. New York City Board of Standards and Appeals, 703 N.Y.S.2d 150 (N.Y. App. Div. 2000)

This appeal concerned the granting of variances to owners of adjacent lots to build buildings in a historic neighborhood. Opponents such as the SoHo Alliance expressed opposition to the construction saying that it would destroy the character of SoHo. The Supreme Court needed to assess whether the Board properly concluded that the requirements for a variance were met. There is a well established rule that local zoning Boards have wide discretion in considering applications for variances and the judicial function in reviewing a zoning board's determination is limited. If the determination of the Board has a rational basis, it will be sustained. The court found that there was substantial evidence to support the Board's determination. The court held that it was sufficient for the board to rely upon the City Planning Commission's report to make its determination that the subject properties were unique. Furthermore, there was substantial evidence to support the Board's con-clusion that development of the lots in strict conformance with zoning requirements would not generate a reasonable rate of return and that the character of the community would not be destroyed by the buildings.

VESTED RIGHTS: Transportation Impact Fee Not Deemed a Land Use Control Ordinance for Purposes of Vesting

New Castle Investments v. City of LaCenter, 989 P.2d 569 (Wash. Ct. App. 1999), *review denied*, 140 Wash.2d 1019 (Wash. 2000)

The City of LaCenter (the "City") enacted a transportation impact fee (TIF), which it attempted to impose upon New Castle (a developer) after it applied for preliminary plat approval. The TIF was adopted two days after New Castle filed its application. The

City's hearing examiner approved the application and found that the TIF did not apply to New Castle since it was enacted two days after the application was filed. The City appealed the hearing examiner's order. The main issue is whether the TIF "is subject to the vesting statute for land use ordinances[,]" and specifically, whether it falls within the meaning of "land use control ordinances." 989 P.2d 569, 570. The City maintains that the TIF is a tax and not, as New Castle avers, a regulatory fee, and thus the TIF is not sub-ject to the vested rights doctrine. The City also claims that the TIF should be calcu-lated form the date when the building permit is issued while New Castle asserts that the TIF should be calculated at the time of application. The court agreed with the City in finding that the land use ordinance in question was more like a tax than a regulatory fee, since its purpose was to raise revenue, not regulate residential developments. However, the court determined that although the TIF serves a purpose similar to that of taxes, it is nevertheless a fee, not a tax or a regulation, and it does "not fall within the vesting statute as 'land use control ordinances.'" *Id*. at 575. The court concluded that "[b]ecause TIFs do no 'control' land use, do not affect the developer's rights with regard to the physical use of his or her land, and are best characterized as revenue raising devises rather than land use regulation, we hold that the definition of 'land use control ordinances' does not include TIFs." *Id*. at 576.

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