CURRENT DECISIONS ON STATE AND FEDERAL LAW IN PLANNNING AND ZONING

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§ 1.01 Introduction

The past year saw an increase in both state and federal reported cases with the number rising near 400 in state cases and over 50 for federal cases. There were several Supreme Court decisions rendered that will have a direct or indirect impact on governmental regulation of land use including *Village of Willowbrook v. Olech*. The federalization of land use control as it affects the telecommunications industry was made

apparent by the many cases arising under the Telecommunications Act, a trend seen in the past two years. In addition, there appears to be a growing number of "omnibus" constitutional challenges to zoning decisions based on regulatory taking, substantive or procedural due process and equal protection grounds. In most cases I will report these "omnibus" attacks in the section which appeared to be the most important to the deciding court. This article follows the basic outline used in prior years.[1] As in past years I have intentionally omitted analyzing cases where the main issues are primarily parochial in nature, although as the author I reserve the right to include cases that may appear to the reader to be narrow and limited, but due to some quirk in my personality appeals to my intellectual curiosity.

§ 1.02 Land Use Controls and the Fourteenth Amendment

[1] Federal Cases

[a] Village of Willowbrook v. Olech[2]

I have noted an increase in the number of equal protection claims brought in the land use context in past few years.[3] The Supreme Court has encouraged this type of claim in *Olech*. The Olechs sought to connect their parcel to the Village's water supply. The Village agreed to do so, but only on the condition that they grant the Village a 33-foot easement. The Olechs objected because they believed that Village policy was to require only a 15-foot easement. After a three month delay, the Village agreed to the connection and only required a 15-foot easement. The Olechs then sued under § 1983 asserting that the Village spitefully and intentionally denied them the hook-up because of prior ill will between Village officials and them. The issue is whether or not an equal protection claim can be asserted for a "class of one" where no wider class is alleged to have suffered discrimination.

The court looked to the purpose of the Equal Protection Clause that is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[4] The allegations of the complaint are sufficient to raise questions of fact as to whether the Village's demands were "irrational and wholly arbitrary." That is the standard for an equal protection claim and thus the complaint should not have been dismissed. The court did not agree with the Seventh Circuit's opinion that also found an equal protection cause of action based on the "ill will" allegations made by the Olechs.[5] Justice Breyer, in offering a short concurring opinion, tries to deal with the Village concern that § 1983 actions will be springing forth like dandelions from run-of-the-mill zoning disputes based on this rather broad reading of the Equal Protection Clause. Almost by definition, individual zoning decisions treat one

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[1] See e.g., Bruce Kramer, Current Decisions on State and Federal Laws in Planning and Zoning, 1999 Inst. on Planning, Zoning & Eminent Domain 1-1 (hereinafter Kramer I); Bruce Kramer, Current Decisions on State and Federal Law in Planning and Zoning, 1998 Inst. on Planning, Zoning & Eminent Domain 1-1 (hereinafter Kramer II).

[2] 120 S.Ct. 1073 (2000).

[3] See e.g., Riley v. Town of Bethlehem, 44 F.Supp.2d 451 (N.D.N.Y. 1999), discussed at Kramer I, note 1 *supra* at § 1.02[1][c] and Jackson v. City of Auburn, 41 F.Supp.2d 1300 (M.D.Ala. 1999) discussed at Kramer I, note 1 *supra* at § 1.02[1][d].

[4] 120 S.Ct. at 1075 quoting from Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923).

[5] The Seventh Circuit opinion is reported at 160 F.3d 386 (7th Cir. 1999). In an opinion by Judge Posner, the court, at great length, talks about the personal animus of Village officials.

landowner differently than another. If that factual circumstance will allow for a § 1983 action to be filed almost every permit denial may end up in federal court. Justice Breyer would deflect that trip to the federal courthouse by emphasizing Judge Posner's view that the critical factor is not a wrong or incompetent decision, but the existence of an "ill will" or personal animus driving the decision.[6] Merely alleging that a decision lacks a rational basis should not be the basis for filing a § 1983 equal protection claim according to Breyer.[7]

[b] **Forseth v. Village of Sussex**[8]

The owners submitted a preliminary plat to the Village Plan Commission for approval. The Plan Commission objected to a number of features of the plat, including its failure to delineate wetlands and the inclusion of several lots with direct access to an arterial street. Preliminary plat approval was granted in September 1993. Shortly thereafter a new president of the village board was elected who had openly opposed the development. The final plat was rejected, due in part to the president's insistence on a new wetlands survey that showed substantially more acreage as wetlands than was shown in the preliminary plat. The owners alleged that the Commission at the president's insistence conditioned final plat approval on the sale of a buffer tract to the president at below market rates. Eventually the final plat was approved and then the owners filed this omnibus § 1983 action alleging substantive due process, equal protection and regulatory takings claims.

The key issue on the due process claim is whether the *Hamilton Bank* ripeness doctrine applies. If it applies, not only does the agency have to make a final decision, but the owner must seek state judicial relief before filing a federal court action. While there were some earlier decisions that hinted that *Hamilton Bank* should not apply to due process claims,[9] the type of claim involved here requires the owner to seek state judicial relief. In essence, the owner is asserting that his property interest is being taken for a private purpose. Whether couched as a regulatory taking or as a substantive due process violation the policies underlying *Hamilton Bank* are equally applicable.[10] Clearly having not exhausted their available state remedies, the owners have not complied with the exhaustion component of *Hamilton Bank*. The court observed that "litigants who neglect or disdain their state remedies are out of court, period."[11] Thus from both the ripeness doctrine perspective and the substantive law perspective, the 7th Circuit makes

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[6] See Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995) a prosecutorial discretion decision, that served as the basis for Judge Posner's view in this case.

[7] It is interesting to note that *Olech* has been cited over 25 times in federal court decisions since being handed down in February, most dealing with some type of local governmental decision affecting a single individual. See e.g., Hilton v. City of Wheeling, 209 F.3d 1005 (7th Cir. 2000)(no equal protection claim for alleged differential treatment by police force and social workers).

[8] 199 F.3d 363 (7th Cir. 2000).

[9] *See e.g.*, Gamble v. Eau Claire County, 5 F.3d 285 (7th Cir. 1993), *cert. denied*, 510 U.S. 1129, *reh'g denied*, 511 U.S. 1047 (1994); Himmelstein v. City of Fort Wayne, 898 F.2d 573 (7th Cir. 1990).

[10] The court treated *Hamilton Bank* as encompassing a "Final Decision" and an "Exhaustion" requirement. 199 F.3d at 372

[11] 199 F.3d at 373. *See also* Hager v. City of West Peoria, 84 F.3d 865 (7th Cir. 1996); River Park, Inc. v. City of Highland Park, 23 F.3d 164 (7th Cir. 1994). The *Forseth* approach to ripeness was used in Watson v. City of Chicago, 2000 WL 516533 (N.D.Ill.) where an owner claimed that Chicago mistakenly demolished her house pursuant to a "fast-tract" demolition ordinance in violation of both the 5th and 14th Amendments. The court dismissed the takings claim because the plaintiff had not sought state court relief but allowed her to re-cast her due process claim by amending her complaint.

it difficult to file "garden-variety" land use cases in federal court under the guise of substantive due process violations.

As to the equal protection claim, however, the court categorized such claims as surrogates for takings claims where ripeness would be required or as bona fide claims where the ripeness doctrine is not applicable. Relying on its own decision in *Olech* and the clear allegations of malice and ill will, the court finds that there were sufficient grounds for the equal protection claim of the owner. There appeared to the court to be actions bordering on official oppression and misconduct if the allegations regarding the village board president were proven.

[c] **Woodwind Estates, Ltd. v. Gretkowski**[12]

In a case decided a week after *Olech,* the Third Circuit reaffirmed its approach to substantive due process claims and followed the Seventh Circuit's lead in zeroing in on intentional governmental official misconduct as actionable under the 14th Amendment. Plaintiffs were developers who sought approval to build a subdivision on 75 acres of land. The proposed project involved "low income" housing and the developer had received substantial tax credits from the state to subsidize the project. The development plan was originally submitted in March 1996. The attorney for the Township planning commission advised the commission that the plan met all of the subdivision criteria. Opposing neighbors were also present at the hearing and voice several objections. They urged that the project be defined as a planned unit development (PUD) and not a straight subdivision. After a six month delay the commission voted to recommend a denial of the subdivision plan. The Board of Supervisors voted unanimously to deny approval. No reasons were originally given until the attorney for the neighbors informed the Board that they needed to provide reasons for the denial. That attorney then drafted a denial letter giving several reasons. The letter, in slightly amended form, was then sent to the developers. Included in the letter was the conclusion that the proposal was for a PUD and because the proposal lacked several ordinance requirements for a PUD, it needed to be resubmitted within a year as a PUD. The plaintiff then filed this action asserting that the actions of the Commission, Board and several individual officials violated its substantive due process rights.

As noted by the district court, the Third Circuit's definition of what is a protectible property interest under a substantive due process claim is ill-defined. The Third Circuit has been more willing than other circuits in finding a protectible property interest, if the governmental decision affects the use and enjoyment of property.[13] In this case, the subdivision ordinance is interpreted to give the Commission and Board no discretion if the objective standards are met. The facts undisputably showed that the standards had been complied with. Thus the court finds that the plaintiffs have a protectible property interest.

Once that determination is made the developer must show that the governmental action was "arbitrary, irrational, or tainted by improper motive."[14] Those types of issues are clearly fact issues to be decided by the trier of fact. The motives of the township in denying the permits can be reviewed by a jury to determine whether the permits were

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[12] Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3rd Cir. 2000). The district court opinion is analyzed at Kramer I, note 1 *supra* at §1.02[1][b].

[13] This is to be distinguished from the Second and Seventh Circuits which apply a "strict entitlements" approach.

[14] 205 F.3d at 124 citing Bello v. Walker, 840 F.2d 1124 (3rd Cir.), *cert. denied,* 488 U.S. 851 (1988). *See also* Blanche Road Corp. v. Bensalem Township, 57 F.3d 253 (3rd Cir.), *cert. denied,* 516 U.S. 915 (1995).

denied for an improper purpose. In this case, the defendants had no legitimate basis for inquiring about the socioeconomic background and income levels of the proposed purchasers of the housing. Likewise, the adoption by the Board of a letter proposed by an attorney representing the opposing neighbors also raises a fact issue that a jury may look at. The court also refused to uphold the summary judgment as to the liability of the individual officials because there was a fact issue as to whether they were entitled to good faith immunity. The result in this case clearly aligns it with the Seventh Circuit in *Olech* regarding the importance of motive in making decisions. While it is often said that courts are not to look at the motive of legislators, the Third Circuit decision would allow, if not require, the Township officials to be placed on the stand and be asked questions about why they voted to deny the subdivision permit. This approach is obviously a two-edged sword. It may deter bad decisions made by officials for the wrong purpose, but it also may allow juries to second guess such decisions and open up legislators to questions that may hinder the legislative process.

[d] **Acierno v. New Castle County**[15]

The owner filed a development plan at a time the parcel was zoned for PUD. The parcel was downzoned to a residential district that did not allow for the proposed development of 322 apartment units. After a first round of litigation removed the individual defendants, the parties agreed to a trial on the merits of the substantive due process claim, after the owner waived any claims for monetary relief. Unlike *Gretkowski,* which seemingly toughens the Third Circuit's view of what is a protectible property interest, this court goes back to the position that ownership of property vel non is worthy of substantive due process protection.[16] Normally one does not have a vested right or a protectible interest in existing zoning. The downzoning decision may have been irrational, but certainly under a 'strict entitlements' approach it would not be remediable using a substantive due process theory. Nonetheless the court finds that plaintiff had a protectible property interest in the existing zoning classification.

The second part of the test is whether the downzoning decision was truly irrational or arbitrary. The owner sought to assert an "improper motive" test as well, based in part on *Gretkowski*. But the court distinguished *Gretkowski* on the basis that it involved administrative actions taken to enforce existing zoning laws. This case, in part, involves a legislative rezoning decision and is to be judged solely on whether it was rationally related to a legitimate government interest. Thus, the motives of the legislators is irrelevant.[17] The City offered two reasons for the downzoning; the first would make the parcel more compatible with the surrounding neighborhood that was largely single family residential and the second related to traffic congestion in the area. Both of these reasons are legitimate governmental objectives and the downzoning decision advances those objectives. Therefore, the substantive due process claim fails. But as to the decision of the council to void the record plan of the owner, the court determined that it was an administrative decision and thus inquiry into the motive is appropriate. The court did not grant the relief sought but asked for further briefing on this issue in light of the court's earlier finding that the rezoning decision itself was rationally based.

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[15] Acierno v. New Castle County, 2000 WL 718346 (D.Del.).

[16] *Id*. at *3 relying on DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592 (3rd Cir.), *cert. denied*, 516 U.S. 937 (1995).

[17] The Supreme Court has taken a similar approach in F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993).

As to the owner's equal protection claim, the court again noted the limited judicial review afforded such claims in the absence of a fundamental right or a suspect classification. The showing that the council did not downzone other land similarly situated does not show irrationality. Because of the traffic and other concerns of the council, the equal protection claim was likewise barred. A similar finding was made as to the administrative decision to void the record plan.

Plaintiff finally sought relief under the state law doctrine of equitable estoppel. Under Delaware law the doctrine could be raised as a defense against the enforcement of a zoning regulation where: "(1) a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine."[18] There was no evidence in the record showing that the owner made expensive or permanent improvements on the land. The only proven expenditure was $38,500 spent on architectural and engineering fees. The court did not allow the owner to show the acquisition cost of the site since the acquisition was not made in reliance on any affirmative act of the city.

[e] **Herr v. Pequea Township**[19]

This is a substantive due process case arising out of a ten year battle by the developer to build a proposed industrial park on 45 acres of land.[20] In exploring whether the developer has a protectible property interest, the court does not merely accept the notion that ownership vel non is sufficient. Instead, the court applies a vested rights analysis to see whether the developer was entitled to a permit at some time during the ten year process. Under Pennsylvania law,[21] once a development proposal is submitted, the regulations in place are not subject to change for a period of five years after the preliminary plan is approved. Although there was a dispute as to whether the five year period was tolled, the court found that the developer has a protectible property interest in having the now-repealed industrial zoning district applied to the parcel in question and to a public sewer hook-up.

In applying the second part of the substantive due process test, the court had no difficulty showing that the rezoning decision was not arbitrary or irrational. The township had a strong interest in preserving agricultural land that was served by the rezoning. Then the court went on to discuss the improper motive aspect of this test, using such language as "tainted by improper motive,", "motivated by bias, bad faith or improper motive," or for "reasons unrelated to the merits."[22] Normally this issue must be decided by the trier of fact and is not subject to summary judgment motions. But in this case the court found no evidence of bias, improper motive or bad faith. The fact that several township officials expressed strong opposition to the development does not make a prima facie case of improper motive. In fact, the court found that the township acted out of a strong desire to restrain development. That is not an improper motive and it is not up to a court to second-guess the elected officials on public policy issues. There was no evidence of injustice or unfairness at a level sufficient to trigger substantive due

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[18] *Id*. at *9.
[19] 2000 WL 1100848 (E.D.Pa.)
[20] An earlier decision of the Pennsylvania Commonwealth Court gives a detailed version of the litany of administrative and legislative decisions involved over that 10 year period. Pequea Township v. Herr, 716 A.2d 678 (1998).
[21] Pa.Stat.Ann. tit. 53, § 10508(4)(I).
[22] 2000 WL 1100848 at *8.

process concerns. Therefore, the court granted the township's motion for summary judgment.

[f] **McDonald's Corp. v. City of Norton Shores**[23]

Plaintiff leased a pad in a K-Mart shopping center located in a general retail zoning district. The ordinance allowed for the operation of a fast food restaurant. The ordinance also required site plan approval for such facilities. Plaintiff submitted a site plan showing a drive-through window. Plaintiff had submitted expert testimony and reports showing only a minimum amount of traffic flows during peak meal hours. Plaintiff also showed that in 5 years the city had only rejected 3 site plans. The city eventually rejected a revised site plan because of vehicle and pedestrian traffic concerns. Plaintiff then filed this omnibus constitutional attack on the city's decision claiming a regulatory taking, violations of substantive due process and equal protection rights and pendent state claims.

The court easily dismissed the regulatory taking claim because it is unripe under *Hamilton Bank*. Michigan clearly recognized an inverse condemnation cause of action at the time the federal suit was filed so plaintiff should have filed this claim in state court. As to the substantive due process claim, the court applied the deferential review first stated in *Pearson v. City of Grand Blanc.*[24] While plaintiff's evidence disputed the reasons given by the city for rejecting the site plan, the court found the decision rationally related to the legitimate governmental interest of dealing with vehicular and pedestrian traffic concerns.

On the equal protection claim, the court initially noted that in zoning cases substantive due process and equal protection arguments tend to merge together. Plaintiff tried to rely on *Olech* and its class of one claim to attack the city's decision. Again, the court fell back on its very deferential rational basis review, even after *Olech*. Plaintiff must prove that the city treated it differently than others similarly situated and that there was no rational basis for that difference in treatment. Even though McDonald's provided evidence of disparate treatment by the approval of site plans for other fast food restaurants with drive-through windows and other restaurants in the same area, the court found that those cases were not similarly situated. None of the drive-through restaurants abutted the street that the proposed McDonald's was to be located on and the nearby restaurants that did abut that street did not have drive-through operations. Thus the court granted the city's motion for summary judgment and refused to exercise jurisdiction over the state law claims.

[g] **Vigilante v. Village of Wilmette**[25]

In March 1999, plaintiff purchased two parcels of land and demolished the single family home that had been built on both parcels. She then sought permission to allow separation of ownership of the two parcels, in order to construct two new homes. The Village denied the permit and plaintiff filed this omnibus takings, due process and equal protection claim. The court followed *Hamilton Bank* and *Forseth* by applying the ripeness doctrine to both the takings and substantive due process claims. Available

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[23] 102 F.Supp.2d 431 (W.D.Mich. 2000).

[24] 961 F.2d 1211 (6th Cir. 1992). There are, however, Sixth Circuit decisions that do not follow that deferential approach. See Berger v. City of Mayfield Heights, 154 F.3d 621 (6th Cir. 1998); Curto v. City of Harper Woods, 954 F.2d 1237 (6th Cir. 1992).

[25] 88 F.Supp.2d 888 (N.D.Ill. 2000).

state remedies must be used however the plaintiff characterizes her causes of action. Since Illinois allows for an inverse condemnation remedy for regulatory takings and substantive due process violations, plaintiff must first file her claim in state court. The equal protection claim was not treated the same as the takings and due process claims. If the equal protection claim was not a subterfuge for a takings claim then *Hamilton Bank* would not apply. While the plaintiff asserted that she was being treated differently from others that were similarly situated, the court applied the traditional rational basis test since no fundamental rights or suspect classifications were involved. Merely asserting differential treatment and that plaintiff's proposed development would not cause any harm do not make a prima facie equal protection case. The court concluded:

> Perhaps the Village is concerned about the character of the neighborhood, something it does not think was affected by the previous variances, but would be affected by granting hers. The cumulative effect of small changes, each of which by itself is insignificant, may make a difference here.[26]

A more deferential scope of judicial review is hard to find. The court clearly is discouraging future claimants from making equal protection claims in the absence of some type of smoking gun, raising the *Olech* issue of whether motive is required to show equal protection violations in the typical land use scenario.

[h] **Tandy Corp. v. City of Livonia**[27]

Plaintiff executed an option contract to purchase a tract of land if the city rezoned the tract from professional office to general commercial use. The land was rezoned in 1995 and the plaintiff purchased the tract. In 1997, the city voted to rezone the property back to the professional office district. At that time Tandy was in active negotiations to sell the tract, but those fell through when the city rezoned the tract. Plaintiff then filed this omnibus constitutional suit alleging a regulatory taking and violation of its substantive due process and equal protection rights. Prior to the onset of the litigation, the tract of land was sold for an amount that exceeded Tandy's purchase price by some $ 300,000.

The city argued that Tandy did not have a protectible property interest under the due process clause. In the Sixth Circuit, the owner must show either a "legitimate claim of entitlement" or a "justifiable expectation" regarding the commercial zoning of the property. The city strenuously argued that no party has a property interest in an existing zoning classification even where they engage in acts relying on that classification. But the court found that the actions taken by the plaintiffs, including the expenditure of substantial funds in reliance on the existing zoning, were sufficient under Michigan law to create a protectible property interest.[28] The court's view of what constitutes a protectible property interest is in line with the Third Circuit's view, but clearly contrary to the view taken in the First, Second, Seventh and Ninth Circuits.

The court found that the *Lucas* regulatory takings claim could not be sustained where the parcel was sold during the pre-trial period for over $ 6,000,000. The fact that Tandy expected to make a profit on the sale does not trigger a *Lucas* taking. The second part of the regulatory takings test is similar to the substantive due process test, namely whether there the rezoning substantially advances a legitimate state interest. The city proffered several reasons for the rezoning including uniformity of zoning for the subject property, compatibility with the surrounding uses and the development of the area as a corporate park. After a hard look at the reasons and the alleged nexus

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[26] Id. at 891.

[27] 81 F.Supp.2d 800 (E.D.Mich. 1999).

[28] Nasierowksi Bros. Investment Co. v. City of Sterling Height, 949 F.2d 890 (6th Cir. 1991).

between the rezoning and those interests, the court determined that factual issues remained that could not be resolved on the city's motion for summary judgment. The court was clearly influenced by the quick change of heart by the city and wanted to have a factual record to understand why the land was rezoned twice in a two year period.

[i] **Scott v. City of Seattle**[29]

Plaintiffs are the owners of several floating structures that were moored at a recreational marina. The owner of the marina received a notice of violation (NOV) from the city that the structures violated various provisions of the city's land use ordinances. Later a final Land Use Order was sent to both the marina owner and the plaintiffs. As a result of the city's actions the marina owner terminated the leases with the plaintiffs, requiring them to move their structures. Plaintiffs then sued the city alleging that the city's actions violated their due process and equal protection rights.

The court found that the plaintiffs did not have a protectible property interest because the NOV and the order did not encumber their property interest in the structures. There can be no deprivation of a property interest until such time as a court hears the case and determines that a violation of the ordinance occurred. The order did not effect the contractual rights or legitimate business expectations of the plaintiffs. It was the marina owner, not the city, that terminated the leasehold relationship. The marina owner could have reacted to the NOV and order in any number of ways. The fact that the owner decided to eliminate the problem by terminating the lease did not mean that the city's actions caused the plaintiffs to be deprived of their property interests.

Plaintiffs made a second substantive due process claim by contending that the City imposed requirements on them and the marina owner that were not contained within the land use ordinances. Only where actions of the city would shock the conscience of the court can a party assert a substantive due process claim. Here the issue was whether the structures were vessels and thereby exempt from city regulation. The city's interpretation, according to the court, was reasoned and reasonable in light of the purposes of the shoreland management statutes. Thus, this claim must also be dismissed.

Plaintiffs also asserted a procedural due process claim since they did not receive notice of the NOV and did not participate in the informal hearings that resulted from the marina owner's discussion of the NOV with city officials. The informal review process triggered by the NOV did not lead to the final order. The plaintiffs were given notice of the order and an opportunity to participate prior to its issuance. The court also dismissed the equal protection claim under the rational basis test. Plaintiffs had urged that they were discriminated against because they owned square-hulled structures that were treated differently than other seaborne structures. The court found a rational basis for the disparate treatment. Finally, the court dismissed the pendent state claims since no federal claims survived the city's motion for summary judgment.

[j] **Burnham v. City of Salem**[30]

Plaintiff asserted that the city, through a series of actions taken over a 4 year period, violated the due process and takings clauses. Some of the alleged actions include wrongfully removing mooring and tackle from a river, wrongfully denying various

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[29] 99 F.Supp.2d 1263 (W.D.Wash. 1999).
[30] 101 F.Supp.2d 26 (D.Mass. 2000).

licenses and permits, filing frivolous lawsuits against the plaintiffs and refusing plaintiff the right to repair a broken water main in front of their business.

The court found that for plaintiffs to show a violation of their procedural due process rights, they must prove that they had a protectible property interest that the city interfered with without adequate process. Since almost all of the permits and licenses that plaintiffs sought and the city denied were discretionary permits, the court concluded that it was dubious whether they had a property interest in the issuance of those permits. If plaintiffs were asserting that the defendants illegally departed from state or locally mandated procedures in making the permit decisions, there is no due process violation, so long as there were adequate post-deprivation processes available.[31] The evidence showed that the plaintiffs were able to bring appropriate state court action to remedy the apparent attempt by the city to remove or eliminate the plaintiff's business from the city. Thus the adequacy of post-deprivation remedies was clearly evident so that no procedural due process violation could be proven. The court refused to allow a procedural due process claim based on "motive or intent" to go to the jury. A bad faith refusal to follow state law in local administrative proceedings does not constitute a violation of the due process clause so long as there are adequate post-deprivation remedies available.

Many of the same factual predicates asserted in the procedural due process claim were repeated in the substantive due process claim, although the plaintiffs added the lodging of numerous frivolous criminal complaints against them to this claim. Unlike the procedural due process claim where motive or intent is basically irrelevant, it became the central issue in the substantive due process claim. The court looked at what was done, rather than how or when it was done. The court applied the traditional "shock the conscience" approach to substantive due process and found that even if the plaintiff's alleged facts were shown to be true and that there was a city attempt or crusade to chase the plaintiffs from the city, that would not constitute a substantive due process violation. The clear hostility between the city and the plaintiff was evident, but not sufficient to rise to a constitutional violation. The First Circuit's view of substantive due process traditionally has limited the cause of action to cases dealing with invasions of personal security or privacy and not business relationships.

Finally, the plaintiff alleged that several actions of the city constituted a taking of property without just compensation. The basis for their claim was that the city's actions did not substantially advance a legitimate state interest. It was clear that no *Lucas* taking was alleged since the business was still in operation. The physical confiscation of a mooring was done consistent with the city's interest in protecting navigation. There was no showing that the plaintiffs had a property interest in keeping the mooring where it was located. Finally the court found that the placement of some barriers on the plaintiffs land were not a taking under *Loretto* even though they involved a physical invasion of plaintiff's land. The physical occupation was temporary and plaintiff could show no injury. That reading of *Loretto* and *First English* was arguably wrong in that a temporary taking could have occurred, although the issue of damages would have been problematic.

[k] **Odlan Holdings, LLC v. City of New Orleans**[32]

Plaintiff's petition to have a zoning map change from multi-family residential to some type of commercial district was rejected. Plaintiff filed this omnibus due process

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[31] See PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991).

[32] 109 F.Supp.2d 503 (E.D.La. 2000).

and equal protection challenge. The court summarily dismissed the equal protection claim because the complaint only included conclusory allegations that are not sufficient as a matter of law. As to the substantive due process claim, the court also dismissed the complaint, emphasizing that typical zoning disputes represent "infertile grounds" for due process claims. The court noted that it would be rare for a party seeking a discretionary permit or decision to be able to assert a protected property or liberty interest. Requests for zoning map changes clearly involved the discretionary authority of the city planning commission thus negating any substantive due process claim. The court, however, kept alive the lawsuit for further factual development of the alleged procedural due process claim based on the failure of the commission to hold a hearing on plaintiff's request.

[l] **Katz v. Stannard Beach Association**[33]

Notwithstanding the *Olech* admonition that it was not deciding whether intent was an element of the equal protection claim, courts have seemingly adopted the Posner view that it is an indispensable part of the cause of action. In this case, plaintiff owns a home within a locality created by special state legislation and governed by the defendant that is composed of all record owners of property within the locality. The Association is empowered to enact by-laws and provide for governance by a board of directors. One of the plaintiffs replaced a cement walkway and placed a hedge over a right of way that had apparently been used by other residents to access the beach. The Association votes to initiate litigation against the plaintiff to remove the obstruction and have an easement declared giving residents beach access. The Association was dismissed from the first suit and re-filed a second suit. Plaintiffs allege that the state court litigation brought by the Association violates their due process and equal protection rights and constitutes a taking of property without just compensation.

The court refuses to abstain from hearing this case under the *Pullman* doctrine since the plaintiffs' claims will not depend on the outcome of the state court litigation. On the equal protection claim, plaintiffs rely on *Olech.* The court agrees that plaintiff can constitute a class of one. The court, however, then relies on pre-*Olech* cases that require the plaintiff to allege that when compared with others similarly situated the plaintiff was selectively treated and that selective treatment was based on impermissible considerations including malicious or bad faith intent to injure a person. The court relies on the Breyer concurring opinion that adopts the Posner view that animus, ill will or vindictiveness is required and not pled in this case.

On the due process claims, the court finds that plaintiff does not show a protectible liberty interest in her good name and reputation. It is not merely the loss of reputation that triggers a loss of a liberty interest, but it requires something else, such as an effect on a vested property interest. Since no further injury was alleged there was no cognizable liberty interest. Likewise the court finds no invasion of a protectible property interest through the act of soliciting and filing the litigation seeking to establish an easement. While there may have been some misconduct in the Association elections authorizing the litigation, there was no direct impact on her property interest. The court further finds that the regulatory takings claim is not ripe for review under *Hamilton Bank* since there has been no final resolution of the state court action. Only if the Association is successful in claiming an easement will a takings claim arise.

[2] State Cases

[33] 95 F.Supp.2d 90 (D.Conn. 2000).

[a] **FM Properties Operating Co. v. City of Austin**[34]

While not involving either the Due Process or Equal Protection Clause, this case involves the difficult constitutional problem of unlawful delegations of legislative authority. In response to Austin's aggressive regulation of land use and water quality in their extra-territorial jurisdiction (ETJ), the state enacted a statute that allowed certain landowners to opt out of local regulation upon meeting one of two required options.[35] The first method was for the landowner to maintain background levels of water quality in the waterways. Monitoring sites had to be set up to collect water quality data. The second method was to capture and retain the first 1.5 inches of rainfall from developed areas. No monitoring was required for the second method. In both cases the plans had to be developed by a registered professional engineer. Review by the Texas Natural Resources Conservation Commission (TNRCC) differed depending on the size of the acreage. For parcels between 500-1000 acres, the owners had to submit their water quality plans to TNRCC for approval. For parcels over 1000 acres, the plans were effective immediately upon recordation, although TNRCC had an opportunity to review those plans. TNRCC review is limited to seeing if the plans will meet one of the two options. Landowners may amend their plans from time to time. TNRCC may deny approval of these amendments only if it finds that the amended plan will impair the achievement of the plan's objectives. A landowner may appeal a TNRCC denial and the burden of proof is on TNRCC. The plans and review by TNRCC are not subject to public hearings. Once a water quality zone is designated all municipal land use, water quality or environmental control ordinances that are inconsistent with the zone and its plan are not enforceable. Further restrictions on municipal action include that the city may not collect fees or assessments or exercise the power of eminent domain within a zone until it annexes the zone. But a city may not annex an area covered by a plan until 90% of the plan's facilities have been completed or 20 years have passed since the zone was designated. The city sued several landowners in its ETJ who sought plan designations under the statute. The city's claim was based on several theories including the unconstitutional delegation of legislative power to private owners, the violation of municipal home rule provisions in the Texas Constitution and that the statute was an impermissible special or local law. The majority opinion only dealt with the facial non-delegation challenge.[36]

After noting, and then ignoring, the presumption of constitutionality in facial challenges, the majority made the necessary finding that the Legislature had in fact delegated its plenary legislative authority to private landowners. Legislative authority involves the making of laws of private conduct and setting public policy. The Legislature may delegate that power to coordinate branches of government or even to private individuals or institutions without violating the constitution's reservation of that power to

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[34] 22 S.W.3d 868 (Tex. 2000).

[35] Tex.Water Code § 26.179.

[36] Justice Baker wrote for the 6 justice majority. Justices Owen and Hecht filed separate dissenting opinions joined in both by Justice Abbott. The open and at times quite personal disagreements between the majority and dissenting opinions is reflected in the following quotes: "Most of Justice Owen's dissent is nothing more than inflammatory rhetoric, and thus merits no response." *Id* at 877. Justice Owen responds in kind: "I am at a loss to understand what is driving the Court's opinion, since it clearly is not reasoned decision-making. I know only that the Court today exercises raw power to override the will of the Legislature and of the people of Texas." *Id*. at 889.

the Legislature.[37] The majority found that the power to exempt themselves from otherwise applicable police power regulation constituted a delegation of legislative power to the private landowners.[38] Clearly the state, in other circumstances, has reserved to itself the power to regulate water quality issues. Giving the landowners the power to make those decisions relating to matters of public interest must constitute a delegation of legislative power.

Once a delegation is found, the court applied the 8 factor *Boll Weevil* analysis to determine if the delegation was valid. These 8 factors are:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government? 2. Are the persons affected by the private delegate's actions adequately represented in the decisionmaking process? 3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals? 4. Does the private delegate have a pecuniary or other personal interest that may conflict with its public function? 5. Is the private delegate empowered to define criminal acts or impose criminal sanctions? 6. Is the delegation narrow in duration, extent and subject matter? 7. Does the private delegate possess special qualifications or training for the task delegated to it? 8. Has the Legislature provided sufficient standards to guide the private delegate in its work?[39]

Any time a court develops a multi-factor analysis one must ask whether the court is engaging in a judicial or legislative function. The court noted that there is not a hierarchy within the 8 factors, although the court did suggest that several factors should be weighed more heavily than others. The court found that the first and fourth factors are particularly important in private delegation cases because of the potential impact on the public interest. Not surprisingly, the majority found that both of those factors weigh against the statute's constitutionality. Delegations of power to private bodies, such as accreditation agencies, national standard setting commissions and ADR organizations are widespread. Applying an 8 factor test to each of these types of delegations may require the court to take an intrusive role in making what are essentially policy decisions regarding the size and powers of governments. In Texas, which lacks a history of strong governmental regulatory bodies, delegations to private entities has been a way to avoid empowering governmental entities. This decision, as well as the *Boll Weevil* decision will make it hard for the state government to use surrogate private parties to achieve desired goals. In this case the court could have attempted to affirmatively limit the powers of home rule cities in their ETJs. Instead, they chose to empower private parties to exempt themselves from those powers. That option appears to be foreclosed to the legislature in the future.

[b] **Turbat Creek Preservation, LLC v. Town of Kennebunkport**[40]

A developer purchased a parcel containing 4 cottages and a boathouse. It obtained a permit to renovate the 4 cottages and sell them as separate condominium units. The application did not separately identify the boathouse as a separate residential

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[37] The court has struggled in the past few years with this delegation issue. See Proctor v. Andrews, 972 S.W.2d 729 (Tex. 1998); Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1997).

[38] Justice Abbott in his dissent argued that there was no delegation, an argument he also unsuccessfully made in the *Boll Weevil Foundation* case.

[39] 22 S.W.3d at 874.

[40] 2000 ME 109, 753 A.2d 489.

unit. Evidence showed that the boathouse had been occasionally used for overnight stays and a gathering place for residents and guests in the cottages. The developer obtained a permit to modernize the boathouse. The submitted plans did not show an intent to change its use to a residential unit. Nonetheless, the developer made extensive renovations making the boathouse usable for seasonal residential use. Several years later the plaintiff was served with a notice of violation of the town's zoning ordinance.

The developer asserted two due process violations. The first was that the town attorney appeared at the zoning board of appeals hearing stating that he was representing the enforcement official and not the ZBA. The second was that the chair of the ZBA had prejudged the case by preparing in advance an outline of issues and potential findings based on extra-record evidence. The court found that neither allegation was sufficient to violate the procedural due process rights of the developer. The attorney's role in the proceeding was appropriate and the pre-hearing review of materials was not prejudicial to the developer's rights.

Under the town's zoning ordinance the boathouse was located in a resource protection zone where no residential uses are allowed. Only if the boathouse was a NCU could it continue to be used or rebuilt. In reviewing the ZBA's decision not to treat the boathouse as a NCU, the court applied the substantial evidence test. Only if the proposed use as a guesthouse was the use that existed prior to the enactment of the zoning ordinance will it qualify as a NCU. The developer argued that the only change was a change in the intensity of the use not the type of use. The court found, however, substantial evidence in the record to support the ZBA's finding that the present use was far in excess of the occasional overnight use that had occurred in the distant past. Even if the use was of the same kind, the evidence also showed that there had been a non-use of the boathouse for any purposes for a period in excess of 12 months. Under the zoning ordinance such a period of disuse constituted an abandonment of the NCU. Finally, the court rejected the developer's equitable estoppel claim based on the issuance of the renovation permit because the developer affirmatively misled the town official regarding the scope of the planned renovations.

[c] **Masi Management, Inc. v. Town of Ogden**[41]

Last year I analyzed the lower court opinion in this case that challenged on due process and equal protection grounds various decisions of the town that were allegedly taken to delay action on the plaintiff's development proposal in order to favor a competing developer's proposal.[42] The court agreed with the lower court opinion that no substantive due process claim was asserted since plaintiff did not have a legitimate claim of entitlement to the continuation of the multi-family zoning classification that had attached to the land he was seeking to develop. It was entirely within the discretion of the town to determine how to provide housing units for senior citizens. The court refused to expand the substantive due process cause of action to include decisions motivated by ill will or bad faith since that would federalize all local land use decisions where an allegation was made that a decision was made under questionable or unfair circumstances. Ill will or improper motive are relevant considerations under the plaintiff's equal protection claim, but the court found that the plaintiff failed to show that the town acted "with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances."[43] Without citing

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[41] 709 N.Y.S.2d 734 (App.Div. 2000), *aff'g*, 180 Misc.2d 881, 691 N.Y.S.2d 706 (Sup.Ct. 1999).
[42] See Kramer I, note 1 *supra* at § 1.02[2][f].
[43] 709 N.Y.S.2d at 736.

either the Supreme Court or 7th Circuit decision in *Olech* the court seemed to embrace the 7th Circuit standard that emphasized motive as the gravamen for an equal protection claim in the land use context.

[d] **Hanlon v. Town of Milton**[44]

In 1990, Hanlon sought a CUP from the town to operate a gravel quarry on his agricultural property. The CUP was denied, although at the same meeting, two other CUP applications were approved, both being sought by members of the Planning and Zoning Committee. State court review reversed the town's decision and led to a second decision in 1994 that again denied the CUP. A second round of state judicial review led to an eventual affirmance of the decision. In 1997, Hanlon then filed this action in federal court under § 1983 alleging that the town deprived him of his due process and equal protection rights by its failure to approve the CUP. The district court granted the town's motion for summary judgment. The Seventh Circuit then sought an answer to the following certified question: "when a municipal administrative determination gives rise to an equal protection claim for money damages actionable under § 1983, must this equal protection claim be brought and heard in a Wis. Stat. § 68.13 certiorari proceeding brought by the litigant?"[45]

The Town argued that failing to bring the equal protection claim in the state court action required the federal court to dismiss the action based on the claim preclusion doctrine. The court found that while a certiorari proceeding to review a local zoning decision may raise constitutional claims to prove that the decision was unreasonable, arbitrary or oppressive, that is not the same as bringing a § 1983 equal protection action seeking monetary damages. Remedies under the state procedure only affect the local decision. They do not include any possibility of receiving money damages. Since the issue of monetary damages could not have been raised in the state court action, the § 1983 claim could not have been as part of that proceeding. In addition, the failure of the plaintiff to voluntarily join the separate § 1983 claim with the state court review action does not preclude him from bringing a later federal action. Certiorari review is limited and cannot be expanded to include the type of damages sought under § 1983. While joinder was possible, failure to join will not preclude the plaintiff from filing separate state and federal actions.

[e] **Thorp v. Town of Lebanon**[46]

The Thorps own a 255-acre tract of land that prior to 1994 was zoned for rural development. At that time the town engaged in a comprehensive revision to its zoning ordinance. The town requested that the county amend its official zoning map to incorporate the town's changes. The Thorp tract was reclassified to general agricultural uses. The Thorps challenged the rezoning and simultaneously filed a request to rezone the non-wetlands and flood plain areas. The town voted to rezone approximately 165 acres back to rural development. The county, however, refused to go along with the town's rezoning decision and voted to maintain the general agricultural classification. Plaintiffs then filed an omnibus § 1983 action in state court alleging a regulatory taking and substantive due process and equal protection violations.

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[44] 2000 WI 61, 235 Wis.2d 597, 612 N.W.2d 44.

[45] 612 N.W.2d at 47.

[46] 2000 WI 60, 235 Wis.2d 610, 612 N.W.2d 59. The court of appeals decision, 225 Wis.2d 672, 593 N.W.2d 878 (1998) is analyzed at Kramer I, note 1 *supra* at § 1.02[2][g].

The court initially had to deal with the town's assertion that by failing to comply with Wisconsin's notice of claim statute relating to litigation against local governments, the trial court lacked jurisdiction. When a party brings a § 1983 action claiming a violation of constitutional or statutory rights under color of state law, the party need not exhaust its state remedies and need not comply with whatever state procedural hurdles normally attach to suing a local governmental entity.[47] In addition, the court found that the plaintiffs had complied with the notice of claim provision through their various actions prior to filing this lawsuit.

The court noted the traditional two tests for showing equal protection violations, namely the compelling state interest test for suspect classifications and fundamental rights and the rational relationship test for everything else. The court found that the complaint's allegations regarding the bias of at least one member of the county board was sufficient to withstand the county's motion for summary judgment. In addition, the plaintiffs asserted that the topography of their tract was ill-suited for agricultural uses, evidence of a lack of a rational relationship between the classification and the governmental objective. A plaintiff in an equal protection case does not have to exhaust state judicial or administrative remedies. The court noted that at trial the burden on the plaintiff to prove the lack of a rational relationship will be difficult to meet. The plaintiff must show that the ordinance is unconstitutional beyond a reasonable doubt.

The court held that plaintiffs had not stated a claim for a substantive due process violation. The plaintiff must prove that there has been a deprivation of a liberty or property interest that is constitutionally protected. Plaintiff asserted that the town's rezoning efforts had not complied with state law. The plaintiff in this case had no property interest involving the statutory procedures required to be met before a zoning ordinance could be amended. The gist of the substantive due process claims were the same as the equal protection claims. Where a specific constitutional provision can be relied on, rather than the general provision relating to due process, the specific claim will essentially subsume the general claim. Finally, the court found that there was no procedural due process claim because the state provided an adequate post-deprivation remedy of judicial review of improper zoning decisions through the certiorari process.

[f] **St. Raymond v. City of New Orleans**[48]

Plaintiff owned a lot located in a duplex residential zone. Over a negative recommendation by the City Planning Commission, the city council enacted an ordinance issuing to the plaintiff a CUP to construct three townhouses on the lot. The ordinance contained several conditions or provisos and waived several setback requirements. The ordinance was to have "legal force and effect" only when the provisos were fully complied with. Two amendments to the ordinance extended the period of time when construction had to begin. Several years after the last deadline had passed, plaintiff sought a ruling that the ordinance was still valid even though the townhomes had never been built. The plaintiff listed several activities he asserted met the ordinance requirements for development. The city notified the plaintiff that his CUP had not expired and then issued him a building permit. The plaintiff began construction and apparently did substantial work leading to the pouring of the foundation when the city issued a stop work order. Notwithstanding other stop work orders the plaintiff continued to build and got a restraining order against the city from the trial court to

[47] Felder v. Casey, 487 U.S. 131 (1988).
[48] 2000 WL 1126046 (La.App. 2000), *writ denied*, --- So.2d --- (La. 2000).

prevent them from interfering with his development. The trial court, however, refused to grant plaintiff a preliminary injunction against the city.

The basis for the plaintiff's claim for an injunction was that he had a vested property right in the building permit. But Louisiana law, like most states, does not treat the issuance of a building permit as conferring a constitutionally-protected property right.[49] If a building permit was issued in error, the permit owner does not have a right to prevent the city from revoking or rescinding the permit. The permit was issued in error because the city attorney who wrote the memorandum finding that the CUP had not expired was wrong. There had not been sufficient development work done within the period of time set by the earlier ordinances. The only work accomplished within the time frame was the pouring of the sidewalk. That was insufficient to keep the CUP alive. The completion of work after the stop work orders were issued was not sufficient to show irreparable injury. Even if the plaintiff was misled by the city's action, a preliminary injunction should not issue since monetary damages can fully compensate the plaintiff for his injuries.

[g] **East Lampeter Township v. County of Lancaster**[50]

In 1986, Mr. Hondares, an African-American, purchased two contiguous tracts of land. At the time of the purchase both tracts were zoned for commercial use. The front tract was used to operate a retail store. In 1990, the township engaged in a comprehensive rezoning that reclassified the rear tract to rural while maintaining a commercial classification for the front tract. Hondares petitioned the township board of supervisors to rezone the rear tract back to commercial but they refused. No further appeal was taken. Mr. Hondares was using the rear tract as a residence in apparent violation of the ordinance, but the township had never sought to enforce its ordinance. In 1993, he filed a complaint with the County Human Rights Commission asserting that the township had discriminated against him because he was black. Before the commission could hold any hearings, the township sought a declaratory judgment that the commission did not have jurisdiction over the Hondares claim. When the township refused to rezone the rear tract it acted in a legislative capacity. Courts and administrative agencies exercising adjudicatory powers do not have any power to interfere with the legislative process. Under the state zoning law, decisions to rezone are entrusted to the board of supervisors with appropriate resort to the courts provided for. This type of attempted collateral attack was not authorized by statute. The commission would have no power to remedy the alleged discriminatory treatment since it could not rezone the tract. The commission lacked the power to review the legislative decision of the township.

§ 1.03 Land Use Controls and the Fifth Amendment

[1] Regulatory Takings

[a] **Agripost, Inc. v. Miami-Dade County**[51]

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[49] See St. Charles Avenue Corp. v. City of New Orleans, 704 So.2d 909 (La.App. 1997), writ denied, 712 So.2d 881 (La. 1998).

[50] 744 A.2d 359 (Pa.Commw. 2000).

[51] 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 2000 WL 693530 (2000).

Plaintiff was issued a permit from the county board of commissioners in 1987 to operate a waste disposal facility. Plaintiff had been a successful bidder to construct a facility that would create an environmentally safe end product from the solid waste. Plaintiff also received a variance containing several conditions since the facility was located in an agricultural zone. Four years later, however, the county zoning appeals board revoked the permit, after receiving complaints upon the operation. The board determined that the plaintiff had failed to comply with several of the conditions. Upon direct state judicial review, the revocation decision was upheld. Plaintiff then filed this action asserting a regulatory takings claim against the county. The trial court dismissed the action as unripe under *Hamilton Bank* since plaintiff had not pursued a state inverse condemnation claim. The county had argued that under the *Rooker-Feldman* doctrine only the Supreme Court of the United States has jurisdiction to review final decisions from a state's highest court. It also argued that under either the issue or claim preclusion doctrines the case should be dismissed on the merits. The county sought to avoid the plaintiff's filing of a state court inverse condemnation claim, something the plaintiff did shortly after the district court's opinion.

While normally the prevailing party does not have standing to attack a judgment or order, in this case the county was injured by the district court's handling of its issue or claim preclusion claims. The court agreed with the district court that the earlier state court litigation did not act to prevent the plaintiff from filing a state inverse condemnation claim. The court found that the earlier state court proceeding did not deal with the regulatory takings claim and that it lacked authority to hear it since it was the permit revocation decision that allegedly constituted a regulatory taking. Since the legitimacy of that revocation decision was not finally determined under after the state court proceeding was final, plaintiff would not be precluded from filing a new regulatory takings claim in state court. Obviously, *Hamilton Bank* precluded plaintiff from bringing a federal takings claim, since Florida provides for an inverse condemnation remedy. In addition, since the earlier state court proceeding did not deal with the takings issue, the district court had subject matter jurisdiction to determine that the issue was not ripe for review under the Rooker-Feldman doctrine.

[b] SGB Financial Services, Inc. v. Consolidated City of Indianapolis-Marion County[52]

Plaintiff is the owner of a 286-unit apartment complex. Starting in 1996, it sought to sell or re-finance and renovate the complex. No proposals or bids were received when in April 1997, the parcel was placed on the city's "acquisition list" under the state's urban redevelopment law. Under the law, the city was could either negotiate a purchase of the parcel, condemn it through an eminent domain proceeding or do nothing. Two city appraisals listed the value of the parcel at around $ 900,000. The plaintiff's appraisal came in at $ 3.2 million. The city also provided information to several prospective purchasers or re-developers of the complex regarding the high crime rate and what the city had appraised the parcel for. While the city disclosed its appraisals to third parties, it refused to disclose its appraisals to the plaintiff. Plaintiff the filed this claim asserting that the city's actions have constituted a regulatory taking and have impeded its ability to sell the parcel for its listed purchase price of $ 2.6 million.

The plaintiff tried to avoid the *Hamilton Bank* ripeness doctrine by asserting the futility exception. An Indiana state court decision had found that a city's actions in declaring an area "blighted" and placing the parcel on the acquisitions list does not

[52] 2000 WL 680412 (S.D.Ind.).

constitute a regulatory taking.[53] The fact that a single decision by an intermediate appellate court appears to be contrary to the position of the plaintiff does not make the state inverse condemnation futile, unavailable or inadequate. Hostility of the state court system to the type of regulatory taking claim asserted by the plaintiff is not sufficient to avoid *Hamilton Bank's* requirement of seeking state court relief prior to the filing of the case in federal court. Where the state procedure exists, the property owner must avail itself of the procedure and be denied an inverse condemnation award the case will be ripe for federal court review.[54]

[c] **John Corp. v. City of Houston**[55]

In 1991, the city had issued demolition orders covering an apartment complex. In 1995, John Corp. agreed to purchase the complex from the owner for $ 1,900,000. Plaintiff entered into discussions with the City regarding its rehabilitation plans for the complex. During this time period there was a fire on the premises and eventually the city demolished about two-thirds of the buildings within the complex. Plaintiff then sued the City for violating various of its constitutional rights as well as the sellers. The district court dismissed all of the plaintiff's constitutional claims.

The court treated many of the plaintiff's claims as essentially regulatory takings. The alleged activities of the city in dealing with the plaintiff and then demolishing the buildings, involved a claim that the regulation went too far. Once classified as regulatory takings, the claims have to fail under the *Hamilton Bank* ripeness doctrine. Only if the demolition was accomplished for a private purpose might the federal courts hear the case prior to a state court. Thus, the district court was correct in dismissing the bulk of the plaintiff's claims.

The court then found that the substantive due process claims raised by the plaintiff should not have been dismissed because they were different from the regulatory takings claims. Rather than subsuming the due process claims into takings claims, the court treated them separately.[56] The allegations in the complaint that the ordinance authorizing the demolition of the building were sufficient to state a cause of action under the due process clause. Those claims are different than the regulatory takings claims and are ripe for review without the need for filing a claim in state court.

[d] **Jim Sowell Construction Co., Inc. v. City of Coppell**[57]

Plaintiff brought a regulatory takings claim against the City after the City downzoned land where the plaintiff had planned to construct an apartment complex.

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[53] Reel Pipe & Valve Co. v. Indianapolis, 633 N.E.2d 274 (Ind.App.), *cert. denied*, 513 U.S. 1058 (1994).
[54] See also Forseth v. Village of Sussex analyzed in § 1.02[1][b] *supra* and Hager v. City of West Peoria, 84 F.3d 865 (7th Cir. 1996).
[55] 214 F.3d 573 (5th Cir. 2000).
[56] There is a split of authority on the melding or separating of due process and takings claims. *Compare* South County Sand & Gravel v. Town of South Kingstown, 160 F.3d 834 (1st Cir. 1998)(no separate takings and due process claims); Macri v. King County, 126 F.3d 1125 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998)(same); Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996)(same) *with* Berger v. City of Mayfield Heights, 154 F.3d 621 (6th Cir. 1998)(separate takings and due process claims); Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208 (11th Cir. 1995); Villager Pond, Inc. v. Town of Darien, 56 F.3d 375 (2nd Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); Taylor Investment, Ltd. v. Upper Darby Township, 983 F.2d 1285 (3rd Cir.), *cert. denied*, 510 U.S. 914 (1993).
[57] 2000 WL 968782 (N.D.Tex.), clarifying, 61 F.Supp.2d 542 (N.D.Tex. 1999) and 82 F.Supp.2d 616 (N.D.Tex. 1998).

Earlier orders had dismissed the takings claims finding that the regulation substantially advanced a legitimate state interest and did not deny an owner economically viable use of the land. Plaintiff urged that *Del Monte Dunes* required the court to take a hard look at the city's downzoning decision to see if it substantially advanced a legitimate state interest. The court found that *Del Monte Dunes* did not reverse the traditional presumption of validity and the placement of the burden of proof on the party challenging the ordinance. The more rigorous scope of judicial review applicable to exactions does not apply to normal land use regulations, including downzoning amendments. In addition, heightened scrutiny does not apply to legislative decisions, while it may, under certain circumstances, apply to adjudicatory decisions. Plaintiff alleged that the downzoning was racially motivated because the proposed multi-family development was going to contain some low- and moderate-income units. The city responded with reasons for the downzoning that were unrelated to the potential racial make-up of the apartment complex. Under the soft glance approach taken to these type of cases, the court found that the city's decision substantially advanced a legitimate state interest.

Plaintiff also made a claim that the city's decisions violated its vested right to develop that was created by Texas statues.[58] The city admitted that the vested rights statute required the city to apply the ordinance in existence when the permit request was originally filed. But the court found that the statute did not create a cause of action for money damages. Instead the remedies are limited to declaratory, mandamus or injunctive relief. The court then dismissed this state law claim as well.

[e] **Rau v. City of Garden Plain**[59]

The city downzoned plaintiff's parcel from light commercial to residential. Plaintiff then filed a state lawsuit making a § 1983 claim that the city had violated her due process, equal protection and regulatory takings rights. The city filed a motion to remove the case to federal court based on federal question jurisdiction and then moved for summary judgment on all of plaintiff's § 1983 claims.

The underlying basis for the motion for summary judgment was that the claims were not ripe for review. Kansas law provided two means of attacking the judgment in state court. The first was a statutory review procedure to determine the reasonableness of the zoning order or determination. The second was a claim for inverse condemnation. It was unclear under Kansas law whether such a claim can be made for a zoning ordinance that went too far. Nonetheless, Kansas does recognize the inverse condemnation cause of action. The plaintiff did include in the state complaint a claim that the ordinance was unreasonable. But the plaintiff also included the regulatory takings claim that was both unripe under *Hamilton Bank* and was the grounds for removing the case. Plaintiff needed to have filed in state court either or both of the statutory review or inverse condemnation cases without alleging a § 1983 cause of action.

The court also dismissed the substantive due process and equal protection claims as unripe. Where these claims are really offshoots of the regulatory takings claim, the more particularized protection of the Takings Clause applies as does the *Hamilton Bank* ripeness doctrine.[60] As to the procedural due process claim, the

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[58] See Tex.Gov't.Code Ann. §§ 481.141 et seq.

[59] 76 F.Supp.2d 1173 (D.Kan. 1999).

[60] See Landmark Land Co. of Oklahoma, Inc. v. Buchanan, 874 F.2d 717 (10th Cir. 1989), *abrogated on other grounds*, Federal Lands Legal Consortium v. U.S., 195 F.3d 1190 (10th Cir. 1999). Graham v. Connor, 490 U.S. 386 (1989) provided the basis for the rule that allows the due process and equal protection claims to be subsumed within the regulatory takings claim.

Hamilton Bank ripeness doctrine normally does not apply. But as asserted by the plaintiff in this case, the procedural due process claim was directly related to and thus coextensive with the regulatory takings claim. Thus, the procedural due process claim was also dismissed as unripe. Because all of the federal claims were dismissed, the court remanded the state claim under Kansas' statutory review to the state court for their determination. Only rarely should a federal court review local zoning decisions where a state court can otherwise exercise jurisdiction.[61]

[f] **Town Council of New Harmony v. Parker**[62]

Two separate tracts of land were subdivided and platted in 1871 and 1874. About 100 years later, Parker purchased several of those lots. Some ten years later, Parker asked the town to extend various utilities to the lots. The town agreed to do so if Parker would pay the pro rata share of the costs of extending those utilities as provided by state statute. That offer was never accepted. Shortly thereafter, the town placed a chain across the street that dead-ended at the Parker tract because of numerous complaints from neighbors that vehicles were running off the end of the paved street and onto the parcels. Parker then filed this action claiming that the town was obligated to provide utilities at its own expense and that the placement of the chain constituted a regulatory taking.

After surveying basic regulatory takings law, including *Lucas* and *Penn Central,* the court analyzed the town's action in placing the chain across the street. While the Parker parcel was subdivided the court treated it as one inclusive parcel of undeveloped land. There are no paved streets leading into the Parker tract. The town action did not deprive Parker of access to her property as it was still accessible from a wide variety of streets and rights of way. The chain was located over the street and thus there was no physical invasion of the Parker tract.

The second regulatory takings claim allegedly arose when the town zoning official indicated that he would not issue any building or location improvement permits for the tract. There was, in fact, no permit application from Parker. In addition, there was no appeal of a permit denial to the BZA. Thus because Parker failed to exhaust her administrative remedies, the trial court lacked subject-matter jurisdiction to hear her constitutional claims. The court refused to apply the futility exception to the exhaustion requirement since that exception is to be narrowly construed. The purpose of seeking a permit is to give the court a decision that can be reviewed so as to properly adjudicate the as applied regulatory takings claim. The court noted that the BZA might have developed an alternative to the denial decision, including a conditional approval based on factors unique to the parcel.

The third regulatory takings claim allegedly arose when the town refused to extend utility services without the assessment of costs. In this situation the court applied the *Penn Central* analysis of reasonable investment-backed expectations. When Parker purchased the lots she was charged with knowledge of the existing city ordinances and state statutes dealing with utility services. She could only have expected that the town would either grant or deny developmental permission and utility services based on its stated policy of requiring reimbursement for costs. The state authorized the town to levy assessments for the provision of utility services and when the town exercised its power, there was no regulatory taking.

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[61] *See also* Norton v. Village of Corrales, 103 F.3d 928 (10th Cir. 1996), analyzed at Kramer II, note 1 *supra* at § 1.03[1][d].

[62] 726 N.E.2d 1217 (Ind. 2000).

[g] **Shemo v. Mayfield Heights**[63]

The owners of a 22.6 acre parcel bordered by commercial and residential uses, as well as an interstate highway challenged the residential zoning classification for the site in June 1995. The parties stipulated that the existing zoning classification was unconstitutional, but that the city reserved the right to rezone the property. The city rezoned the parcel to a cluster SFR zone. The owners then challenged the rezoning decision and urged that they were entitled to have their lands zoned for commercial and warehouse uses. While the case was on appeal the Ohio Supreme Court decided to separate out the two prongs of the *Agins* taking test, namely whether the ordinance deprives the owner of an economically viable use and whether the ordinance fails to advance a legitimate governmental interest.[64] Only the economically viable use test is employed in dealing with a regulatory takings claim. Likewise, only the advancement or reasonable relationship test is used where a due process claim is made.

In this case, the trial court found that the cluster SFR zoning classification did not meet the reasonable relationship standard, even after allocating the burden of proof to the owners. The court of appeals had remanded the case to the trial court to apply the separate tests, but the supreme court determined that the ordinance was unconstitutional and therefore no remand was required. The court reviewed the trial court judgment, not the rezoning decision. The city argued that under the deferential "fair debate" standard used in Ohio, the rezoning ordinance was reasonably related to several legitimate public objectives including maintaining the residential character of the neighborhood, maintaining a mixed blend of uses and preventing undue traffic congestion. The court employed a *Nectow*-type hard look at the individual rezoning decision, discounting the adjacent residential uses by focusing on the adjacent commercial uses located near the interstate highway. Evidence was proffered by the city showing concern by the residents of the adjacent homes regarding the commercial development of the area. The court found that insufficient even under the fair debate standard. The court suggested that the externalities from the commercial development could be minimized through buffering requirements. The court also found that the city's traffic congestion claims were unsupported by the evidence. The court also rejected the claim that the owners of the tract created their own hardship in developing the area for residential use by selling off portions of the tract at earlier dates. The court minimized the self-imposed hardship argument by saying that the owners made legitimate business decisions that should not be held against them when determining the validity of the rezoning ordinance. With this case, Ohio places itself in the Illinois camp of scrutinizing very closely zoning decisions that limit the developmental potential of a site while stating that their scope of judicial review is deferential.

[h] **San Remo Hotel L.P. v. City and County of San Francisco**[65]

The hotel asserted that the application of the amended hotel conversion ordinance in 1990 constituted a regulatory taking. The hotel property was developed in 1906. It had a long history of both tourist and long-term residential use. The hotel was extensively refurbished in the early 1970s who continued the dual use. Under the terms

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[63] 88 Ohio St.3d 7, 722 N.E.2d 1018 (2000).

[64] See Goldberg Cos. v. Richmond Heights City Council, 81 Ohio St.3d 207, 690 N.E.2d 510 (1998) and Gerijo, Inc. v. Fairfield, 70 Ohio St.3d 223, 638 N.E.2d 533 (1994).

[65] 83 Cal.App.4th 239, 100 Cal.Rptr.2d 1 (2000).

of the 1990 ordinance, the hotel would be prohibited from renting rooms to tourists unless it paid the city a $ 567,000 conversion fee or provided suitable replacement housing and received a CUP. The in lieu fee was based on the city's finding that all of the units were being used for long-term residents at the time the first hotel conversion ordinance was enacted in 1979. The hotel first instituted litigation in the federal court, but the Ninth Circuit determined that it was more appropriate for the litigation to take place in state court.[66] The city filed a demurrer claiming that the hotel had not stated a cause of action for a regulatory taking.

The court initially had to determine the appropriate scope of judicial review of the conversion ordinance. The hotel asserted that the higher level of scrutiny employed by *Nollan/Dolan* for impact fees and applicable in California through the *Ehrlich* case should be used.[67] The imposition of discretionary fees by a governmental body presents an inherent and heightened risk that the local government will manipulate the police power to impose conditions for which it would otherwise have to pay just compensation. The court found the fees imposed here are analogous to the types of fees imposed in *Nollan/Dolan/Ehrlich.* In order to qualify for a CUP to rent rooms to tourists, the hotel was under the same type of duress as the owners in those 3 cases. Thus, the heightened scrutiny analysis should be applied. The in lieu fee here was clearly set at a level to fund replacement housing that the city wanted to provide. That type of decision was the type that the Supreme Court felt warranted closer scrutiny to avoid overreaching.

The court found that the demurrer should not have been granted by the trial court as to the as applied regulatory taking claim. The court applied the dual *Nollan/Dolan* test of requiring the city to prove that there was both an essential nexus between the permit condition or in lieu payment and the public impact of the proposed development and that a rough proportionality existed between the magnitude of the fiscal exaction and the effects of the proposed development. The allegations of the hotel were sufficient to raise factual issues on both questions. While the court readily admitted that providing low and moderate income housing was an important governmental objective, the hotel raised questions about the nexus or relationship between the replacement housing and fee requirement and that objective. There was a substantial factual dispute as to whether the hotel in 1981 and 1990 was completely committed to residential as opposed to tourist units. The city presumed that it was entirely a residential operation, but if it was not, the nexus between continued use of tourist units and the so-called replacement fee was unclear at best. Likewise, there were substantial questions about the proportionality of the imposed fee since it was predicated on that same presumption.[68] The earlier cases upholding the hotel conversion ordinance did not address the as applied regulatory takings claim made here by the hotel. The court also found that the payment of the fee under protest did not constitute a waiver of the hotel's right to make its regulatory takings claim.

The hotel also sought a writ of mandate that it was a valid NCU and therefore did not have to get a CUP from the city in order to rent rooms to tourists. The court reached a different view as to the effect of the certification of rooms made by the city at the time of the enactment of the conversion ordinance than did the court in *Tenderloin Housing*

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[66] San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095 (9th Cir. 1998).

[67] Ehrlich v. City of Culver City, 12 Cal.4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429 (1996).

[68] In an analogous situation the New York Court of Appeals found a hotel conversion ordinance invalid in Seawall Associates v. City of New York, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, *cert. den.*, 493 U.S. 976 (1989).

Clinic.[69] In that case the court found that the hotel had achieved a NCU status based on the certification by the city that it was renting rooms to tourists without the hotel having to prove that it was actually engaged in that type of room rental business. In this case, the court found that the certification order was not determinative of whether there was a legal NCU in existence. The court looked to the underlying zoning ordinance and found that there was no distinction made between residential and tourist hotels. Thus even though the certification decision showed no tourist use, it may have had that right when the conversion ordinance was enacted. If the use of the premises for tourist rentals was allowed, it would have been a valid NCU. The court remanded the issue to the trial court to take evidence on whether the hotel property was actually used for tourist rentals prior to the enactment of the ordinance.

[i] **City of Annapolis v. Waterman**[70]

Plaintiff purchased a 3-acre tract of land in the mid-1970s with the purpose of developing it in three phases. As part of the first phase development approval process the developer agreed to provide 2375 square feet of recreational space in an appropriate location as part of the future development of the last two phases. When the second phase was approved it did not contain that recreational space. The third phase plat was submitted in 1990. The plat designated a 4598 square foot recreational easement that ran behind the proposed 8 duplex units. Both the staff and the Planning and Zoning Commission recommended denial of the plat because of alleged density and traffic problems and violation of the recreational space condition. The Board of Appeals upheld the commission's findings, based in part on its conclusion that the easement dedication would cause each of the lots to fall below the minimum size required by the ordinance. The trial court reversed the board's decision. While this litigation was ongoing the city amended its zoning ordinance to require site design review prior to subdivision approval. On remand from the trial court, the city applied site design review to the proposal and conditioned its approval of the plat on leaving one of the new lots vacant. The city also required that the 2375 square feet of recreational space be located on that lot. The plaintiff responded by filing this regulatory takings claim asserting that the original condition created an unconstitutional takings. The trial court found that a taking had occurred by focusing on the decision's impact solely on the single lot.

The city's zoning and subdivision ordinances emphasize the need for open space. The site design plan review procedures also attempt to maximize the amount of available open space and give the city the power to reject such plans that do not achieve compatibility with safety, efficiency and attractiveness standards. The use of conditions on subdivision plats to achieve legitimate public objectives was well recognized in Maryland. The court distinguished between common law dedications and mandatory dedications. Common law dedications involve an offer to dedicate and an acceptance by a local government while mandatory dedications arise from the exercise of the police power. The recreational land requirement is not a dedication because the proposed space was not intended for general public use. Thus the requirement is a condition, not a dedication. While a dedication requires a developer to transfer title to a governmental entity, a condition merely limits the method in which a property owner may thereafter use his property. The court examined Maryland law to see whether it was more appropriate to apply the *Mahon/Lucas* or *Nollan/Dolan* tests to the city's condition. It determined that the *Nollan/Dolan* test would not be applicable where there was no dedication or

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[69] Tenderloin Housing Clinic is analyzed at § 1.07[1][a][v] *infra*.

[70] 357 Md. 484, 745 A.2d 1000 (Md.App. 2000).

transfer to the government. The real issue is whether a valid public purpose existed for the condition and whether the end result is to leave the owner with no remaining viable economic use of the totality of his land. In applying the *Mahon/Lucas* test the court dealt with the denominator problem. The lower courts had focused on the single lot that was to hold the open space. This court determined that at least the entire third-phase property must be included and hinted that the entire three phases must be considered since the owners have received substantial economic benefits from sales of lots during the first two phases. Since the remaining duplex lots clearly retained substantial value, there was no evidence to support a finding of a regulatory taking by the imposition of the condition to provide recreational space for future residents of the subdivision.

[j] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency[71]

Several property owners asserted that a temporary planning moratorium adopted by the TRPA constitutes a regulatory taking of their property interests. In response to changes in the interstate compact in 1980, TRPA adopted a moratorium on development pending the enactment of a new regional plan. The moratorium was in effect for nearly 3 years until the new plan was adopted. That plan, however, was challenged by several parties as not being strong enough to comply with the new mandates regarding protection of the lake. This led to a revised land use plan being adopted in 1987. Litigation was initially filed in 1984 and has led to several Ninth Circuit decisions in the ensuing years.[72] The district court found that as to two of the earlier time periods, plaintiffs had stated a § 1983 cause of action for a regulatory taking, but that for two other time periods there was no regulatory taking or the claim was time-barred. Both parties appeal.

The trial court had based its regulatory taking decision as to the earlier periods on its conclusion that the moratorium was a *Lucas* total taking. It had specifically found that if *Penn Central* was applied there was no taking. The takings claims are based on a facial attack on the moratorium. In such facial attacks, the court is to look only at the regulation's general scope and dominant features rather than to its individual effect or impact. Facial attacks place a substantial burden of proof on the property owner. The Ninth Circuit examines the aggregate/disaggregate issue, not in terms of area, but in terms of time. Plaintiffs assert that for the period of time covered by the moratorium, there has been a *Lucas* deprivation of all economically feasible uses of the land. The court, however, refuses to temporally divide the fee simple absolute into shorter time periods. The court relies on *Penn Central* to conclude that severing the property interest into discrete segments should not be the basis of a regulatory takings claim. While *Mahon* might suggest a conceptual severance, other Supreme Court decisions, including *Keystone Bituminous* and *Andrus v. Allard* reject disaggregation. *Mahon* can be distinguished from the usual case where a single fee simple absolute estate is involved since state law allows for there to be two separate fee simple absolute estates, one in the surface and one in the minerals. In this case there is clearly no separate durational estates involved. A contrary result would clearly invalidate all development moratorium ordinances. That ignores the *Lucas* admonition that even a very important governmental objective may not save a land use regulation that deprives the owner of all economically viable uses of the land. The court rejects the notion that *First English*

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[71] 216 F.3d 764 (9th Cir. 2000).

[72] See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Commission, 34 F.3d 753 (9th Cir. 1994), 938 F.2d 153 (9th Cir. 1991), 911 F.2d 1331 (9th Cir. 1990).

adopted a temporary taking analysis that requires a temporal disaggregation or severance. The court reads *First English* as authorizing temporary takings in the situation where the court finds a taking and then the local government changes the regulation to remedy the overreaching. It dismisses the language in *First English* that discusses normal regulatory delays as not being temporary takings as not leading to the implication that moratoria are not normal regulatory delays deserving of protection. The court further indicates that areal disaggregation is also not to be used in takings analysis.

In then applying *Lucas* to the fee simple absolute interests, the court notes that the regulations effectively prohibited all development, but that the regulation was designed to be temporary. It tries to define the term "economically beneficial or productive use" that is the heart of the *Lucas* test. The court refuses to equate the terms use and value. While admitting that value is strong evidence of the availability of economically beneficial uses, it is not the exclusive measuring stick. Because the regulation was temporary, it did not have the effect of denying either the future developmental use or value of the properties. The future uses have substantial present values. The court does note that should the moratorium be extended for a lengthy period of time, that future value and/or use may be diminished substantially. But in this case, given the facial attack and the reality of the reasonably short period of time the moratorium was in effect, the court concludes that there was no *Lucas* taking. Since no *Penn Central* taking was found by the trial court, the Ninth Circuit also affirms that finding given its analysis of the *Lucas* taking issue.

[k] **Santa Monica Beach, Ltd. v. Superior Court**[73]

One of the intriguing questions in the area of regulatory takings is what should courts do regarding the first prong of the *Agins* test, namely does the regulation substantially advance a legitimate state interest?[74] Should the courts take a soft glance approach as many of them do in the substantive due process arena, or should they follow the Scalia hard look approach as used in the development exactions cases? This case attempts to address this important question, even though the results led to 5 separate opinions.[75] In 1979 the city adopts a rent control ordinance, delegating to a rent control board the power to establish maximum allowable rents and providing for annual general and special adjustments for rental units. Plaintiffs own a 12 unit apartment and sought an increase in the allowable rents in 1992. The board, after a hearing, denies the request. In 1993, the board allows a permanent rent increase of $ 3.00/month/unit and a temporary rent increase of $ 58.00/month/unit. Plaintiff challenges the board's actions as a regulatory taking, asserting that the statute as applied does not meet the substantial advancement test since the alleged effect of the law has been to diminish, not augment, the number of affordable rental units within the city.

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[73] 19 Cal.4th 952, 81 Cal.Rptr.2d 93, 968 P.2d 993, *cert. denied*, 119 S.Ct. 1804 (1999).

[74] This questions is explored in greater depth in Edward Ziegler, Development Exactions and Permit Decisions: Nollan, Dolan and Del Monte Dunes, at Chapter 4 *infra*.

[75] Judge Kennard concurred while Judges Baxter, Chin and Brown wrote separate dissenting opinions. Judge Kennard acknowledges that the substantially advancing test is the type of means-end analysis used in substantive due process decisions such as Nectow v. Cambridge, 277 U.S. 183 (1928). 968 P.2d at 1009-10. Justice Baxter would hold that the substantially advancing test must be applied with some level of judicial scrutiny and that to do so would not revive substantive due process review. 968 P.2d at 1013-14.

The city initially asserts that the plaintiff's challenge is really a facial attack, not an as applied attack and is therefore barred by the statute of limitations. While not directly resolving that issue, the court presumes that the plaintiff's challenge is to the individual decision and not the enactment of the ordinance. The court initially notes that the wisdom or stupidity of rent control ordinances is not at issue. While courts have struck down rent control ordinances as violating the Fifth Amendment, they have done so on takings or procedural due process grounds. The court notes: "The notion that a court may invalidate legislation that it finds, after a trial, to have failed to live up to expectations, is indeed novel. In our constitutional system, it is generally assumed that only the legislative body that enacted the statute may exercise a power of repeal if that statute fails to meet legislative expectations."[76] The majority rejects the application of the hard look review espoused in *Nollan-Dolan* in the ordinary regulatory takings analysis. In cases such as this where an adjudicatory decision is involved, the appropriate scope of judicial review is the substantial evidence test. Where a legislative decision is involved, the appropriate scope of judicial review is even more deferential under an arbitrary or capricious test. A per se attack on a rent control ordinance should be analyzed under a rational relationship test, since it is a form of price control regulation. An as applied attack on a rent control decision should be based on the substantial evidence test to determine if there was a confiscatory decision. Where the plaintiff makes an attack using the "substantially advancing" test, the scope of judicial review is the most deferential. It allows the court to consider post-decision rationales to support the ordinance. That fact that the ordinance may have a deleterious impact on those individuals who were intended to be protected does not invalidate the ordinance. Even if imperfect, the ordinance may still protect some existing tenants from being displaced. That is sufficient under the *Agins* test. It is not within the province of a court to determine how long a legislative experiment should be carried out. The court eschews a role in declaring a regulatory program a failure and thus unconstitutional. While there may be circumstance where changes in conditions may support an as applied challenge, such as in the case of a zoning ordinance left behind by changing conditions in the neighborhood, that does not authorize a court to invalidate an ordinance whose purposes may be frustrated by changing conditions.

[l] **Isla Verde International Holdings, Inc. v. City of Camas**[77]

Plaintiff seeks approval of a 51 lot subdivision. At the public hearing, the city's fire department asks for the inclusion of a secondary access road for emergency purposes because of some unique features, including steep slopes, long cul de sacs and nearby forest land. The Planning Commission approves the subdivision subject to the construction of the secondary road, compliance with the open space requirements of the ordinance requiring the set aside of 3% of the subdivision and payment of impact fees for park and recreational facilities and open space. The developer objects to all three requirements before the city council. The council, nonetheless, affirms the decision of the Planning Commission and the developer seeks judicial review.

The scope of judicial review of a subdivision plat approval is the substantial evidence test. The appellate court reviews the administrative record and not the record at the trial court. The review is deferential and the evidence is viewed in the light most favorable to the party that prevailed at the fact-finding level of decision-making. The trial court found that the secondary road requirement violated the substantive due

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[76] 968 P.2d at 999-1000.

[77] 99 Wash.App. 127, 990 P.2d 429 (1999).

process rights of the developer. Under Washington law, substantive due process review involves a balancing test using a means-end analysis and an unduly oppressive analysis. The court has no trouble finding that providing emergency vehicle access is an important governmental objective, especially in light of the unique physical features of the development. It also finds that the added costs alone do not make the requirement unduly oppressive. There was no evidence to show that the added costs were extraordinary or would diminish the value of its investment. The fact that the city responded to public criticism of the development does not, by itself, show that the decision to require the secondary road is arbitrary or capricious.

The court, however, finds that the 30% set aside for open space violates the roughly proportional *Dolan* test. Here the court finds that *Dolan* applies even though there is no dedication or exaction requirement.[78] While the owner would retain its possessory interest in the set aside acreage, it would have to leave it undeveloped. That implicitly is treated the same as an exaction. The court does find that the set aside requirement meets the nexus test because there is a relationship between preserving open space and protecting wildlife and recreational resources. But the court finds that there was no city study showing that the 30% figure is justified. The court assumes that even though this is not an individual application, but a figure set by the legislative body, the rough proportionality test still applies. The court does not review the impact fee ordinances under *Nollan-Dolan* because no fee had been imposed at the time of the trial thus making that issue not ripe for review.

[m] **Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck**[79]

Plaintiff owns a 150-acre tract of land that has been leased to a private golf club since 1921. The tract, however, was zoned for SFR use until the late 1980s when the city began to study the need for open space in the community. The tract is then rezoned to a recreational district where golf courses are allowed, but where no residential development is authorized. Simultaneously with the city planning efforts, the plaintiff began exploring the possibility of creating a residential subdivision while retaining the golf course. After the rezoning of the land the town denied the permit and plaintiff filed this regulatory takings claim.

The only issue on appeal is the first prong of the *Agins* test, namely whether the rezoning substantially advances a legitimate state interest. Plaintiff tries to apply the *Nollan-Dolan* hard look approach to this means-ends test. The city argues that there is a need for preserving open space, providing recreational activities and mitigating flooding that is served by the rezoning decision. The court relies on *Del Monte* in concluding that the heightened scrutiny employed in exactions cases do not apply to general regulatory takings cases. While the plaintiff concedes that the rough proportionality prong of *Nollan-Dolan* would be inapposite to a general land use regulation, they urge the court to apply the "essential nexus" test. The court notes that *Del Monte* approved a jury instruction that equates the substantially advancement test with the reasonable relationship test. If the Supreme Court wanted to apply heightened scrutiny it would not have approved the classic deferential reasonable relationship test. The court also rejects the argument that the town could have achieved its objectives in a way that would have caused less damage to plaintiff's development plans. The court finds that it

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[78] See Ziegler, note ?? *supra* for a review of the various state court approaches to what triggers the *Nollan-Dolan* hard look approach.

[79] 94 N.Y.2d 96, 699 N.Y.S.2d 721, 721 N.E.2d 971 (1999).

cannot second guess legislative zoning decisions so long as they fall within the parameters of the 5th Amendment.

[n] **Lambert v. City and County of San Francisco**[80]

The debate over regulatory takings at the Supreme Court is evident from an unusual opinion written by Justice Scalia and joined by Justices Kennedy and Thomas in the denial of the petition for certiorari in this case. As with *San Remo* this case involves the San Francisco Residential Hotel Unit Conversion and Demolition Ordinance. By ordinance, the city does not allow significant alteration, enlargement or intensification of a tourist hotel except upon the issuance of a discretionary permit. The conversion ordinance prohibits the issuance of a permit for the conversion of units from residential to tourist use unless the owner agrees to provide either a one-to-one replacement for those units or pays a portion of the replacement costs of those converted units. The Lamberts own a hotel that has 24 residential units and 34 tourist units. They seek the required discretionary permit to convert the 24 residential units to tourist use. The city appraised the replacement costs of the units at $ 600,000. The Lamberts offered $ 100,000. The Planning Commission denies the permit and plaintiffs use claiming a regulatory taking. The California Court of Appeals opinion finds no taking and does not apply *Nollan-Dolan* because the permit denial was based not on the failure to pay the $600,000 but on the general ordinance not allowing alteration or enlargement of tourist hotels. The opinion found tghat the decision was based on traditional notions of effect on traffic patterns and the surrounding neighborhood.

Justice Scalia, however, believes that the real reason behind the denial decision was the failure of the Lamberts to comply with the demand for the $ 600,000 replacement fund. He finds that the traditional concerns relating to traffic and congestion would somehow melt away if only the fee was paid, since in other cases the city has approved such conversion when the fees have been tendered. Thus Justice Scalia concludes that *Nollan-Dolan* should have been applied to the decision. Where there is a demand for money or other property, Justice Scalia would apply *Nollan-Dolan* unless the city could sustain the burden of proving that the denial would have ensued even if the demand for money had been met. That type of burden would undoubtedly be very hard to show. He finds that this is the classic type of situation that *Nollan-Dolan* were designed to invalidate. He also finds that state courts and zoning authorities are ignoring the admonitions of *Nollan-Dolan* that justifies the court to grant the writ for certiorari to reinforce the central position of the Fifth Amendment in exaction cases.

[2] Vested Rights

[a] **McPherson v. City of Manhattan Beach**[81]

In September 1990, the city approved a vesting tentative subdivision map and corresponding CUP to permit the construction of 4 beachfront condominiums on a double sized lot. In January 1991, the city amended its zoning ordinance that lowered

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[80] 57 Cal.App.4th 1172, 67 Cal.Rptr.2d 562 (1997), *opinion superseded,* 71 Cal.Rptr.2d 215, 950 P.2d 59 (1998), *review dismissed, cause remanded,* 87 Cal.Rptr.2d 412, 981 P.2d 41 (1999), cert. denied 120 S.Ct. 1549 (2000). I find it interesting that Justice Scalia would agree to hear a case where the opinion he savages has been withdrawn so that he can issue an advisory opinion to the states not to mess with *Dollan-Nolan.*

[81] 78 Cal.App.4th 1252, 93 Cal.Rptr.2d 725 (2000).

by several feet the maximum height limitation on multi-family buildings. In September 1991 the final plat was submitted and approved shortly thereafter. The plat, however, was never recorded because the developer had not paid the requisite property taxes and had not submitted some additional data. The developer did nothing until 1996 when it submitted the data and paid the delinquent taxes. It sought a CUP in 1997. Plaintiffs opposed the CUP saying it violated the 1991 amendment lowering maximum heights. The developer argued that he had a vested right to develop under the ordinances in effect when he submitted his tentative subdivision plat. The city took the position that under its ordinances any vested right expired 3 years after the developer failed to record the final approved plat. The developer argued that the city ordinance terminating vested rights was preempted by the state Subdivision Map Act that vests right at the time of the filing of the tentative map. But since the city ordinance does not deal with the time of vesting, but merely extinguishes the right upon failing to record after the final map has been approved, the court found no preemption. The court also found that the automatic termination effect of the city ordinance did not violate the state statute that requires notice and a hearing prior to the municipal determination as to a final plat. The state statute dealt with the approval/disapproval decision on the final plat. The city ordinance only dealt with the post-approval action of recording the plat. There is no state requirement that a hearing must be held where the developer failed to meet a clear condition subsequent that would terminate his vested right to develop.

§ 1.04 Land Use Controls and the First Amendment

[1] Religion Clauses

[a] **Boyajian v. Gatzunis**[82]

Defendant church initially purchased a 8.9 acre parcel of land in the Town of Belmont and conducted religious services in a small building for several years. The area is zoned for residential use. The church then sought a discretionary permit to build a much larger religious facility. Religious uses are allowed as of right in the zone, but the permit was sought in order to exceed the allowable height limit. Under state law,[83] zoning regulations may not restrict the use of land for church purposes, but may impose reasonable regulations on such a use. The town after several public hearings issued the permit. Plaintiffs are neighbors who claim that the state statute and municipal ordinance violate the Establishment Clause of the U.S. Constitution.

The court reviewed both the statute and ordinance under the three-part *Lemon* test. It was conceded that the statute did not foster excessive governmental entanglement with religion so the court focused on the first two parts, whether the statute has a secular legislative purpose and does not have as its principal or primary effect the advancing or inhibiting of religion. The claim was that giving religious organizations a preferred zoning status, by essentially exempting them from use regulation violated the Establishment Clause. While the history of the enactment of the statute reflected a legislative attempt to reverse a town's exclusion of churches and religious schools, the First Circuit concluded that the statute fits within the boundaries of "benevolent neutrality" required by the interstices of the Establishment and Free Exercise clauses. The statute's principal purpose was to prevent discrimination against religious uses. There is no implied endorsement of religion or a specific religion in a statute that tries to

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[82] 212 F.3d 1 (1st Cir. 2000).

[83] Mass.Gen.Laws ch. 40A, §3.

remove discriminatory treatment.[84] The statute was amended after its initial enactment to include uses other than religious uses. Therefore, there is no argument under the extant version that the statute's primary effect is to enhance religion. Where a state chooses to prevent its local governments from treating religious uses as non-residential in character, it is not favoring religion. While the free exercise clause would not require a state to adopt a statute like the one here, the state is free to prevent local governments from erecting barriers to communal worship. The town ordinance, that was amended in response to the enactment of the state statute, specifically authorized religious uses in residential zones. Treating the ordinance, no differently than the state statute that spawned its passage, the court found no Establishment Clause violation regarding the town's state-mandated decision to allow such uses in residential zones.

[b] **Concerned Citizens of Carderock v. Hubbard**[85]

Plaintiffs are homeowners and prospective neighbors of a synagogue that was given a building permit to construct a house of worship and support facilities on a 5 acre parcel. Under the county's zoning ordinance, churches and other places of worship are permitted uses in single-family residential zones. Other types of charitable, philanthropic or social organizations are not allowed uses in such zones. But other types of non-single family residential uses are allowed such as embassies, mobile homes, utility lines, bed and breakfast lodgings and home offices. Plaintiffs alleged that the ordinance violates the Establishment Clause by endorsing religion through its treatment of churches as a permitted, as opposed to a conditional, use.

The court applied the *Lemon* test, notwithstanding the fact that courts and commentators had announced its demise for the past 20 years. The county argued that the ordinance had a secular purpose, namely the fostering of development that is harmonious and compatible with single-family residential use. Merely because other compatible uses are excluded or subject to a conditional use permit process does not make the exemption one that has a religious purpose. The ordinance was treated as being neutral, even though it specifically named churches and houses of worship as constituting a permitted use. The exemption given churches was also given to non-religious uses providing sufficient evidence that the ordinance was neutral. In fact, the ordinance required religious organizations that operated private clubs or non-religious activities to get a conditional use permit if they wanted to locate those facilities in a single-family zone. The ordinance and the permit issued pursuant thereto, are both valid actions under the Establishment Clause.

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[84] The dissenting judge who also applied *Lemon* concluded that the statute was not merely intended to erase discriminatory local actions, but was originally designed to provide a direct benefit to religious uses. Massachusetts could have passed a statute barring local discrimination as opposed to a statute exempting them from local use regulation. This special treatment goes too far in providing benefits and not merely lifting burdens on the free exercise rights of the churchgoers. 212 F.3d at 11-12 (Toruella, J. dissenting). The Supreme Court is still struggling with the parameters of the Establishment Clause as reflected in Mitchell v. Helms, 120 S.Ct. 2530 (2000) a parochial school aid program where there was a 4 judge plurality opinion, a 2 judge concurrence and a 3 judge dissent. The plurality opinion would sweep away most Establishment Clause precedent and apply a *Smith*-type neutrality test so that if government aid is supplied to both public and parochial schools there is no constitutionality claim. The plurality disagree with that sweeping neutrality test and suggest that the court has always considered other factors in resolving Establishment Clause problems. The dissent wants a clearer test that is truer to the wall of separation concept.

[85] 84 F.Supp.2d 668 (D.Md. 2000).

[c] **Mayor and Board of Aldermen v. Hudson**[86]

A church sought to be designated as a public/quasi-public facility under the city's zoning ordinance in order to apply for what the court labeled a "conditional use variance." The church wanted to expand its facilities and parking lot. The Board voted to grant the church's request. Several neighbors participated in the Board's public hearing opposing the CUV. They brought this action challenging the Board's decision.

Under Mississippi law, the scope of judicial review of local zoning decisions is quite restricted and subject to being overturned only if arbitrary, capricious or illegal. The party challenging the decision shoulders a heavy burden of proof and the Board decision will be upheld under the classic "fairly debatable" standard. Under the city's ordinance, churches and other religious organizations can be designated as public facilities. In dealing with the church's expansion plans, the Board can consider the impact on the surrounding neighborhood and take whatever steps it deems appropriate to minimize any negative effects. The Board decision clearly met the "fairly debatable" test since the Board was weighing the various factors that go into the issuance of the CUV and the designation of a public facility. The trial court decision that had reversed the Board's decision was in error and amount to a substitution of judgment by the trial court for the Board, a result not warranted under Mississippi's limited scope of judicial review.

[d] **Bethlehem Christian Fellowship, Inc. v. Planning and Zoning Commission**[87]

Plaintiff executed a contract to purchase a parcel of land subject to the receipt of getting a discretionary permit from the town in order to construct a meetinghouse. There was a time limit placed on how long the plaintiff could take to secure the permit. Because the permit decision-making process took longer than expected, several extensions of the agreement were made. The PZC denied the permit request and plaintiff sought judicial review. The town argued that the plaintiffs lacked standing to appeal since the late for the option contract to be exercised had passed.

The court viewed the standing issue as one of aggrievement. The party claiming standing must demonstrate a specific personal and legal interest in the subject matter of the decision and must also establish that this interest has been adversely affected by the governmental decision. At the time the plaintiff filed the first appeal the purchase and sale agreement was still in effect. It was no longer in effect when the trial court decision was rendered. The court treated the agreement in this case as a purchase and sale agreement with a condition precedent, as opposed to an option contract. In cases where an option contract expires prior to judicial resolution of the zoning issue, there is no aggrievement. But where you have a purchase and sale agreement, even where there is a specified period of time for performance, that period may be extended for a reasonable time, since time is not of the essence in real estate purchase contracts. The parties to the contract treated it as being in full force and effect during the court proceedings, even though the time specified in the contract had been passed. Thus, the plaintiff still was an aggrieved party who had standing to challenge the denial of the permit by the commission.

[e] **Jesus Fellowship, Inc. v. Miami-Dade County**[88]

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[86] 2000 WL 760939 (Miss.App.).

[87] 58 Conn.App. 441, 755 A.2d 249 (2000).

The church owned a 12.2 acre tract in a residential area zoned for SFR use on a minimum one lot parcel. They sought a special exception to expand the existing religious facilities and to start a new private school and day care center. The planning staff recommended denial of the permit but the Zoning Appeals Board voted to conditionally approve the permit. Further appeal to the County Commission was made by neighbors who objected to the Board decision. The Commission voted to conditionally approve as well, but lowered the maximum number of students from 524 to 150 and limited the school to kindergarten through sixth grade. The trial court upon the Church's appeal, affirmed the Commission's conditional approval.

The court found that the trial court decision applied the wrong scope of judicial review. Where an applicant for a special exception shoulders the burden of producing evidence that the proposed use is consistent with the land use plan, the burden shifts to the county to show through substantial evidence why the permit should not be issued. In this case, the Commission's decision to further lower the enrollment figure and limit the grades offered was not supported by any competent, relevant evidence in the record. The only witnesses before the Commission either provided irrelevant testimony or lay testimony that could not be treated as expert testimony on technical subjects. Therefore, the court reversed the trial court's decision and rendered a decision that the permit was conditioned by the Board should be issued.

[f] **First Baptist Church of Perrine v. Miami-Dade County**[89]

The church operated an elementary school on its property. It sought two discretionary permits and a sign variance in order to expand the school to include a seventh and eighth grade that would also result in an increase in enrolled students from around 500 to 650. The planning staff recommended that the permits and variance be issued. At the public hearing before the County's Community Zoning Appeals Board, neighborhood opposition to the expansion project surfaced. Specific questions about the required traffic study were raised. Under Florida law, the applicant for a discretionary permit bears the initial burden of producing evidence that its proposal is consistent with the county's land use plan. Once that burden is satisfied, the burden of producing evidence is shifted to the opponents to show that the application does not either meet the performance standards or that the proposal is contrary to the public interest. In this case the Board rejected the permit application because there was no church-introduced evidence on the issue of traffic impacts. That is a requirement under the zoning ordinance.

The church also argued that the Board's decision violated the Florida Religious Freedom Restoration Act.[90] They argued that the ruling restricted the free exercise rights of its congregants and that the county had not shown a compelling state interest to support that restriction. Relying on *Lukumi Babalu Eye,* the court rejected the application of the compelling state interest test to an admittedly neutral ordinance. The

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[88] 752 So.2d 708 (Fla.App. 2000). See also Miami-Dade County v. New Life Apostolic Church of Jesus Christ, Inc., 750 So.2d 738 (Fla.App. 2000) where the appellate court reinstated the county's decision not to issue a series of variances to a church to establish a church sanctuary and day care center, after that decision had been overturned by the trial court. The appellate court found that there was substantial evidence in the record to support the variance denial decision based on such negative externalities as noise, traffic and deleterious impact on nearby residences.

[89] 2000 WL 833077 (Fla.App.)

[90] Fla.Stat. §§ 761.02-.05.

requirements of the ordinance relating to traffic impacts for discretionary permits is clearly neutral regarding religious conduct. In fact, the court noted that if the county modified its requirements for churches it might run into an Establishment Clause problem. The court also found that the Board decision did not prevent or seriously inhibit the Church's ability to provide religious education. There may be other locations that do not have the same type of traffic problem as the present location. In addition, it may try to accommodate the expansion into the higher grades by lessening the enrollment in the lower grades so as not to need a building expansion and as not to create substantial traffic impacts.

[g] **Camp Ramah in the Poconos, Inc. v. Zoning Hearing Board**[91]

The Camp is a non-profit organization that runs a summer camp devoted to providing a Jewish educational experience. They own two parcels of land adjacent to the existing camp totaling almost 30 acres. The vacant parcels are located in an agricultural district that allows recreational, religious and educational uses only by special exception. The ordinance further provides that for religious uses there must be a 150 foot setback, while for educational and recreational uses the setback requirements are expanded to 350 feet. The Camp seeks approval of its expansion plans as a religious use to take advantage of the smaller setback requirements and also seeks a variance in order to place a stormwater detention basin and septic system on the smaller of the two lots. The board denies the special exception and variance requests finding that the proposed uses are not religious in character and that the requirements for a variance had not been shown.

A key issue is whether the proposed children's camp is a religious use. It is not the owner of the use that determines the type of use. It is the proposed uses that allow for its classification as a religious or recreational use.[92] There is a need for larger buffer zones for recreational or educational uses than for religious uses. Thus the proposed plans were properly rejected since they did not comply with the 350-foot setback requirement. The court also upholds the board's decision that the proposed adult retreat facility is not an allowed use in the agricultural zoning district. The retreat is designed to accommodate 125 people, including the capability of having overnight stays. Such a use is the equivalent of a hotel or conference center and not a religious, recreational or educational use that would be allowed with a special exception. Finally, the court finds that the plaintiff has not shown sufficient hardship to justify the awarding of a variance.

[2] Free Speech Clause

[a] Adult Entertainment Facilities (AEFs)

[i] **City of Erie v. Pap's A.M.**[93]

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[91] 743 A.2d 1019 (Pa.Commw. 2000).

[92] A dissenting judge would have found that the proposed uses are religious uses since they are part of a religious program. The existence or non-existence of religious practices does not determine whether there is a religious use under the ordinance. The ordinance, if interpreted otherwise, might lead to an entanglement of the court in religious practices to make a determination as to what type of uses are allowed. 743 A.2d at 1024-25 (Smith, J. dissenting).

[93] 120 S.Ct. 1382 (2000). This is a typical fractured First Amendment decision. Seven of the justices agreed that the case was not mooted by the closing of the AEF. But only 4 justices, O'Connor, Rehnquist,

The City enacted an ordinance prohibiting public nudity, based in large part on the type of ordinance found constitutional in *Barnes*.[94] Notwithstanding the similarity between ordinances, the Pennsylvania Supreme Court had found the ordinance unconstitutional on First Amendment grounds because it unduly burdened the AEF owner's rights of free expression.[95] The plurality opinion finds that nude dancing is entitled to limited First Amendment protection. By targeting conduct, the ordinance is content-neutral and therefore the Pennsylvania court should not have applied a strict scrutiny, less onerous alternatives analysis. The plurality treated the ordinance as not a total ban on nude dancing, but merely a limit on one type of nude dancing that has as its primary objective the prevention of secondary effects. Thus the plurality applied the *O'Brien* four-par test of whether the governmental regulation is within the constitutional power of the government to enact, whether the regulation furthers an important or substantial governmental interest, whether the governmental interest is unrelated to the suppression of free speech and that the restriction goes no further than is necessary to achieve that objective. The concurring opinion would find that as a content neutral ordinance of general applicability, no First Amendment protections adhere to the conduct being proscribed. As Justice Scalia observed: "even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates."[96] The remaining justices all would have applied a higher level of scrutiny to the ordinance under the First Amendment, with Justice Stevens particularly concerned about the extension of *Renton* to non-locational decision situations. While not as fractured as *Barnes* the Supreme Court is still quite divided on the basic approach to First Amendment issues relating to nudity and/or sex. It is clear that *Renton* is alive and well insofar as it treats secondary effects as some sort of talisman against judicial interference with municipal attempts to rid themselves of AEFs. Yet it is unclear what is the appropriate First Amendment approach. It appears that the "fiction" that ordinances such as this are content-neutral will continue to be the bedrock for dealing with regulation of AEFs.[97]

[ii] **Charette v. Town of Oyster Bay**[98]

Kennedy and Breyer joined in the plurality opinion. Justices Scalia and Thomas want to apply the *Smith* rationale that the First Amendment does not apply to a general law regulating conduct and not directed at expression. Justice Souter concurred in part and dissented in part and Justices Stevens and Ginsburg dissented.

[94] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

[95] 553 Pa. 347, 719 A.2d 273 (1998). The court followed the *O'Brien* test and found the ordinance content based. It said it could not find any controlling decision in *Barnes* due to the fact that 8 opinions were filed.

[96] 120 S.Ct. at 1402.

[97] *See also* People v. Foley, 94 N.Y.2d 668, 731 N.E.2d 123, 709 N.Y.S.2d 467 (2000) where the court upheld a conviction under a statute criminalizing the dissemination of indecent material to minors against a charge that it was overbroad as applied to certain internet communications. Unlike the federal Communications Decency Act invalidated in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), the New York Penal Code punishes not the mere transmission of certain types of communication but adds several requirements including showing an intent to induce or invite activities affecting minors. The court also found that the statute was content based but because it was speech used to further the sexual exploitation of children it was not protected by the First Amendment.

[98] 94 F.Supp. 357 (E.D.N.Y. 2000), *on remand from*, 159 F.3d 749 (2nd Cir. 1998). *See also* DJL Restaurant Corp. v. City of New York, 271 A.D.2d 275, 706 N.Y.S.2d 395, *app. denied*, 95 N.Y.2d 845 (2000) where the court found that the New York City AEF ordinance was not preempted by the state alcohol law because the AEF ordinance only has an incidental effect on those holding liquor licenses.

An AEF operator sought injunctive relief against the enforcement to an AEF ordinance. The first round of litigation led to a remand for development of a sufficient record to see whether the ordinance meets the *Renton* guidelines. Under the ordinance, cabarets are allowed in two of the three business districts. The AEF in this case is located in the district where restaurants and similar businesses are allowed. The operator claimed that his AEF was a similar type business allowed in the district by receipt of a discretionary permit. The town argued that cabarets are only allowed in the two districts where they are specifically listed. The court did not apply the traditional *Renton* or *Freedman* analyses to determine whether injunctive relief was appropriate. It mainly determined that since the AEF was located in a district in which it was not allowed, there was no First Amendment violation. The Operator argued that the discretionary permit requirement for live entertainment in the district violated the First Amendment, because of the unbridled discretion given the decision-makers as to whether to issue a permit, along with the fact that there were apparently no time limits on the permit issuing process. Disregarding the fact that the Town had argued in an earlier phase of the trial that live entertainment was allowed in the district after receipt of a discretionary permit, the court interpreted the ordinance as totally prohibiting AEFs from the location owned by the operator. Therefore, the court determined that the operator had not met its burden of proof for a preliminary injunction that it was likely to win on the merits.

[iii] Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County[99]

In 1997 the county amended its AEF ordinance by not allowing AEFs in the CBD zoning district and by prohibiting the sale of alcohol on premises holding an AEF permit. The plaintiff, a preexisting AEF, sought an alcoholic beverage license and an AEF permit. The county informed the plaintiff that it could not get both permits. Under prior 11th Circuit decisions, governments can prohibit AEFs from qualifying for alcoholic beverage licenses as long as the regulation is content neutral.[100] The alcohol restriction only restricts the place or manner of nude dancing without focusing on the content of the message contained therein. Likewise, the court relies on *Erie* and its findings that bans on public nudity are content neutral. The ordinance contained a lengthy preamble evincing the county's intent to deal with the secondary effects of AEFs and the sale of alcoholic beverages.

The court then applies the four-part *O'Brien* test without much scrutiny. It rubber stamps the county's decision to prohibit the combination of nude dancing and the sale of alcohol as going no further than is necessary to achieve the important governmental objective of preventing the secondary effects of AEFs. The court also found that there was no evidence that the ordinance was enacted with the purpose of discouraging nude dancing or hindering the communicative effects of nude dancing. The county commissioners must have been very restrained in their discussions regarding the enactment of the ordinance or were "wood-shedded" by the county attorney to minimize any invective against the evils of nude dancing. Finally, the court has no difficulty upholding the county decision to eliminate AEFs from the CDB zone. Applying the

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[99] 2000 WL 966706 (11th Cir.).

[100] See Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, *reh'g denied,* 156 F.3d 188 (11th Cir.), *cert. denied,* 120 S.Ct. 1553, (2000).

Renton standard there were apparently other zoning districts where AEFs were allowed and thus the ordinance was upheld

[iv] **David Vincent, Inc. v. Broward County**[101]

.In 1993, the county adopted an AEF ordinance that imposed permit, building and siting requirements on AEFs. Plaintiffs represent several adult bookstores and live dancing establishments that were affected by the ordinance. Plaintiffs initially sought a preliminary injunction through the state court system, but that relief was denied. They then filed this federal action claiming that the ordinance was both unconstitutional per se and unconstitutional as applied.[102] On the per se unconstitutional claim, the plaintiffs were faced with a prior 11th Circuit decision upholding an earlier version of the AEF ordinance.[103] Two changes had been made to the ordinance, the first removing a waiver provision whereby AEFs could locate in zoning districts even if they were not an allowed use if community approval was given. The second gave non-conforming AEFs five years to amortize their business before being required to shut down while the prior ordinance did not have an amortization provision. The court found that neither change had an impact on the constitutionality per se of the ordinance.

On the as applied argument, the court applied the *Renton* analysis to determine whether the ordinance allows for reasonable alternative avenues of communication. The plaintiffs challenged the district court's finding regarding the number of available sites and whether those sites met the test. The 11th Circuit noted the somewhat different approaches of the 5th and 9th Circuits to the issue of what is an available site. The Fifth Circuit focuses almost exclusively on physical obstacles and largely ignores economic factors.[104] The 9th Circuit, on the other hand, applies a multi-factor test that does include the consideration of economic factors.[105] The court declined to follow either approach but instead adopted its own multi-factor test that is much closer to the 5th Circuit's approach. The court observed:

> First, the economic feasibility of relocating to a site is not a First Amendment concern. Second, the fact that some development is required before a site can accommodate an adult business does not mean that the land is per se, unavailable. . . Third, the First Amendment is not concerned with restraints that are not imposed by the government itself or the physical characteristics of the sites designated for adult use . . . It is of no import under Renton that the real estate market may be tight and sites currently unavailable

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[101] 200 F.3d 1325 (11th Cir. 2000).

[102] The court found that neither the issue or claim preclusion or Rooker-Feldman doctrines prevented the federal district court from determining the issue of whether the ordinance was unconstitutional per se or as applied. 200 F.3d at 1331-32. A state court denial of a request for a preliminary injunction is not a final or conclusive judgment on the merits of the constitutional claims and therefore cannot bar the district court's review on the merits.

[103] International Eateries of America v. Broward County, 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992).

[104] Woodall v. City of El Paso, 49 F.3d 1120, *reh'g denied*, 59 F.3d 1244 (5th Cir.), *cert. denied*, 516 U.S. 988 (1995). Other circuits that follow this approach include the Eighth, Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) and the Fourth, D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1991).

[105] Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

for sale or lease, or that property owners may be reluctant to sell to an adult venue.[106]

While there was evidence produced at the district court that showed obstacles to obtaining a site for an AEF in the allowed zones, none of the obstacles were government-imposed or government-caused. Thus, the district court's finding that there were between seven and nine available sites would not be disturbed. In determining whether those available sites were sufficient the court went back to the "equal footing" doctrine. Relevant factors include the population of the area, acreage available for AEFs as a percentage of overall size, number of existing AEFs and demand for AEFs as represented by the number of businesses seeking AEF permits. While criticizing the district court for not being thorough in its analysis of the sites, the court did not reverse the finding that the ordinance was constitutional as applied. One factor influencing the court's decision was that the county's total acreage still not annexed into a municipal corporation was shrinking so that the small number of sites would be tolerated even though the county's population was substantial.

[v] **Young v. City of Simi Valley**[107]

The City is an exurban community in the Los Angeles metropolitan area that has a population of around 100,000. Prior to this litigation there had been no AEFs within the city. An AEF ordinance adopted in 1978 was found unconstitutional several years later. In 1992, plaintiff sought a zoning permit for an AEF. After filing the permit the city adopted an emergency ordinance placing a moratorium on all AEFs within the city. In March 199e, the City adopted an AEF ordinance that utilized a classic scatter-site approach. In addition, no AEF could operate without getting a discretionary permit. At that time the ordinance would allow AEFs on about .5 percent of the total land area of the City, but when you included the buffer zones at most only 4 sites were available. Plaintiff's site was not an available site. Plaintiff sought to lease another site and inquired of the City as to its meeting of the AEF ordinance's requirements. He was informed the second site was an allowed site so he entered into a lease of that site. The city then told the plaintiff that no permit would issue until he provided additional information including noise mitigation and traffic studies. None of the additional information was contained in the original discretionary permit requirements. Eventually the permit was denied, in part because the City had in the interim given permission for a bible study group to use a vacant lot within 1000 feet of the plaintiff's lot for a once a week outdoor bible study program. Under the AEF ordinance the existence of a "sensitive use" as defined by the ordinance, either before or after the AEF is permitted will cause the AEF to violate the ordinance.

The court found that the ordinance is unconstitutional per se in large part due to the existence of the "sensitive use" veto power. The court applied the *Renton* test, specifically the reasonable alternative avenues of communication doctrine. Plaintiff argued that because any person may seek a zoning permit to open a "sensitive sue" within the designated buffer zone while an AEF permit is pending, the ordinance impermissibly chills First Amendment rights and denies to AEF operators alternative avenues of communication. By interpreting the ordinance to require no sensitive uses be in existence at the time the application is approved and not the time the application is filed, the city had made it difficult, if not impossible for an AEF to get a permit. The court noted that it is unconstitutional "for a local government to impose a procedural

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[106] 200 F.3d at 1334-35.

[107] 216 F.3d 807 (9th Cir. 2000).

requirement that delegates to certain favored private parties the unfettered power to veto, at any time prior to governmental approval and without any standards or reasons, another's right to engage in constitutionally protected freedom of expression."[108] Combining the sensitive use veto with only 4 available sites in a community of 100,000 violated the *Renton* test.[109]

The court further explored the delegation of veto power to private individuals or groups. The ordinance was drafted to avoid the *Freedman* problems by having a reasonable time period in which the decision to issue the permit is to be completed and for having prompt judicial review. But the court noted that the sensitive veto provisions, while not acting as a prior restraint, do act as a restraint that may lead to a total prohibition of AEFs from the community. Obviously, the city cannot delegate to private parties, powers it could not exercise itself. As with *Larkin v. Grendel's Den, Inc.*,[110] a standardless delegation of powers to private institutions is unconstitutional, even without the infringement of First Amendment rights.

The court reversed the district court's finding that the buffer zone requirements were unconstitutional as applied because there were only 4 available sites. While that number is quite low for a community of 100,000 the court felt it premature to find the ordinance unconstitutional since there did not appear to be a substantial demand for AEFs in the community. No AEFs were present in the community at the time the plaintiff applied for his permit. The court recognized that the absence of AEFs could have been caused by the chilling effect of the ordinance. Nonetheless the court found that in looking at the totality of the circumstances on the record before it that 4 sites was clearly unconstitutional.

[vi] **Lim v. City of Long Beach**[111]

This case illustrates how a court within the jurisdiction of the 9th Circuit determines whether there are "reasonable alternative avenues of communication" available under the *Renton* test. In 1994, the city amended its AEF ordinance by expanding the buffer zone requirements, prohibiting AEFs from certain zones where they were previously allowed and by establishing an 18 month amortization period for non-conforming AEFs. Plaintiff owned two existing AEF's that violate the 300 foot buffer provision for residential districts. The city identified 115 sites it contended were available for use within the city. The district court found that 27-28 sites were available and that was sufficient to meet *Renton*. The district court further found that there was no equal protection violation by the disparate treatment of non-conforming AEF uses.

The court initially noted that the burden of producing evidence and the burden of persuasion on the alternative avenues issue is clearly on the city.[112] It applied the *Topanga Press* multi-factor formula to determine the number of sites that are reasonable available. As noted earlier, this approach allows for the consideration of economic factors in order to show that the sites are part of an "actual business real estate market."

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[108] 216 F.3d at 817.

[109] A dissenting judge argued that the sensitive veto issue was hypothetical only and that plaintiff lacked standing to challenge it. As the majority noted, the city issued a sensitive use permit to a bible study group at the same time it denied the plaintiff's permit because of the existence of that sensitive use. 216 F.3d at 823.

[110] 459 U.S. 116 (1982).

[111] 217 F.3d 1050, *as amended*, 2000 WL 1191043 (9th Cir.).

[112] *See also* J & B Entertainment, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998) analyzed at Kramer I, note 1 *supra* at § 1.04[a][2][vii]; Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir.)(en banc), *cert. denied*, 522 U.S. 932 (1997) analyzed at Kramer II, note 1 *supra* at § 1.04[2][a][iv].

The issue in this case was the consideration of sites containing restrictive covenants prohibiting the leasing of the premises for AEF purposes. But the court found that private covenants do not make the sites unavailable applying an equal footing approach. After all private owners may restrict the use of the parcels whether it be for AEF or any other use. In order to satisfy its burden of proof the City must present sufficient evidence that the sites it put forward meet the definition of actual business real estate market. There is a good faith standard imposed on the city to present its evidence in a way that the court may judge whether the site is or will become available. Since the trial court had placed the burden of proof on the plaintiff and did not allow the plaintiff to sufficiently present evidence that some of the site were not legally available, the court remanded the case. Finally, the court found that having an amortization period requirement for AEF non-conforming uses while not having such a period for other NCUs did not violate the equal protection clause. There was a rational basis for the city to treat AEFs differently from other uses because of their secondary effects.

[vii] **Alameda Books, Inc. v. City of Los Angeles**[113]

It has been rare since *Renton* was decided to challenge a city's AEF ordinance on the basis that there was insufficient proof of the secondary effects of AEFs. In this case, however, the plaintiffs were able to persuade the 9th Circuit that the amendment to the AEF ordinance was not narrowly tailored to serve a significant governmental interest.[114] The city amended its existing AEF ordinance to segregate different types of AEF operations so that a single AEF structure could not, under the minimum distance requirements, have both video booths and adult books. The city relied on its original AEF study of secondary effects to support the new regulation. After noting that courts are to be deferential to legislative determinations regarding such matters as secondary effects, the court nonetheless concluded that the entire thrust of the earlier study deals with the segregation of AEFs from other types of uses, not the segregation of AEF uses within a single facility. The court found no evidence in the earlier study that a combination bookstore/arcade/video booth operation produced any of the harmful effects of an AEF. Even though *Renton* specifically authorized cities to rely on studies performed by others, the court found that the city had not met its burden of proof to show that the studies were relevant to the problems being addressed by the multiple use regulation.[115] Having not proven that there was a substantial governmental interest to be served by prohibiting multiple uses within a single AEF structure, the city could not enforce such a prohibition.

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[113] 222 F.3d 719 (9th Cir. 2000).

[114] The court noted the differences in approaches taken by the 9th Circuit to applying *Renton* that had been established in Colaruccio v. City of Kent, 163 F.3d 545 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1553 (2000) and Tollis v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987). In Tollis the three step test involved: 1. determining that the ordinance was a time, place and manner regulation, 2. determining that it was content neutral or content based and then, if content neutral, 3. does it serve a substantial government interest and not unreasonably limit alternative avenues of communication. Colacurcio, on the other hand, presumes that the ordinance is a time, place and manner regulation and then asks, 1 is it content neutral, and if so, 2. is it narrowly tailored to serve a significant governmental interest, and 3. does it leave open ample alternative avenues of communication. 222 F.3d at 722-23.

[115] Several of the other circuits appear to have a more lenient interpretation what a city can rely on. ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir.), *cert. denied*, 513 U.S. 1017 (1994); Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123 (3rd Cir. 1993); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 120 S.Ct. 1965 (2000).

[viii] **Diamond v. City of Taft**[116]

While the Ninth Circuit allows for economic factors to be considered in determining the number of reasonably available sites, it still is not easy to show that an AEF ordinance violates the reasonable alternative avenues of communication test. In this case, the owner of a lot located in a commercial zone that under the AEF ordinance allows an AEF sought a discretionary permit. The parcel, however, violated the distance requirements of the ordinance and the permit was denied. The owner then argued that there were insufficient available sites in the city under the *Renton* test. The city is a rural town with a population of around 6800. The city identified some 20 potential sites. But because several of the sites were contiguous, the district court concluded that only 3 sites were available. The city had no existing AEFs and the plaintiff was the first person to have sought an AEF permit. Applying the same analysis as *Lim* the court examined whether the 3 sites were part of the actual business real estate market. Plaintiff argued that the sites lacked the requisite infrastructure for a commercial establishment and that many of the sites were currently occupied. While infrastructure shortcomings might take a site out of the actual marketplace, in this case the plaintiff did not prove that any general commercial enterprise wanting to locate on those sites would need sidewalks and streetlights. The fact that the some of the sites were currently occupied did not remove them from the real estate market. The city made a good faith effort to identify appropriate sites including providing detailed information on each site. That was sufficient to make the 3 sites reasonably available.

As to whether the three sites identified fulfill the city's obligation under *Renton* is a separate question requiring the court to weigh several factors including the ratio of available land to total land, the number of existing AEFs and the demand for AEFs. With 3 available sites and only one applicant for an AEF permit, the court concluded that three was sufficient. In addition, in comparing the demand for sites and the number of available sites, one can expand the number of available sites to all sites since the plaintiff can choose from any one site that would then prevent other AEFs from opening. Another consideration in determining whether the number of sites is reasonable is whether existing AEFs will be able to relocate. In this case there was no relocation problem and therefore no need to expand the number of available sites to meet the relocation and new demand needs.

[ix] **D.H.L. Associates, Inc. v. O'Gorman**[117]

In 1987, the town adopted an AEF ordinance limiting AEFs to a zoning district that never existed. In 1992, DHL sought an alcoholic beverage license and a live entertainment license. The permits were issued. In 1994, DHL wanted to present nude dancing. After several town meetings where substantial local opposition was voiced, the town amended its zoning ordinance to allow AEFs on two parcels of land, neither of which was owned by DHL. DHL presented nude dancing for two years claiming it could do so under its existing permits. It also sued the town seeking to invalidate the ordinance. After the suit was filed, but before it was heard, the town amended its ordinance to increase the size of the AEF zone from 2 parcels to some 10.4 acres. The district court only reviewed the amended ordinance and found that it met the *Renton* requirements.

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[116] 215 F.3d 1052 (9th Cir. 2000), *as amended on denial of rehearing*, 2000 WL 1022716.
[117] 199 F.3d 50 (1st Cir. 1999).

Because DHL was allowed to continue nude dancing an argument was made that the case was not ripe for review. The town, however, claimed that as soon as the litigation was final it would seek to enjoin further nude dancing. That threat of injury was sufficient to make the case ripe for review. Likewise, the court did not deal with the constitutionality of the earlier AEF ordinances because the issues were moot. DHL had not suffered any injury or damages from those now-repealed ordinances since it had been allowed to operate as a nude dancing facility. Thus, the court only looked at the most recent AEF ordinance that greatly expanded the area where AEFs could locate.

The town's AEF ordinance requires an applicant to seek a discretionary permit. Since the plaintiff had not sought a permit the issue of prior restraint was not before the court. Yet the court, in dicta, clearly indicated that such a permit requirement was a prior restraint, subject to the *Freedman-FW/PBS* limitations. There was a claim that the ordinance was adopted without any reference to the secondary effects of AEFs. The timing of the ordinance might show that the town was interested in prohibiting nude dancing, not minimizing the secondary effects. The court, however, believed that the evidence proffered by town officials showed an interest in preventing or minimizing the secondary effects of AEFs. Under a minimal scrutiny of the district court's finding, the appellate court would not reverse.

In reviewing the reasonable alternative avenues of communication requirement the court was faced with an allegation that the allowed district only encompassed less than 1% of the total land area of the town. While that small a percentage of available land is a factor, it is not determinative. Instead, the court applied the multi-factor analysis used in the other circuits. One important factor that the court weighed was the rural nature of the town and the fact that most of the town's area was unsuitable and not desired for commercial use. There was evidence that 5 lots were available within the allowed zone and that was sufficient. The court also noted that testimony from the owner of the 5 lots showed that the lots were on the market to be sold, if the price was right. Under the equal footing approach, the claim by DHL that the owner was charging too high a price was irrelevant. In addition, the lots had the necessary infrastructure to support a commercial use. Thus, the ordinance was upheld, albeit with the caveat that the discretionary permit requirement would have to provide for a quick decision and an equally short period of time for judicial review.

[x] **Ward v. County of Orange**[118]

Plaintiff operated a "swimsuit club" where the activities were alleged to be either lewd dancing or social dancing depending on whether you read the affidavits of the owner or the county. Plaintiff had never sought an AEF permit from the county since he believed he did not meet the definition of an AEF as specified in the county zoning ordinance. Plaintiff sought to have the AEF ordinance declared unconstitutional per se and as applied. The county, for its part, had never sought to close down the plaintiff's operations or bring an enforcement action under its zoning ordinance.

The court found the ordinance constitutional on its face under *Renton*. The ordinance is a clear time, place and manner, content-neutral effort designed to rid the county of the secondary effects of AEFs. Plaintiff also argued that the ordinance shifts to the AEF operator the burden of proof on the issue of whether the predominant business or attraction of the establishment is not intended to provide sexual stimulation or gratification. One of the *Freedman* safeguards for prior restraints is that the burden of proof must be on the state to show that the film or publication is not protected by the

[118] 217 F.3d 1350 (11th Cir. 2000).

First Amendment. As interpreted by *FW/PBS,* however, some of the procedural safeguards only apply to film censorship regulations, not general business licensing decisions. The Eleventh Circuit, for example, has interpreted *Freedman* to only require access to speedy judicial review in licensing cases as opposed to requiring access to a speedy judicial decision.[119] Continuing that distinction, the 11th Circuit finds that the shifting of the burden of proof to the license applicant to show that the proposed business operation is not an AEF under the ordinance did not violate *Freedman*.[120] Having stripped away two of the three *Freedman* procedural safeguards, I would not be surprised if *Freedman* itself is ignored or overruled insofar as the licensing schemes for AEFs are concerned. [121] The as-applied constitutional claims are remanded for a determination as to whether they are ripe for review, given the fact that the City has not sought to shut the plaintiff down, nor apply the AEF ordinance to it. The 11th Circuit wanted the district court to determine if there was a county procedure allowing the plaintiff to seek a determination that no AEF permit should be sought. If no such procedure existed, the as applied attack would not be ripe for judicial review.

[xi] **Nightclub Management, Ltd. v. City of Cannon Falls**[122]

In another *Freedman* type case, plaintiff sought to invalidate various portions of the city's AEF licensing ordinance. The AEF had been a pre-existing use outside of the city's territorial limits at the time the city sought to annex the area where it was located. Prior to annexation, the city engaged in various studies showing the negative secondary effects of AEFs. At that time there were no AEFs within the city. Simultaneous with the enactment of the AEF ordinance, the city adopted a public nudity ordinance making the showing of human genitals or buttocks illegal, except as part of any theatrical production performed in a theater. The licensing provisions require the AEF operator to submit an application to the city that has 30 days to review the application. A denial decision may be appealed to the city council within 10 days of that denial and the decision is stayed pending the city council's disposition of the appeal.

Plaintiff alleged that the AEF ordinance was content-based since it was based in part on a study conducted by a private organization that allegedly was devoted to the suppression of sexually explicit speech and conduct. Citing *Erie* the court found that the motive of the city council in enacting the AEF ordinance is irrelevant to the constitutional question.[123] Thus the AEF ordinance is a content-neutral time, place and manner regulation.

The plaintiff then argued that the ordinance acted as a prior restraint due to the discretionary decision-making power of the city official and the lack of prompt judicial review under *Freedman*. As to the first prong of *Freedman,* namely the decision-making process must be of a specified brief duration, plaintiff argued that because there was no time limit on how long the city council could deliberate on an appeal, the ordinance

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[119] See Boss Capital, Inc. v. Casselberry, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000) analyzed at Kramer I, note 1 *supra* at § 1.04[1][a][x].

[120] Two other decisions have reached the same result. Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634 (4th Cir. 1999) analyzed at Kramer I, note 1 *supra* at § 1.04[1][a][viii]; Florida Video Xpress, Inc. v. Orange County, 983 F.Supp. 1091 (M.D.Fla. 1997).

[121] The court also quickly dismissed the argument that the AEF ordinance was unconstitutionally overbroad because of the use of the terms sexual gratification and sexual stimulation. 217 F.3d at 1355.

[122] 95 F.Supp.2d 1027 (D.Minn.).

[123] The court distinguished a free exercise case, Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) where the Supreme Court clearly did not at the intent of the city in enacting the ordinance prohibiting animal cruelty.

violated *Freedman*. But the ordinance is valid under *Freedman* because of the stay provision. While the ordinance is unclear as to whether a new AEF operator can open its business after its application for an initial permit is denied, the court found that the stay provision would necessarily allow the operator to open. Thus, the only period of time where there is a prior restraint is the 30 day period given the city official to render the initial decision. That is a sufficiently short and specific period to satisfy *Freedman*.

The court acknowledged the split in the federal courts regarding the issue of whether judicial access or judicial resolution is required under the second prong of *Freedman*.[124] Agreeing with the 4th, 6th and 9th Circuits, and disagreeing with the 5th, 7th and 11th Circuits, the court found that access to a judicial forum is a worthless safeguard. The court criticized those circuits that have found access sufficient as based on an inference from Justice O'Connor's holding in *FW/PBS,* that is unwarranted because of the Supreme Court's continued reliance on *Freedman*. Under the AEF ordinance, the denial decision is stayed only until the city council renders a decision. After that, judicial appeals are governed by general statutes that at a minimum require at least 8 months after the filing of a petition for a writ of certiorari before a judicial decision will be rendered. That is too long under *Freedman*. While the ordinance contained a severability provision, the court invalidated all parts of the ordinance dealing with the licensing scheme since they were all tainted by the lack of prompt judicial decision making. Other portions of the AEF ordinance were upheld.

Relying largely on *Erie* the court found that the separately enacted public nudity ordinance was constitutional. It found that the ordinance was not overbroad, in large part because of the exception provided for nudity in certain types of theatrical productions.[125] The court reviewed the impact of *Erie* on *Barnes* but found that since neither decision was accompanied by a majority opinion, the Souter concurring opinion in *Barnes* would continue to serve as the rationale for reviewing public nudity ordinances. Thus the court applied the *O'Brien* test to this ordinance and found that it met all of the requirements including the fact that the requirement that pasties or G-strings be used was a minimal restriction on speech designed to achieve an important governmental interest. As such the public nudity ordinance was upheld.

[xii] **T Backs Club, Inc. v. Seaton**[126]

Plaintiff operated an AEF that had a liquor and city business license. The AEF offered erotic, but not totally nude, dancing. Plaintiff then built a wall within the building and sought a separate business license. That part of the operation did not serve alcoholic beverages. It did, however, provide totally nude dancing. Eventually the City revoked the restaurant and business permit it had issued for the new business. Plaintiff then filed this action seeking a preliminary injunction barring the city for revoking its licenses for the new operation and facially challenging various state statutes imposing licensing requirements on AEFs.

The court, at this stage of the litigation, found that plaintiff had not established standing to challenge the validity of the licensing provisions that seem to raise *Freedman* questions. Even though the city did not raise the standing issue, the court on its own motion determined that plaintiffs alleged injury was caused by the application of the state

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[124] See cases cited in note ?? *supra*.

[125] See also Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998).

[126] T Backs Club, Inc. v. Seaton, 84 F.Supp.2d 1317 (M.D.Ala. 2000).

licensing provisions. The court in dicta did find that the statutory spacing requirement of 1000 feet from various types of uses was not facially invalid.[127]

As to the invalidity of the city ordinance, the court faced an ordinance dealing with revocation of city licenses that was not specifically targeted at AEFs. Plaintiff argued that the ordinance violated the *Freedman* requirement of providing prompt access to judicial relief from an adverse licensing decision. But the court found that the license revocation decision had nothing to do with any asserted First Amendment right of the plaintiff. It was clear that plaintiff was operating without one of the required permits since it was serving food. The city's revocation decision on the other permits were based on the fact that plaintiff had not received the public health permit. Without further evidence that the decision was made to suppress the free speech rights of the plaintiff, the court held that plaintiff had not shown a substantial likelihood of winning on the merits and therefore denied the preliminary injunction.

[xiii] **Nightclubs, Inc. v. City of Paducah**[128]

Plaintiff has operated an AEF at the same location since 1987. In 1998, the city enacted an AEF ordinance. The ordinance imposed a licensing requirement on AEFs as well as licensing requirements on employees that required employee fingerprints, social security numbers, disclosure of various offenses within 3 years of the date of application and a description of the type of activity that the employee will be undertaking. The ordinance required the city to approve or deny the license application within 10 business days after receipt. A speedy review procedure was provided so that the legislative body would have to render a decision within 15 days of it receiving the appeal. The ordinance also provided that there is a right to seek prompt judicial review of the city's decision and hortatorily required the court to promptly review the petition.

Plaintiff filed this action claiming that the ordinance violated the required *Freedman* safeguards. The court followed the general rule that prior restraints are presumptively invalid and the city has a heavy burden to overcome that presumption. While the ordinance does have a 10 day period of time in which the city is to approve or reject the permit, the ordinance also requires the AEF to pass a number of city inspections. There are no time limits on when these inspections are to take place. The ordinance does not require the city to issue the permit if the inspections are not completed within the 10 day period. There are also mandatory conditions that appear to require actions before the application can be filed. Again, there are no limits on when these conditions requiring city actions or approvals will take place. There is also no stay provision in the ordinance so that the status quo will not be preserved pending the outcome of the decision. Thus the first prong of *Freedman* was found to be violated by the ordinance.

The court went on to find that notwithstanding the hortatory statements regarding judicial review, state statutes do not provide for expedited review of city decisions affecting AEF licenses. There is no requirement that the city provide the required transcripts for review of administrative decisions. In addition, the 6th Circuit requires not only prompt judicial access, but prompt judicial adjudication of these cases. Again there is nothing in Kentucky law that would require a judge to move quickly in reviewing this type of case. The judge agreed with the reasoning of the court in *Nightclub Management* that prompt access to judicial review is a meaningless right, Citing the famous umpire Bill Klem, "It ain't nothin' till I call it," until a judicial officer renders a

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[127] See also Ranch House v. Amerson, 22 F.Supp.2d 1296 (N.D.Ala. 1998)

[128] Nightclubs, Inc. v. City of Paducah, 202 F.3d 884 (6th Cir. 2000).

decision the problem of prior restraints remain unsolved. Thus, the court found the ordinance violated the second prong of the *Freedman* test.

[xiv] **People v. Studio 20, Inc.**[129]

Under Illinois state law as applicable to counties, no AEF can be located within 1000 feet of the property boundary of a place of religious worship.[130] The issue in this case is how the distance is to be measured. The AEF was to be located on leased land that was part of a larger parcel, labeled by the court as the facility parcel. The closet distance between the boundary line of the church parcel and the boundary line of the facility parcel was 955.13 feet. There was a dispute as to whether the lease merely covered the building, that was not located within 1000 feet of the church, or the entire facility parcel. Under the terms of the lease, the leased premises were defined as the building. Yet it was expected that patrons of the AEF would have to park somewhere on the facility parcel in order to have access to the building. In interpreting the statute, the court noted that its primary purpose is to prevent AEFs from locating close to churches. Having a certain rule, namely that measurement is to take place from property line boundary to property line boundary will achieve that objective better than an ambiguous rule of facility to facility or facility to property line. The property line to property line rule maximizes the protection afforded religious facilities. A dissenting justice asserted that the statute was designed to keep offending AEFs a minimum distance from churches. Therefore, one has to look at the facility, not the property line of the premises where the facility is located in order to carry out the intent of the legislature.

[xv] **McKillop v. Onslow County**[131]

In prior litigation, the County's AEF ordinance had been upheld against a First Amendment challenge. McKillop continued to operate her AEF in violation of the ordinance and a court order. In this case the county moved for an order to show cause why the owner should not be held in civil contempt for failing to comply with the prior court order. The AEF operator had shut down her business in response to the court order, but then opened up another facility adjacent to the site of the original AEF. An undercover law enforcement official testified that defendant's activities were in clear violation of the county's AEF ordinance. The trial court held plaintiff in contempt for her willful failure to comply with the prior court order. The court found that intent is required to support a contempt citation, but that the evidence clearly showed that the owner had the requisite intent to flout the court's prior order. The fact that McKillop asserted her 5th Amendment rights in the hearing does not prevent the court from inferring her guilt in a civil proceeding.

[xvi] **City of New York v. "The Black Garter"**[132]

Under New York City's AEF ordinance, AEFs are not allowed in certain manufacturing districts where residences are allowed as of right as with a discretionary permit. The AEF owner had operated the business in such a manufacturing district for over 25 years. The city sought to shut down the AEF under its nuisance abatement law,

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[129] 314 Ill.App.3d 1000, 248 Ill.Dec. 4, 733 N.E.2d 451 (2000).
[130] 55 ILCS 5/5-1097.5.
[131] 532 S.E.2d 594 (N.C.App. 2000).
[132] 709 N.Y.S.2d 110 (App.Div. 2000).

since it was allegedly operating in a district where it was not authorized to be. Applying the hoary canon of construction that zoning ordinances are to be narrowly construed against the municipality, the court interpreted the ordinance in favor of the property owner. While the zoning ordinance allowed residential uses in the manufacturing district applicable to where the AEF is located, under the terms of the ordinance, residential uses are only allowed where they would have no adverse impact on existing commercial or manufacturing uses. If the city allowed residential uses, it would have an obvious adverse impact on the AEF that has operated on the same site for 25 years. Since residential uses could not be approved there is no violation of the ordinance and therefore no right to claim that a nuisance existed by virtue of such a violation.

[xvii] **Harkins v. Greenville County**[133]

In 1995, the county enacted an AEF ordinance limiting AEFs to certain zoning districts and imposing a permit requirement on their operation. Plaintiffs alleged that there were only 4-5 sites within the county for AEFs to locate. The county's evidence showed that there were 14 sites. The permit decision had to be made within 30 days of the application unless one of seven listed conditions existed. There was nothing in the ordinance dealing with the issue of judicial review. Plaintiffs operate several AEFs, none of which are located in an appropriate zone. They were sent a notice of violation from the county and told to remove their businesses from their present locations within one year. After the year amortization period passed, the plaintiffs challenged the constitutionality of the ordinance as applied to them.

The court agreed with the plaintiffs' argument that the permit or licensing scheme imposed a system of prior restraints. Relying of *FW/PBS* rather than *Freedman*, the court analyzed the dual requirements of having the permit decision rendered within a specified and reasonable time period during which the status quo was maintained and providing for the possibility of prompt judicial review. The court found that the initial decision by the county official had to be made within a 30 day period and that was sufficient. In order to seek judicial review of such decisions, however, South Carolina law required the applicant to exhaust all of her administrative remedies. The record did not contain how such decisions were to be administratively appealed and whether those appellate decisions were similarly time-constrained. The plaintiffs, however, bore the burden of proof on this issue and since it was their failure to include all of the ordinances in the record, the court found in favor of the county on this issue.

The court analyzed the split in the circuits regarding whether the prompt access to judicial review meant merely access or resolution. The court agreed with the Fourth, Sixth and Ninth Circuits that only requiring prompt access makes this safeguard meaningless. Judicial review is not the filing of the lawsuit, but its resolution. Because there is no guarantee that a judicial hearing will be held within any prescribed period of time, much less that a decision will be rendered within any period of time, the court invalidated the licensing provisions of the ordinance.

The court found that there were reasonable alternative avenues of communication left open for AEFs after it made a saving interpretation of the ordinance. The ordinance prohibited the location of an AEF outside of the designated S-1 district. That was the basis for the plaintiffs' claim that there were only 4-5 sites. The court,

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[133] 2000 WL 760716 (S.C.). The South Carolina Supreme Court has not exactly been a friend or supporter of AEFs. Last year in Restaurant Row Associates v. Horry County, 335 S.C. 209, 516 S.E.2d 442, *cert. denied*, 120 S.Ct. 528 (1999), the court upheld an AEF ordinance both on First Amendment grounds and on state law grounds relating to the variance denial decision that was made by the county.

however, interpreted the provision as not excluding AEFs from the unzoned areas of the county. That supported the trial court's factual finding that there were 9 available sites for the 6 existing AEFs. Under *Renton*, that was a sufficient number. The court warned counties when they adopt AEF ordinances that they need to tailor their ordinances to their individual needs.

[xviii] **P.M. Realty & Investments, Inc. v. City of Tampa**[134]

P.M. began operating an AEF that served alcoholic beverages in a section of the city where nightclubs and other drinking establishments were commonplace. They never sought a special use permit required to open and operate an AEF. The city sought a temporary injunction seeking to shut down the AEF. The district court granted the injunction. Where the city alleged that the zoning ordinance has been violated, the court may presume that irreparable harm has occurred. The court held that under the city ordinance, P.M. was required to get the type of special use permit applicable to uses that could have adverse effects on adjacent properties without the inclusion of specialized conditions. P.M. also argued that the ordinance failed to have the *Freedman* safeguard of prompt administrative and judicial review of the permit decision. Under the terms of the ordinance the city must review the SUP application within a 30 day period. A subsequent appeal to the city council must be decided within 45 days. Judicial review would be governed by the state statutes dealing with review of municipal zoning decisions. This court accepted the view of *Freedman* where access to judicial review is sufficient to satisfy the First Amendment. The court has no problem finding that the zoning restrictions on AEFs are consistent with the *Renton* standards. The trial court apparently made on-site visits to the list of available sites to see that they were truly acceptable under *Renton*. The fact that other bars and nightclubs in the area did not have to get a SUP would not support an equal protection claim. Finally, the court found no regulatory taking because some 38 other uses of the parcel were allowed by the zoning ordinance.

[xix] **Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County**[135]

In November 1997, the county amended its AEF ordinance prohibiting the issuance of an AEF license if the AEF is operating in a designated Central Business District (CBD). The ordinance also prohibited the holder of an AEF licenses from serving or selling alcoholic beverages on the premises. Plaintiffs were all AEF operators who sought AEF and/or liquor sales licenses from the county. The permits were denied and plaintiffs challenged the validity of the 1997 amendments.

The plaintiff argued that the prohibition against the sale of alcohol at an AEF is the regulation of protected expression, thereby requiring the court to apply heightened scrutiny. The court disagreed, however, finding that the appropriate level of scrutiny for this content-neutral ordinance is the intermediate level *O'Brien* test.[136] The mixture of alcohol and nude dancing involve independent elements of expression and conduct. The court cited the *Erie* case as supporting its conclusion that the *O'Brien* test should bed applied. The court easily found that the challenged regulation furthered a legitimate

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[134] 2000 WL 1206347 (Fla.App.).

[135] 217 F.3d 1360 (11th Cir. 2000).

[136] This same issue had split a panel of the court with the majority finding O'Brien applicable. Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 120 S.Ct. 1553 (2000).

governmental interest. The minutes of the public hearing and the preamble to the ordinance showed that the county was concerned with the secondary effects of AEFs that serve alcohol. The court found that the regulation was unrelated to the suppression of free expression and went no further than was necessary to achieve the objective of minimizing the secondary effects. The court also found that the prohibition against AEFs in the CBD was supported by *Renton*, since AEFs were still allowed in several other locations outside the CBD.

[xx] **Bugsy's, Inc. v. City of Myrtle Beach**[137]

Plaintiff operated a sports bar and restaurant that also contained a separate video poker room. Under the city's zoning ordinance video poker machines were allowed as a principal use in seven zoning districts. In a number of other districts, including the one where plaintiff's business is located, they are allowed only as accessory uses. Plaintiff admitted that 95% of its gross sales per month came from the video poker machines. The zoning ordinance defined an accessory use as one that is subordinate to the principal use in area, extent or purpose and that is designed for the comfort, convenience or necessity of the occupants of the primary use. There was a specific reference to coin-operated amusement devices as accessory uses in restaurants and bars. There was no factual dispute that plaintiff's video poker business did not comply with the performance standards set forth in the ordinance for accessory uses. The ordinance further provided for a two-year amortizaiton period for non-conforming businesses.

Plaintiff argued that local control over video poker had been preempted by state statute. While the state statute prohibits certain types of local regulation of video poker operations, it does not occupy the field of regulation. A city may not limit the number of video poker machines within city limits, but there was not preemption of locational requirements on those machines. The court found that there was no preemption by occupation of the field. The plaintiff also argued that the ordinance was in direct conflict with two state statutes, one dealing with the licensing of businesses where video poker machines were allowed and the second dealing with video arcades. Again there is no conflict since the city's zoning ordinance merely affected the siting of such machines and not with their licensing.

The court did not deal with plaintiff's vested right argument since it was not properly preserved for appeal. Obviously, an ad hoc analysis would have to be made to see if the two year amortization period was reasonable. The burden of proof on the reasonableness of the period is on the party attacking the validity of the ordinance. Since the machines were rented, the court determined that a two year period to recoup the rental costs of the machines that were valued at around $ 7500 was reasonable.

[xxi] **Aguirre v. State**[138]

It is reasonably rare to report a criminal case in this annual review, but this decision by the Texas Court of Criminal Appeals clearly effects many AEF ordinances. An El Paso AEF ordinance made it a misdemeanor to "own, operate or conduct any business in an adult bookstore, adult motion picture theater or nude live entertainment club" within 1000 feet of various uses. City inspectors cited the owners and employees of an AEF that they claimed was located within 1000 feet of a parochial school. The

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[137] 340 S.C. 87, 530 S.E.2d 890 (2000).
[138] 22 S.W.3d 463 (Tex.Crim.App. 1999).

municipal court convicted all of the defendants and fined them $ 500.00. The issue on appeal is whether the ordinance required the prosecution to allege and prove a culpable mental state as a prerequisite to a conviction.[139]

Under Penal Code § 6.02 all crimes require the state to prove that the person acted intentionally, knowingly, recklessly or with criminal negligence unless in the definition of the offense the language plainly disposes of any mens rea element. This section is applicable to municipal ordinances. Thus, unless the language of the El Paso AEF ordinance plainly disposed of a mens rea requirement, one will exist even where the statute is silent. Rarely does a legislature speak plainly on the creation of strict liability criminal offenses. The Penal Code requires that where there is any doubt the mens rea requirement attaches. Applying the statutory canon of construction to the facts, however, is not either. The court noted that strict liability offenses are rarely criminal. The fact that a person is faced with potential criminal liability requires a court to rarely find strict liability crimes. The court looked to see whether the AEF ordinance expressed in certain provisions an intent to require a mens rea element. If it then omitted that language in another provision, it would be evidence of legislative intent to make that second provision a strict liability crime. The court also examined whether the AEF ordinance is similar to the types of regulations that dispense with the intent element, such as public health matters. In looking at a number of factors, the court concluded that El Paso had not plainly stated its intent to make a violation of its AEF ordinance a strict liability offense. The court noted that the ordinance applied not only to the owner, but also to the employees who would not be in a position to know or even to inquire about whether the AEF was violating the city's zoning ordinance.

[xxii] **State v. Russo**[140]

In a second criminal prosecution, the court was not concerned as the Texas Court of Criminal Appeals was with the mens rea requirement for violating an AEF ordinance, but was concerned with the more typical *Renton* and *Freedman* challenges. Defendants started to operate an AEF in a commercial zone in apparent violation of a traditional Renton-type scatter-site AEF zoning ordinance. In addition, the AEF ordinance required all AEFs to be surrounded by a 50 foot perimeter buffer consisting of plant material approved by the Planning Board. Plaintiffs pleaded guilty and paid substantial fines, reserving the right to challenge the validity of the ordinance. The township contained about 5,265 acres of which 32.1 acres or .52% are available for AEFs. It was alleged that the 50 foot buffer zone requirement would eliminate much of that acreage from being available. There were 4 existing AEFs in the township that were not effected by the ordinance because it was specifically prospective in effect.

The court invalidated one of the violations based on the failure of the defendants to have the required AEF license. Even though they never sought a license, the defendants have standing to challenge the licensing provision because of the potential chilling effect the provision may have on their First Amendment rights. Relying on state law, rather than *Freedman,* the court found that since there were essentially no standards to govern the decision-maker in issuing or denying the license the licensing provisions were invalid. The decision-maker must be given "narrow, objective and definite" standards to avoid invalidation.

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[139] The court also disposed on an argument that the prosecutor lacked standing to appeal the intermediate appellate court's reversals of the convictions. 22 S.W.3d at 464-65.

[140] 328 N.J.Super. 181, 745 A.2d 540, *certif. denied,* 165 N.J. 134, 754 A.2d 1210 (2000).

The court, however, found that the buffering requirement was valid per se and as applied. The municipal objective of impeding the view of the interior of the premises served an important governmental interest of preventing minors and members of the involuntary public from being exposed to nude dancers. The ordinance went further by requiring buffering all around the building even if there were no windows, but the court found that such a requirement served the governmental objectives of preserving property values, preventing urban blight and diminishing negative effects on nearby businesses. The court also rejected the as applied claim finding that there were sufficient alternative available sites under *Renton.* While it was true that some of the 32.1 acres where AEFs were allowed were taken out from the mix, the court considered that the 4 existing AEFs were allowed to continue operation and when combined with the remaining acreage met the *Renton* test. The court also held that several provisions of the AEF ordinance were not void for vagueness. The court finally held that the New Jersey AEF statute[141] did not preempt the township ordinance since it clearly allowed municipalities to enact more stringent buffer requirements than that provided for by the statute.

[xxiii] **Town of Seabrook v. Vachon Management, Inc.**[142]

Defendant leased a portion of a multi-unit building to an AEF in 1990. In 1991, a town building inspector discovered that the AEF was conducting live mud and oil wrestling events on the premises. The AEF owner was told to upgrade its septic system to deal with the increased number of persons using the premises. In 1994, the town enacted an AEF ordinance using the scatter-site approach. The leased premises could not comply with the ordinance since they were close to a residence and a church. Several years later, the town received complaints that the AEF was holding live entertainment, including nude dancing. The town sought injunctive relief to shut down the nude dancing. A trial court found that the AEF had antedated the ordinance and qualified as a NCU.

The major issue is whether the pre-1994 activities on the premises constituted a valid NCU. In order to qualify as a NCU, the use must lawfully exist at the time the restriction is adopted and must continue to operate as a NCU following the adoption of the ordinance. The owner of the NCU has the burden of proof to show that the current use is neither new nor impermissible because of the public policy to limit the extension or enlargement of NCUs. While the mud and oil wrestling activities antedated the 1994 it was not a valid preexisting use because the owner had never sought site plan review. Under the town's zoning regulations when a use converts from one allowed use to another it must get site plan approval. In this case, when the prior use of the leased premises as a computer repair store was changed to a mud wrestling arena, the owners were obligated to get site plan approval. In addition, the present use of the premises for nude dancing would constitute an expansion of the NCU from its prior wrestling format.

Defendants also argued that the town should be estopped from enforcing its zoning ordinance because it granted them amusement licenses after 1994. New Hampshire recognizes that estoppel against the government should not be favored because it may injure the public interest. The court found that defendants had not met their burden of proof to show that the granting of one-year licenses for the operation of amusement booths was the equivalent of an affirmative representation that defendants would be allowed to continue live nude dancing. Finally, the court rejected the claim

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[141] N.J.Stat.Ann. § 2C:34-1 et seq.
[142] 745 A.2d 1155 (N.H. 2000).

that the town should be barred by the equitable doctrine of laches from seeking to enforce its site plan requirements. As with estoppel, courts do not easily allow governments to be prohibited from enforcing their ordinances merely because they have delayed in bringing that enforcement action. Laches should not be applied to parties who come in with unclean hands, such as the defendants who knowingly violated the site plan approval requirements in 1992.

[xxiv] City of New York v. Warehouse on the Block, Ltd.[143]

The city sought to shut down the defendant's alleged AEF operation under its Nuisance Abatement Law. The AEF ordinance defined an AEF as a commercial establishment where a substantial portion of the AEF included an adult book store. An adult book store is defined as one having a substantial portion of its stock in trade depicting or describing sexual activities or specified anatomical areas. The defendant's operation was not located in an area where AEFs were allowed. Inspectors for the city found that 64% of the total floor space was allocated for non-adult material. The guidelines used by the city use a 60-40 ratio to determine if the establishment is an AEF. The city argued, however, that the non-adult material was merely a sham for the adult books being sold. But the court found that the city's guidelines limited administrative discretion to the 60-40 ratio without allowing for the consideration of other factors such as sales totals or sham transactions.[144] The defendant could not be judged on the basis of revised guidelines adopted in response to a Court of Appeals decision limiting the prior guidelines to the floor space ratio factor. The revised guidelines specifically add a sham compliance factor. The city would have to give AEFs notice and an opportunity to come into compliance with the new guidelines before bringing an action to shut them down as nuisances.

[xxv] T & A's, Inc. v. Town Board of the Town of Ramapo[145]

Plaintiff operated the only AEF in the town, opening for business in 1990. Under New York law, no alcoholic beverages are served and there is only a limited food operation. The AEF was located in a rural area, largely inhabited by members of an orthodox Jewish sect, known as Chasidim. They voiced objections to the town regarding the operation of the AEF. In 1997, the town enacted an AEF ordinance after conducting a study on the secondary effects of AEFs. The ordinance used the scatter-site approach for zoning AEFs and required them to meet the parking requirements for restaurants. AEFs that are non-conforming had one year to relocate, subject to an extension period should they show that they needed more time to amortize their investment-backed expectations. The ordinance was unclear as to whether AEFs were permitted or conditional uses in the single commercial zone they were allowed in. If they were conditional uses they would have to apply to the Planning Board for a CUP and meet several standards including being in harmony with the development in the district, not be a hindrance to development of adjacent land and not be detrimental to the site or adjacent properties. The court found that the ambiguity in classifying AEFs made it virtually certain that the AEF owner would not have the benefit of objective criteria in the

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[143] 183 Misc.2d 489, 703 N.Y.S.2d 900 (2000).

[144] See City of New York v. Les Hommes, 94 N.Y.2d 267, 702 N.Y.S.2d 576, 724 N.E.2d 368 (1999) analyzed at § 1.04[2][a][xxix] *infra*.

[145] 109 F.Supp.2d 161 (S.D.N.Y. 2000).

issuance of a permit, but would be subject to the unbridled discretion of the planning board.

There was some dispute as to the number of alternative available sites. The town encompassed some 31,040 acres. The commercial zone where AEFs were allowed included only 2.1% of the developable land. The scatter-site requirements further reduced the potentially available land to only 0.6%. The actual amount of available land may be even less. Interestingly the town in its determination that 9 sites were available used a building to building measurement criteria, while the AEF owner argued that a lot-line to lot-line criteria should be used, leaving only 2 available sites. Since the town used the lot-line measurement technique for other zoning issues, the court found that the town's evidence was not persuasive. In fact, the court concluded that there were probably no suitable locations for an AEF providing live entertainment within the town.

While the AEF operator asserted that the ordinance was not content-neutral since it was triggered by a request by local residents who objected to having nude dancing in their neighborhood, the court found that the ordinance satisfied the *Renton* test for content-neutral ordinances. The primary purpose of the ordinance was to prevent the negative secondary effects of AEFs as stated in the preamble to the ordinance. The town could rely on studies showing those effects in other communities. The court would not second-guess the town and re-examine its motives.

The court, however, found that the ordinance as applied vested too much discretion in the planning board to satisfy the requirements for prior restraints. Since CUPs could be denied based on the board's views on health, safety, comfort and convenience or any other appropriate standard, the ordinance was too vague so as to allow for the board to exercise that power to discriminate based on the content or viewpoint of speech. The ordinance needed to have assigned AEFs to a particular use group so that they would not fall within the conditional use category that gave overly broad discretion to the board to deny the permit. The court also found that the ordinance violated the *Renton* requirement that reasonable alternative avenues of expression remain available after the ordinance was implemented. The court placed the burden of proof on this issue on the town to show an adequate number of potential sites that are part of the community's actual business and real estate market. In determining availability the court may look at such factors as accessibility to the general public, surrounding infrastructure, pragmatic likelihood of the space becoming available and whether the sites are suitable for a commercial establishment. The court noted that prior cases including *Renton* had found that at least 4% of total land area may be sufficient, but the percentage available in this case was less than 1%. While AEF owners must fend for themselves in the real estate market, there must be enough usable and available land so that a real, not an illusory, market exists.

[xxvi] **City of Dallas v. North by West Entertainment, Ltd.**[146]

An AEF sought a permit to operate a club as an adult theater under the terms of the Dallas AEF ordinance. The application was denied on the basis that it was located within 1000 feet of another AEF. The AEF sought a location restriction variance that was denied. Judicial review was sought including a request to enjoin the city from enforcing its AEF ordinance against it. The trial court granted the AEFs temporary injunction. The city appealed the injunction by filing a notice of appeal. The issue in this case related to whether the filing of the notice of appeal automatically suspended the

[146] 24 S.W.3d 917 (Tex.App.—Dallas 2000).

enforcement of the temporary injunction order. The court found that under Texas Rule of Appellate Procedure 29, the filing of the notice of appeal did supersede the order because home rule entities do not have to file a supersedeas or cost bond. Thus the city's action superseded the order granting the temporary injunction.

[xxvii] **Kismet Investors, Inc. v. County of Benton**[147]

Plaintiff operated an AEF. In previous litigation, the county's attempt to require it to get a CUP was overturned because it granted too much discretion to the county to satisfy the First Amendment. That led to the county's enactment of an AEF ordinance that restricted AEFs to 4 zoning districts and imposed a scatter-site requirement. The ordinance provided a 4 year amortization period for NCUs. Plaintiff sought a variance shortly before the end of the amortization period. At the public hearing, plaintiff proffered evidence of making substantial improvements to the building that were only beneficial if it remained an AEF. The variance was denied.

The scope of judicial review of a variance decision is limited to see whether it was reasonable. Appellate court review looks at the record before the county, not the record before the trial court. Under Minnesota law, a variance may only be granted upon a showing of practical difficulties or particular hardship. Hardship is defined as whether the property can be put to a reasonable use absent the variance and whether the landowner's plight is caused by unique circumstances, not self-imposed by the owner. Plaintiff bore the heavy burden to show that the variance was justified. The variance here was not a use variance since the zoning ordinance allowed such uses, the variance was caused by the application of the AEF ordinance. The court found that the statute created separate standards for area and use variances. Area variances may be issued upon a showing of practical difficulties while use variances require the more stringent standard of particular hardship. Nonetheless, the court found that the county's decision not finding practical difficulties was reasonable. There were other reasonable uses for the property, including a restaurant or resort use. The investment made by the AEF owner was self-imposed and did not create a building that was so unique that it only had one economically viable use. There was also no showing that the parcel was unique.

On the First Amendment issue the court placed the burden of proof on the county. The court had no difficulty finding that the ordinance was content-neutral and aimed at the secondary effects of AEFs. Studies from other cities were reviewed prior to the adoption of the ordinance. The county did not have to make specific findings regarding secondary effects in the county or from this particular AEF in order to meet the *Renton* standard. The court rejected the *Alameda Books* interpretation of *Renton* that required a more exacting analysis to determine whether the ordinance is truly aimed at secondary effects. The court reviewed the evidence regarding the number of available alternative sites. It concurred with the county that a building-to-building method, rather than a lot-line-to-lot-line method be used to determine the number of sites. The county established that there were over 100 available sites where plaintiff's AEF could be relocated. That clearly met the *Renton* standard of having a reasonable opportunity for AEF owners to locate their operations within the community.

[xviii] **St. Louis County v. B.A.P., Inc.**[148]

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[147] 2000 WL 1285413 (Minn.App.)
[148] 25 S.W.3d 629 (Mo.App. 2000).

BAP operated a business where 20% of their merchandise was considered adult-oriented products. The business was located within 1000 feet of a church. The ordinance defined an AEF as one where 25% or more of the retail value of the merchandise offered for sale consists of adult material. In previous litigation, the court had upheld the constitutionality of the ordinance after the county had received preliminary injunctive relief ordering BAP to shut down.[149] In this action the county was seeking to cite BAP for contempt of court since it did not stop selling adult material. The trial court refused to hold BAP in contempt since it was selling less than 25% adult-themed material. The county argued that the 25% figure in the ordinance merely created a rebuttable presumption and that upon specific proof, businesses could be found to be AEFs with less than 25% of their sales of adult material. The ordinance further defined an AEF as one where a substantial portion of the merchandise offered for sale are adult-themed. The court found that the 25% figure was not determinative. A business could be an AEF even if its sales or merchandise fell below the 25% figure if a substantial portion of their business dealt with adult material. Since the trial court had applied the 25% figure as the final word, the court remanded the case back to determine whether BAP was in violation of either the ordinance or the injunction.

[xxix] **City of New York v. Les Hommes**[150]

Under administrative guidelines promulgated by the city an adult establishment is defined in terms of a "substantial portion" of the business must involve some type of adult material. In the case of a book store as was involved here the substantial portion had to be of its "stock-in-trade." The guidelines further provide that several factors shall be considered including the amount of such sock accessible to customers as compared to the total stock, the amount of floor area and cellar space accessible to customers containing adult material and the amount of floor space for adult stock as compared to the total floor space available for all stock. A subsequent addition to the guidelines said that if at least 40% of the floor and cellar area is available for adult use that will meet the substantial portion requirement. In addition, if more than 10,000 square feet of a commercial establishment is occupied by an adult use that establishment is deemed to be an AEF regardless of its total size.

At the trial in this size the city was only able to prove that 24% of the stock consisted of adult videos. The trial court nonetheless concluded that Les Hommes was an AEF. It went behind the numbers and found that compliance with the 60:40 guideline was, in essence, a ruse or fraud, since the non-adult stock did not turn over. The court found that under the guidelines the definition of stock does not account for what is actually being sold. Thus the fact that the non-adult stock was not selling as quickly as the adult stock could not be used to label the operation an AEF. The court applied a plain meaning approach to the guidelines and refused to allow the city or the trial court to embellish that plain meaning. The non-adult stock was accessible and available and therefore had to be counted in determining whether this was an AEF. The good or bad faith of the AEF owner was irrelevant as long as it complied with the floor space requirements.

[xxx] **West End Pink, Ltd. v. City of Irving**[151]

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[149] St. Louis County v. B.A.P., Inc., 18 S.W.3d 397 (Mo.App. 2000).

[150] 94 N.Y.2d 267, 702 N.Y.S.2d 576, 724 N.E.2d 368 (1999).

[151] 22 S.W.3d 5 (Tex.App.—Dallas 2000). *See also* City of New York v. Desire Video, 267 A.D.2d 164, 700 N.Y.S.2d 446 (1999) where the court found that an AEF had violated a prior court order to abate the

A city ordinance limits the sale of alcoholic beverages at restaurants to no more than 40% of the annual total sales. Plaintiff operated a restaurant in a zoning district employing that limit. The city notified the plaintiff that it was in violation of the ordinance and threatened to rescind its certificate of occupancy. Plaintiff challenged the constitutionality of the ordinance saying that it was preempted by the Texas Alcoholic Beverage Code (TABC). Irving, as a home rule city, has all powers that are not inconsistent with the constitution or general law. The city cannot regulate in an area preempted by state statute. The plaintiff argued that the city ordinance was either in direct conflict with various provisions of the TABC or was preempted by the state's occupation of the field. The city argued that the enactment of 3 validation statutes by the State Legislature since the passage of the alcoholic beverage limitation provision cured any potential defect. While validation statutes can cure statutory defects, they cannot cure constitutional defects. There was no constitutional claim made in this case. The only basis asserted by the plaintiff was preemption. Since the Legislature can cure any preemption claim by express legislation giving cities the power to act, they can cure the same problem through a validation statute. Thus while several decisions have found local regulation of liquor licensees preempted, none of those cases dealt with the impact of a validation statute.[152]

[b] Signs and Billboards

[i] **Knoeffler v. Town of Mamakating**[153]

After a dispute with a neighbor and the Town, the plaintiff began erecting signs on his home and lawn protesting various matters. He was served with a notice of violation of the Town's sign ordinance. After several attempts he was given a temporary permit to allow the existing signs, provided that they were removed within 6 weeks. The owner sought federal judicial relief and while the case was pending the Town amended its sign ordinance requiring permits for all signs, with several exceptions. One type of exempted sign related to protest signs on matters of public information and convenience, although there were size and number restrictions on this type of size. Plaintiff asserted that both the original and amended sign ordinances violate his First Amendment free speech rights.

As to the original sign ordinance, residential signs are allowed, but only as temporary signs. The ordinance allowed certain on-site commercial signs without a permit, but required public information and convenience signs to get a discretionary permit. Clearly, the original ordinance favored commercial over non-commercial signs. That constitutes a content-based regulation and violates the *Metromedia* and *Ladue* principles. Clearly the ordinance was not narrowly tailored to achieve the significant governmental objectives of traffic safety and aesthetics. Likewise by giving unbridled discretion to the town to grant or deny the permit, the original ordinance violated the First Amendment.

As to the amended ordinance, it too is a content-based regulation. While it required permits for all signs, commercial and non-commercial, it also created 18 classes of exempted signs. The bases for most of the exemptions was the content or

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nuisance it was creating by lowering the amount of adult material being sold or offered where inspections showed 77% of the stock was comprised of adult material.

[152] Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993).

[153] 87 F.Supp.2d 322 (S.D.N.Y. 2000).

message of the sign. There is a strong presumption that content-based sign regulation is unconstitutional. While some of the opinions in *Metromedia* accept the notion that certain types of signs may be treated differently based on content, the Second Circuit follows the view that any type of content-based regulation must satisfy the strict scrutiny test.[154] Thus, it too violated the First Amendment rights of the plaintiff.

The plaintiff sought compensatory and punitive damages against individual Town officials and the Town. As to the building inspector who denied the permits and issued the citations the court found that he was entitled to qualified immunity. If his actions did not violate clearly established statutory or constitutional rights of which a reasonable person would know, immunity attaches. The court found that, as a matter of law, the building inspector acted objectively unreasonably and thus was entitled to immunity. Without the individual official the Town cannot be held liable for punitive damages.[155] Plaintiff's damages claims against the Town, however, may be asserted.

[ii] **Adams Outdoor Advertising v. City of East Lansing**[156]

This is a regulatory takings case relating to the application of a sign ordinance's amortization provision relating to rooftop signs. The ordinance was adopted in 1975 and totally prohibited rooftop signs. The ordinance also required the removal of nonconforming signs by May 1, 1987. In litigation commenced at that time, the Michigan Supreme Court concluded that the city had authority to use amortization provisions to eliminate nonconforming signs or other uses.[157] On remand the trial court found that the amortization provision constituted a regulatory taking as to both rooftop and freestanding signs. The court of appeals affirmed that finding as to rooftop signs but reversed and remanded as to freestanding signs. The city appealed the decision as it affects rooftop signs.

Michigan's approach to regulatory takings jurisprudence is reasonably straightforward.[158] The court accepted the *Agins* view that a taking occurs when the regulations do not substantially advance a legitimate state interest. Secondly, a taking occurs under a *Lucas* type deprivation of all economically beneficial or productive uses of the land. Thirdly, a taking occurs under a *Penn Central* type balancing test where the court weighs the character of the government's action, the economic effect of the regulation and the interference with reasonable investment-backed expectations.

In this case a preliminary question has to be resolved before applying the appropriate test. What is the nature of the plaintiff's property interest that has allegedly been taken? Adams asserted that it was its leasehold rights to the rooftop signs. The court found that a lessor can transfer no greater right to the lessee than that which is possessed by the lessor. The lessor here did not have a vested right to place a rooftop sign on its buildings. Whatever right it had to place a sign there was always subject to reasonable police power regulation. Likewise, by structuring the lease to allow only rooftop signs cannot create a property right not subject to police power regulation. The leases in question were executed many years after the city's sign ordinance went into effect. The prohibition against rooftop signs clearly did not constitute a *Lucas* taking. Only one "stick" from the "bundle of sticks" of property ownership was removed. No

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[154] National Advertising Co. v. Town of Niagara, 942 F.2d 145 (2d Cir. 1991).
[155] City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).
[156] 463 Mich. 17, 614 N.W.2d 634 (Mich. 2000).
[157] Adams Outdoor Advertising v. City of East Lansing, 439 Mich. 209, 483 N.W.2d 38 (1992).
[158] See K & K Construction, Inc. v. Department of Natural Resources, 456 Mich. 570, 575 N.W.2d 531, *cert denied*, 525 U.S. 819, *reh'g denied*, 525 U.S. 1034 (1998).

taking occurred under *Penn Central* as well. All of the factors weigh in favor of the city. The sign ordinance is a reasonable police power regulation, whose impact on the owner's property rights is limited and who interference with investment-bakced expectations is de minimis. Thus, the court found that no regulatory taking occurred when the ordinance prohibited rooftop signs and required their removal after a 12 year amortization period.

[iii] **Lawson v. City of Kankakee**[159]

In 1998, the city enacted an ordinance prohibiting the placement of signs "upon any private or public property without the consent of its owner or occupant." Plaintiff and the city were engaged in a dispute regarding compliance with the city's building code for one of plaintiff's rental units. Eventually the city placed a sign in front of one of these parcels declaring that the home was not in compliance with the building code. Plaintiff responded by placing a sign on an adjacent parcel he owned attacking the mayor. The city removed plaintiff's sign since it was allegedly in an area of the parcel that the city asserted an ownership interest in. Plaintiff then filed this suit claiming that his First Amendment rights had been violated by the removal of his sign and the application of the ordinance.

The court first had to decide who owned the area where the signs were located. It determined that the city did own that area after reviewing the original plats and state law. Thus the plaintiff would have to show that the ordinance was unconstitutional on its face or as applied to him to show a likelihood of winning on the merits. As applied to plaintiff, the ordinance burdens his speech by preventing him from placing a sign on the area in front of his parcel that is owned by the city. The ordinance is content-neutral because it applies to all signs. The city ordinance is similar to the ordinance approved on in *Vincent*[160] based on the city's need to prevent clutter and visual blight. But in this case, the city did not justify its prohibition based on visual clutter, especially visual clutter in these areas owned by the city adjacent to private property. The clearest evidence of that was the city's placement of its sign criticizing the plaintiff's maintenance history on the adjacent parcel. The ordinance has the effect of requiring consent by the city before one can place a sign on city property. There are no guidelines, time limits or procedures for obtaining that consent. Thus it appears to be violative of the *Freedman* guidelines for prior restraints. The fact that the plaintiff could place his sign on his property that is located only several feet from the city-owned parcel did not negate the existence of a First Amendment violation. Finally, the court found that plaintiff had made a prima facie case of selective enforcement of the ordinance because of the sign's political message. Plaintiff was able to show that the city had not removed signs from other locations on city-owned land even though the signs had not been placed there with the city's consent. One witness proffered by the plaintiff was a real estate agent who testified that he often placed for sale or for rent signs on city-owned property adjacent to privately owned property and that those signs had never been confiscated by the city. Thus, plaintiff's motion for a preliminary injunction was granted and he would be able to place his sign on the city-owned strip of land in front of plaintiff's parcel.

[iv] **North Olmsted Chamber of Commerce v. City of North Olmsted**[161]

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[159] 81 F.Supp.2d 930 (C.D.Ill. 2000).

[160] Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

[161] 86 F.Supp.2d 755, clarification denied, 108 F.Supp.2d 792 (N.D.Ohio 2000).

The city enacted a comprehensive sign ordinance in 1991. Nonconforming sign owners were given until January 1, 1998 to remove their signs. Upon a showing of hardship the 6-1/2 year amortization period would be extended an additional 90 days. The city began sending out notices of violations after the deadline for removal. Plaintiffs include the chamber of commerce and individual sign owners and sign sellers. Plaintiffs alleged that the ordinance violated their First, Fifth and Fourteenth Amendment rights. They sought to enjoin the city from enforcing the ordinance.

The district court was reviewing a decision of a federal magistrate who had found that the ordinance was an impermissible prior restraint, an impermissible content-based restriction of both commercial and non-commercial speech and was substantially overbroad. The court initially determined that the plaintiffs had standing to challenge the ordinance. In the context of the First Amendment the usual rule that a party may assert only a violation of its own rights is expanded to allow a challenge that the regulation is content-based because of the chilling impact of such a regulation. In addition, plaintiff had standing to challenge the prior restraints imposed by the sign ordinance under *Freedman* even if the individual plaintiff had not sought a permit or license.

The court defined a content-based regulation as one where the subject-matter of the content conveyed determines whether the speech if subject to restriction. The court found that the ordinance contained content-based restrictions on protected noncommercial speech and thus applied the strict scrutiny analysis to such restrictions.[162] The city tried to avoid strict scrutiny by applying the *Renton* approach. After all, if one looks at Renton, you have a classic content-based regulation. Certain types of facilities are regulated based on the content of what they sell. Yet, the court in *Renton* found that the ordinance was content-neutral because it was dealing with the secondary effects. But the court rejected applying the *Renton* approach outside of the context of AEFs. This court rejected the notion that intent or motive of the city is relevant to determining whether the restriction is content-based. In this case, the ordinance classified signs by use types and by structural types. Use type classifications are clearly content based since they include such classes as real estate signs, directional signs, organizational signs, identification signs and the like. In addition, other restrictions on signs in residential districts are also content-based. The court used as an example a sign in a residential district that mimicked a stop sign and said stop gun violence as a sign that would violate the ordinance. The city was unable to show that its regulation served a compelling state interest and that it was the least onerous means to achieve that interest. While safety and aesthetics are substantial interests after *Metromedia* they are not compelling state interests. Even if the court was willing to equate substantial with compelling, the ordinance would fail because there were less onerous alternative regulatory schemes to achieve those interests. The choice of what type of signs were allowed and not allowed, based on their message and the various exceptions contained in the ordinance, showed that the ordinance was not narrowly restricted.

The court applied the four-part *Central Hudson* test to the content-based restrictions on truthful non-misleading commercial speech. The key issues were whether the ordinance advance the substantial governmental interest and whether it was not more extensive than is necessary to serve that interest. In order to satisfy the requirement of advancing the asserted governmental interest the court applied the following test:

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[162] See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

> This burden is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. . . Consequently, the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. . . We have observed that this requirement is critical; otherwise a state could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.[163]

The last prong regarding the not more extensive a regulation than is necessary fits closely in with the heightened scrutiny under the advancement prong. The court found that several of the restrictions in the sign ordinance relating to identification signs, temporary signs, service station signs and multiple use signs did not meet the third or fourth prongs of the *Central Hudson* test. For example, a sign in the shape of an arrow in front a business could say "enter here" but could not identify the business under the terms of the ordinance. This type of distinction did not advance any interest in safety or aesthetics and thus could not be sustained. Size regulation of signs is clearly permissible content-neutral time, place and manner regulation. But size regulations that are tied to the content of the sign also do not satisfy the *Central Hudson* test. Once a sign is allowed, why is the content of the sign related to the governmental interests in safety and aesthetics. Commercial sign regulations that limit sign size based on what type of sign it is violated the *Central Hudson* test.

The court also struck down the pole sign prohibition contained in the sign ordinance. Because the ordinance exempted a number of pole signs from the prohibition, the court concluded that the restriction was content-based. Even if the ordinance was interpreted to only exempt government-owned pole signs, it would still be invalid, since that exemption does not advance the interests of safety or aesthetics. The pole sign regulation is not saved by an exemption for political pole signs since the other exemptions in this provision make it unenforceable as adopted.

The court also found that the ordinance's requirement that a sign permit be received for all permanent and temporary signs over 6 square feet in sign face area constituted an impermissible prior restraint. The permit official reviewing the application can consider the design, color, orientation, visual impact and influence of the proposed sign. Those factors, when combined with the content-based regulation of various signs, makes the permit system a prior restraint. Here the court found that there were not sufficiently clear standards to limit the discretion of the permit-issuing official. Likewise, the *Freedman* safeguards requiring a decision to be made within a brief and defined period and speedy access to judicial review was not present. Thus the permit requirements of the ordinance were also invalidated.[164]

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[163] 86 F.Supp.2d at 770 quoting from Greater New Orleans Broadcasting Assoc., Inc. v. U.S., 527 U.S. 173, 119 S.Ct. 1923, 1932 (1998). There are some who feel that the *Central Hudson* test has moved in the direction of strict scrutiny analysis, especially in light of 44 Liquormart, Inc. v Rhode Island, 517 U.S. 484 (1996). See, Kathleen Sullivan, "Cheap Spirits, Cigarettes and Free Speech: The Implications of 44 Liquormart, 1996 Sup.Ct.Rev. 123, 128, 141-42 (1997).

[164] In a later opinion the court reaffirmed its finding that the permit requirements violated the *Freedman* guidelines for prior restraints. Prompt review to an architectural review board is insufficient since review must be by an independent branch of government. In addition, in *Nightclubs,* at § 1.04[2][a][xi] *supra* the Sixth Circuit found that a licensing scheme must not merely provide access to prompt judicial review, but must ensure a prompt judicial determination in order to satisfy *Freedman*. North Olmsted Chamber of Commerce v. City of North Olmsted, 108 F.Supp.2d 792 (N.D.Ohio 2000).

[v] City of Painesville Building Department v. Dworken & Bernstein Co., L.P.A.[165]

The City's sign ordinance prohibited the posting of political signs except for certain designated periods preceding and following general or special elections. The ordinance defined a political advertising sign as any sign "concerning any candidate, political party, issue, levy, referendum, or other matter whatsover eligible to be voted upon . . ." In addition, the ordinance required a permit and payment of a fee for the placement and use of such signs. The city issued a notice of violation against a law firm for violating the political sign provisions of its ordinance. The law firm attacked the constitutionality of the restrictions.

The court noted in general that a narrowly drawn ordinance may constitutionally impose reasonable time, place and manner restrictions on the display of temporary signs, including yard signs posted on public property. The city sign ordinance, however, did not come close to passing constitutional muster when it was applied to prohibit the owner of private property from posting a single political sign on that property outside the durational period set forth in the ordinance. The posting of political signs is virtually pure speech given the highest level of protection afforded by the First Amendment. The court rhetorically asked itself whether the ordinance was content-based or content-neutral. If content-based the applicable strict scrutiny test would universally require invalidation. If content-neutral, than one of a number of tests could be applied. The court never directly answered that question, instead relying on *Ladue* and its emphasis on the need to protect political signs. Since the durational limits in the ordinance only applied to political signage, it might be hard to argue that the ordinance was content-neutral. But the court applied the narrowly tailored analysis usually reserved for content-neutral ordinances. The court agreed with the many pre- and post-*Ladue* decisions that invalidate durational limits on political signs.[166] Political speech is not only relevant immediately before an election. The ordinance went way beyond the limits to achieve the governmental objectives dealing with safety, aesthetics and traffic concerns. The court suggested that political signs may be regulated as to matters relating to their construction, the amount of signage allowed and the need to remove a temporary political sign. But the type of regulation imposed by the city went too far in restricting political speech.

[vi] Marathon Outdoor LLC v. Vesconti[167]

In June 1999, plaintiff received several permits to construct a billboard. The signs were to be accessory building signs as defined by the city sign ordinance since they would advertise the name of the business at the location of the sign. The billboard structure was completed when the city notified the plaintiff that it intended to rescind the permits because the sign would violate several performance standards contained in the ordinance. The city believed that the sign would be an off-site commercial sign that was prohibited within 200 feet of any arterial highway. Plaintiff then filed this § 1983 action asserting that the city sign ordinance violated its First and Fourteenth Amendment rights.

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[165] 89 Ohio St.3d 564, 733 N.E.2d 1152 (2000).

[166] See e.g., Whitton v. Gladstone, 54 F.3d 1400 (8th Cir. 1995); Dimas v. City of Warren, 939 F.Supp. 554 (E.D.Mich. 1996); Orazio v. North Hempstead, 426 F.Supp. 1144 (E.D.N.Y. 1977); Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996); Collier v. City of Tacoma, 121 Wash.2d 737, 854 P.2d 1046 (1993).

[167] 107 F.Supp.2d 355 (S.D.N.Y. 2000).

While the court found that the plaintiff might suffer irreparable injury should a preliminary injunction against enforcement of the ordinance was granted, the court found that plaintiffs had not shown a substantial likelihood of success on the merits. As to the regulatory takings and equal protection claims, they were not ripe for review under *Hamilton Bank.* Plaintiff had not exhausted its administrative remedies regarding appealing the permit revocation decision. Even if the equal protection claim was ripe, it would still not succeed because all that plaintiff alleged was that the city changed its interpretation of the ordinance to apply certain performance standards to pole signs or billboards. There were no allegations of selective treatment or enforcement based on some impermissible consideration. Without relying on *Olech* the court required the plaintiff to prove that the city intended to inhibit the exercise of its constitutional rights.

The plaintiff also claimed that the prohibition of off-site commercial signage within 200 feet of an arterial highway violated the First Amendment. The court agreed with the approach taken in *Knoeffler,* that the four-part *Central Hudson* test should be applied. Differentiating between on-site and off-site commercial signs was consistent with *Metromedia.* There was no content-based regulation as the district court had found in *North Olmsted*. The restrictions on commercial speech achieved the legitimate objectives of traffic safety and aesthetics. The court found the ordinance sufficiently narrowly tailored. The regulations affecting the physical size and dimensions of the sign were also upheld as being appropriate time, place and manner restrictions.

§ 1.05 Subdivision Regulation

[1] Impact Fees

[a] **American Fabricare v. Township of Falls**[168]

Plaintiff sought to establish a laundromat business in leased space in a shopping center. The Township would only issue the certificate of occupancy if plaintiff would pay additional sewer tapping fees due to the large amount of wastewater discharge from the premises. Plaintiff filed an "omnibus" due process and equal protection challenge. Initially the court found that the fees were not ultra vires. Plaintiff had argued that the Township lacked authority to impose such fees. Under the enabling act, tapping fees may be charged if they are based on capacity, distribution or collection, special purposes or reimbursement of expenses factors. There was ample authority to impose such fees and the resolution adopting the fees and the special fees in this case were not arbitrary or capricious.

On the due process and equal protection, § 1983 claims, the court applied a rational basis test to determine the validity of the sewer tapping fees. The court found that *Olech* was not applicable to the facts in this case because there was no proof that the township had acted irrationally or arbitrarily. In fact the evidence showed that the higher fees were entirely justified based on the high-volume wastewater discharge. Thus, plaintiff's motion for summary judgment on the equal protection claim is denied.

On the substantive due process claim the court noted the tension between federalizing land use law and protection landowners' from allegedly arbitrary or irrational municipal regulations as such was expressed in *Gretkowski*. In cases where the permit denial decision is supported by a rational basis no substantive due process claim arises. Even though the sewing facilities planning module for the shopping center was approved without the higher fees, an assumption in that module was for limited amounts of

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[168] 101 F.Supp.2d 301 (E.D.Pa. 2000).

wastewater. The laundromat's heavy use of water provided the rational basis for the permit denial and departure from the planning module.

[b] **Volusia County v. Aberdeen at Ormond Beach, L.P.**[169]

In an important decision limiting the ability of local governments to impose impact fees, the court invalidated a county public school impact fee as applied to a mobile home park that provided housing for senior citizens. The development utilized a series of covenants, conditions and restrictions (CCRs) to set a minimum age requirement for residents.[170] There were no provisions allowing the age requirement to be waived. While there was a general right retained by the developer to amend the CCRs, that declaration had not been recorded and was therefore not enforceable. In 1992 the county enacted a countywide public school impact fee on new dwelling units. Excluded from the definition of dwelling units were nursing homes, group homes and adult living facilities. Due to litigation this ordinance was replaced by another impact fee ordinance that effectively lowered the fee and permitted adjustments to deal with the costs of constructing new schools. The ordinance employed a student generation rate to determine the average number of public school students per dwelling unit. The developer had paid, under protest, nearly $ 87,000 in impact fees for 84 new homes

The court had to deal with its earlier decision in *St. Johns County v. Northeast Florida Builders Ass'n, Inc.*[171] In that case, the court upheld a public school impact fee, even though it was applied to dwelling units without children. The court found that there was still a rational nexus between new dwelling units and demand for public schools that was sufficient to uphold the impact fee, at least against a facial invalidity challenge. The court also noted that in *St. Johns* the ordinance provided that individual adjustments to the impact fee could be made. Since in this case, the developer was challenging the application of the impact fee to its new dwelling units, the court did not have to explore the general issue of the required nexus between the development and the need for the impact fee.

One issue that must be resolved is whether the development is truly age restricted so that no public school age children may reside in a new dwelling. The key contention of the county was that the developer retained the right to amend the age restrictive CCRs. But as noted above, that reservation was contained in a document that was never recorded, and ,therefore under Florida law, could not be enforced against the homeowners. Thus, the court looked to the recorded CCRs that clearly prohibit a minor from permanently residing within the community as the controlling legal document.

Under Florida law, an impact fee must meet a dual nexus test, showing connections between the need for additional capital facilities and the growth in population caused by the subdivision and between the expenditures of the funds collected and the benefits accruing to the development. This dual rational nexus test is not applied on a countywide basis. Instead there is a need for a specific need/special benefit analysis. The fee must provide a "unique benefit" to those paying the fee and must not be a stealth tax whereby there is a generalized benefit to everyone.[172]

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[169] 760 So.2d 126 (Fla. 2000).

[170] The restrictions were tailored to comply with the exemption of such actions from the application of the Fair Housing Act. 42 U.S.C. § 3607.

[171] 583 So.2d 635 (Fla. 1991).

[172] See Collier County v. State, 733 So.2d 1012 (Fla. 1999) where the court found that an "interim governmental services fee" designed to recapture the "lost" assessments where property improvements

Because of the age restrictions, the county cannot show that there is any benefit to those paying the fee. Clearly this development does not increase the need for new public schools. The applicable student generation rate when attached to this type of development failed the rational nexus test. The court also found that there were no special benefits to the new residents who would be paying the fee. While they received the general benefit of having new schools, that is insufficient to justify the impact fee.

[c] Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek[173]

In a case of first impression, the Ohio Supreme Court reviewed the constitutionality of a municipal roadway impact fee. The city adopted its impact fee in 1993 and later amended it in 1995. The impact fee was adopted to allow the city to recover the costs of constructing new roadways. The fee was designed to eliminate the need for developers to make off-site improvements. The ordinance divided the city into districts and prepared estimates for the cost of improvements necessitated by full development of each impact fee district. Estimates were also given of generated automobile trips for the type of new development expected. The city subtracted from the total cost figure a percentage of the total cost based on the number of pass-through auto trips. A further deduction was made based on other sources of roadway funds. The ordinance provided an appellate procedure dealing with individual development allocations. It also contained a credit system for dedication and other types of benefits. The funds generated by the fee are to be used for capital improvements within the impact fee district where the funds are generated. The funds cannot be used for normal maintenance of roadways. There was no time limit on when the funds could be expended.

Under Ohio's constitutional home rule provision, municipalities have the power to impose impact fees so long as they are consistent with state law and not violative of any constitutional prohibition. While the court of appeals decision was concerned with whether the ordinance imposed a fee or a tax, the supreme court determined that the labeling was not critical to the court's decision. The court also rejected the court of appeals analysis that required cities to have a matching funds provision in order for impact fees to be valid.[174] While the presence of absence of matching funds may be relevant in determining the constitutionality of an impact or regulatory fee, it is not determinative. The appropriate test is "whether the fee is in proportion to the developer's share of city's costs to construct and maintain roadways that will be used by the general public."[175]

The court applied the dual rational nexus test as gleaned from *Nollan* and *Dolan* and applied by the Florida Supreme Court in *Volusia County*. A court must determine: "1) whether there is a reasonable connection between the need for additional capital facilities and the growth in population generated by the subdivision; and (2) if a reasonable connection exists, whether there is a reasonable connection between the

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occur after January 1 of each year was a tax and not a fee. Since the county did not have the power to impose such an ad valorem tax the ordinance was ultra vires.

[173] 89 Ohio St.3d 121, 729 N.E.2d 349, *reconsideration denied*, 89 Ohio St.3d 1471, 732 N.E.2d 1002 (2000).

[174] The basis for the matching funds requirement comes from two decisions, Towne Properties, Inc. v. Fairfield, 50 Ohio St.2d 356, 4 O.O.3d 488, 364 N.E.2d 289 (1977) and Building Industry Ass'n of Cleveland & Suburban Citys v. Westlake, 103 Ohio App.3d 546, 660 N.E.2d 501 (1995).

[175] 729 N.E.2d at 354.

expenditure of funds collected through the imposition of an impact fee and the benefits accruing to the subdivision."[176] The first prong of the test looks to how the fee is calculated while the second looks to see how the monies are expended. The court noted the difference between the dual rational nexus test and the reasonable relationship test of *Walnut Creek* and the specifically and uniquely attributable test of *Pioneer Trust.* In choosing the middle ground between a more lenient and a more rigorous standard, the court tried to balance the public and private interests. The burden of proof is placed on the city.

In applying the test to the city ordinance the court found that both prongs of the test had been satisfied. The methodology used by the city to determine the need for roadway improvements caused by the new development must be based on generally accepted traffic engineering practices. The evidence at the trial court proved that the city followed the necessary steps in calculating the fee. It developed a comprehensive plan for the impact fee districts, it provided for regular review of those plans, it established an inventory of existing roadways and it determined the cost of new facilities needed to accommodate the expected new development. While there may be some disputes as to the specific methodology or assumptions used, it is not the role of the court to second-guess the city's choices. If the methodology chosen is reasonable, a court should not disturb the city's decision. As to the second prong the court looked at several factors, including the lack of matching funds, the system of credits and the lack of a time period for expending the funds. None of those factors militated against the constitutionality of the ordinance given the reasonable methodology employed by the city that tied in expenditures to the needs of the different impact fee districts.[177]

[d] Greater Franklin Developers Association, Inc. v. Town of Franklin[178]

After undergoing rapid growth between 1980-1995, necessitating the building of a new school, the town employed a consultant to plan for the expected growth. They predicted that a new school would have to be built before 2000 to keep up with the expected population growth. The town enacted a school impact fee in 1995 to shift some of the capital expenditure burdens of the new schools to the development that was going to cause the need. The fee schedule was based on a formula that each family house would bring in .68 children while each condominium unit would bring in .25 children. The money received was to be earmarked to cover the expansion of existing schools and had to be expended within 8 years. None of the money was to be used for maintenance purposes.

Massachusetts towns do not have the power to tax, but they do have the power to exact fees. Thus, unlike *Beavercreek* the characterization issue is outcome-determinative. The court noted that fees are normally charged in exchange for a particular governmental service that benefits the party paying the fee, the fee is normally voluntary and the fee is not designed to raise revenue but to compensate the governmental entity for the funds expended to provide the service. The court found that there may be no direct benefits accruing to the fee payers since the benefits of new school facilities touch all of the residents, not just the new residents. The court also found that the payment of the fee is truly not voluntary, in the sense that if you want to

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[176] *Id*. at 354-55.

[177] This was a 4-3 decision. Two dissenters argued that this was a tax and noted that they would apply the *Pioneer Trust* test if it was a fee. 729 N.E.2d at 358-59 (Pfeifer, J. dissenting).

[178] 49 Mass.App.Ct. 500, 730 N.E.2d 900 (2000).

build a new residential unit in the town you have to pay the fee. Finally, the court found that the basic nature of the fee is really to raise additional revenue to cover the capital expenditures of operating a school system. The court rejected the application of the dual rational nexus test as described in *Volusia County* in part because the issue in this case deals with the legislative denial of the power to tax, rather than the constitutional limits on imposing impact fees. Instead of following the modern trend of treating impact fees as such, the court relied on several older cases where the court found these fees to be hidden taxes.[179]

[e] **Cimato Bros., Inc. v. Town of Pendleton**[180]

The town enacted a public improvement permit ordinance that imposed a 10% fee upon contractors and developers for inspection services conducted by the town. The town had not engaged in any statistical study prior to the adoption of the ordinance to estimate the total costs of the services. It merely estimated that a fixed fee of 8% was needed and then tacked on an additional 2% to ensure that the fees would cover the town's costs. Plaintiff challenged the ordinance. It proffered evidence that all of the surrounding towns used a sliding scale fee structure. Plaintiff had the burden to show that the fee structure was unreasonable or arbitrary. It satisfied that burden by showing that the town had reimbursed individual contractors on an ad hoc basis when it determined that it was charging too much. While the ordinance set forth various duties of the Town Engineer, there was no guidelines regarding the nature or extent of the services to be accomplished. This lack of uniformity and predictability, as well as the lack of statistical support show the arbitrary nature of the fee.

[2] Subdivision Regulation

[a] **Association of Rural Residents v. Kitsap County**[181]

Under Washington's Growth Management Act (GMA), local governments are required to enact comprehensive plans that meet state-mandated minimums. A developer sought approval of a planned unit development (PUD) consisting of 106 lots on a 123 acre tract. At the time of the application the county's zoning ordinance only permitted an overall density of 1 unit/2.5 acres. The ordinance, however, allowed the density to be increased to 1 unit/1acre provided that the PUD proposal is "not unreasonably incompatible" with the surrounding area. The surrounding area was largely undeveloped. In response to the developer's preliminary plat and PUD application, the county issued a mitigated determination of non-significance (MDNS) under the State Environmental Protection Act. After several administrative appeals brought by the plaintiff, the county approved the plat and PUD as proposed, even though one of the reviewing officials recommended that the PUD be limited to 70 units. The parcel was located outside of the county's interim urban growth area (IUGA) as designated under the GMA.

One of the key issues is what land use regulations were in effect at the time the developer submitted his applications on December 15, 1994. Because the county's

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[179] See e.g., Emerson College v. Boston, 391 Mass. 415, 462 N.E.2d 1098 (1984); Daniels v. Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957).

[180] 270 A.D.2d 879, 705 N.Y.S.2d 468, *app. denied*, 95 N.Y.2d 757, 713 N.Y.S.2d 1, 734 N.E.2d 1212 (2000).

[181] 141 Wash.2d 185, 4 P.3d 115 (2000).

comprehensive plan and IUGA designations were not in effect at that time due to their inadequacy under state law, the developer is entitled to have the pre-application ordinance apply to his plans. Washington generally follows an early vested rights rule requiring the ordinances and regulations in effect at the time of the initial application to govern throughout the review process.[182] Plaintiff argued that where a PUD application is filed, a different rule should attach since it is merely the opening salvo in what will be a lengthy, negotiated review process. The court disagreed, however, and concluded that when a PUD application is joined with a preliminary plat approval request, the vested right attached to the entire application, including the PUD. Since the combined application included not only a subdivision plat but a development proposal, the right to develop as well as the right to subdivide should be vested.[183] The court also found that the MDNS ruling should be reviewed under the deferential clearly erroneous standard. The court is only to determine if the county reviewed the environmental evidence as required by the statute and is not to engage in a de novo review substituting its judgment for that of the county's.

[b] **Equicor Development, Inc. v. Westfield-Washington Township Plan Commission**[184]

Plaintiff is the contract-purchaser of a 27.2 acre tract of land zoned for medium density residential development under the township's zoning ordinance. It submitted a preliminary subdivision plat for approval that met all of the requirements under the then-existing ordinance, including a density cap of 82 lots. During the plat review process the town council suspended the operation of the extant zoning ordinance while it considered a comprehensive amendment to its land use ordinances. Eventually the plat was rejected by the commission. During the public hearings there was some commission sentiment to have the plaintiff reconfigure the plat to provide for more open space through a clustering pattern.

The scope of judicial review of an administrative decision to deny a plat is the substantial evidence test. The court found that under the zoning ordinance, the developer must have two on-site and ½ off-site parking spaces available for each 1-3 bedroom units being developed. The plat did not indicate the number and location of parking spaces and therefore there was substantial evidence in the record to support the denial decision. The court remarkably, however, found that the decision to deny preliminary plat approval was arbitrary and capricious notwithstanding its earlier finding that substantial evidence supported the decision. The denial decision was deemed to be arbitrary and capricious using an equal protection, selective enforcement claim. Plaintiff argued that similar subdivision plats had been approved without parking space designations and the only reason for the denial here was the commission's attempt to have the new zoning ordinance's standards apply. Even though the parking space problem provided substantial evidence in the record, the review of the plat by the staff had not identified that as a reason to deny the plat application. The records of the hearings clearly indicated that the officials were concerned with density and design issues, not parking spaces. Therefore, the developer was entitled to have its plat

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[182] Noble Manor v. Pierce County, 133 Wash.2d 269, 943 P.2d 1378 (1997).
[183] *In accord* Schneider Homes, Inc. v. City of Kent, 87 Wash.App. 774, 942 P.2d 1096, 971 P.2d 56 (1997), *rev. denied*, 134 Wash.2d 1021, 958 P.2d 316 (1998).
[184] 732 N.E.2d 215 (Ind.App.2000).

approved.[185] The court explored the motives of the decision-makers here and clearly substituted its judgment for that of the township's. If the decision is otherwise supportable, as the court concluded, whatever ulterior motive may have driven the decision-makers should have been ignored by the court.

[c] **Medina County Commissioners Court v. The Integrity Group**[186]

In 1993 the developer initially sought approval from the county to subdivide a 4.843 acre tract into 16 lots. The developer amended his plat to create a 7 lot subdivision that was approved by the court. The developer received approval from the local special district providing wastewater services and in addition received TNRCC approval for its water pollution abatement plan. When the developer sought final plat approval the county denied the application because the developer had not met the one acre minimum lot size requirement for subdivisions whether they are located inside or outside of the Edwards Aquifer Recharge Zone (EARZ). TNRCC also had the same minimum lot size requirement for its permit, but the subdivision had been filed prior to the minimum lot size requirement taking effect. In addition, most of the subdivision fell outside of the EARZ and was subject to Texas Water Development Board regulation, not TNRCC regulation.

Under Texas law, the authority of the commissioners court to approve subdivision plats is not discretionary if the plat meets the statutory requirements.[187] A county is without power to impose requirements for a subdivision, other than that contained in the statute. The statute does not provide for a minimum one acre lot size. The county argued that it had power under other enabling statutes dealing with private sewage facilities to require a minimum one acre lot size. But the area within EARZ was subject to state, not county, regulation. Under state law, a county government can have a more stringent regulation than that provided for by TNRCC, if it gets approval of those rules by TNRCC. While the developer asserted that the county had never received TNRCC approval, there was no competent summary judgment evidence on that issue. Thus the granting of mandamus relief by the trial court was improper until the fact issue was resolved.

[d] **Miles v. Foley**[188]

Under Connecticut law,[189] if a subdivision plat is not approved, modified or disapproved within the statutory time limits it is deemed approved. The law also required the planning and zoning commission to state the grounds for its actions. In May 1996, the plaintiff submitted a subdivision plat for approval. It was rejected the following day because it was determined to be premature. After the 65-day statutory period passed, plaintiff sent a demand letter stating that the plat had been deemed approved under the statute. The commission disagreed with that conclusion and plaintiff

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[185] A dissenting judge noted the inconsistency in the majority's view of the actions of the commission. He argued that the selective enforcement claims and the fact that staff review had not singled out the parking space problem did not make the decision arbitrary or capricious. 732 N.E.2d at 224 (Shapnack, C.J., dissenting in part).

[186] 21 S.W.3d 307 (Tex.App.—San Antonio 1999).

[187] Tex.Local Gov't Code § 232.001-.002.

[188] 253 Conn. 381, 752 A.2d 503 (2000).

[189] Conn.Gen.Stat. § 8-26.

brought this action in the form of a writ of mandamus to compel the commission to approve the plat as submitted. The trial court concluded that the action taken to reject the application was action within the meaning of the statute and thus refused to issue the write of mandamus.

The issue is whether the "rejection" of the plat as premature constituted an approval, conditional approval or disapproval as required by the statute. An earlier Connecticut decision,[190] had found that a rejection of a plat because an identical plat was the subject of ongoing litigation, was a sufficient action under the statute to avoid the "deemed approved" result mandated by the statute for local inaction. Even if the commission's actions are arbitrary or ultra vires, they are still actions that comply with the statute. The objective of the statute is to avoid dilatory review tactics and to ensure expeditious actions. Even though the commission did not get to the merits of the case it took expeditious action. Thus the automatic approval doctrine contained in the statute was not triggered. Plaintiff could have sought an administrative appeal of the commission's rejection decision. Because an appeal was available, no writ of mandamus should be issued.

[e] **County Council of Prince George's County v. Dutcher**[191]

The owner submitted a subdivision plat application to the Maryland-National Capital Park and Planning Commission in order to develop a 8.83 acre parcel into 20 lots for single-family residential purposes. Under the county subdivision ordinance, the owner had the burden of proof to show the County Planning Board that there would be adequate access to roads to serve the traffic generated by the subdivision. The Planning Board studied the application and the staff initially recommended disapproval because traffic at a key intersection would be adversely affected. At a Planning Board public hearing suggestions were made to the owner to adopt the provisions of a mitigation plan. After agreeing to fund a share of the needed improvements specified in the mitigation plan, the Planning Board issued a conditional approval. A neighborhood association appealed the Board's decision to the County Council. The Council remanded the case to the Board and ordered them to solicit comments from several state agencies. After supplementing the record the Board reaffirmed its original decision and another appeal was taken to the County Council. The Council reversed the Board's decision and denied the mitigation plan. A trial court found that the Council should have given more deference to the Board's decision and that the facts in the record did not support the Council's decision.

The court initially discussed whether the appeal from the trial court's decision was done in a timely fashion. It found that the appeal was not timely since the Council had not authorized an appeal within the 30 day period and that the Council's attorney did not have the power to file the appeal without such authority. The court, in dicta, then analyzed the appropriate scope of judicial review of plat approval decisions. In Maryland, judicial review of administrative agency decisions is very deferential. While applying a substantial evidence test, there is a strong presumption of validity. The court defined the substantial evidence test using the classic Euclidean language of "fairly debatable" a scope of review better suited for review of legislative, rather than adjudicatory decisions. The issue under Maryland law is whether the Council acts in an appellate or de novo review position vis-à-vis the Board's decision. The court concluded

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[190] Winchester Woods Associates v. Planning & Zoning Commission, 219 Conn. 303, 592 A.2d 953 (1991).

[191] 132 Md.App. 413, 752 A.2d 1199 (2000).

that the Council's role is akin to that of an appellate court, and therefore it must give deference to the Board's findings of fact and conclusions.[192] Thus, when the appellate court reviews the decision, it focuses on the decision of the Board, not on the decision of the Council. The court found that the Board carefully studied the plat and its impact on traffic. While it did not conduct an independent traffic study, it relied on other plat decisions that had reached a similar conclusion to support its mitigation plan. The mitigation plan sufficiently dealt with the traffic issues in a way that was consistent with the performance standards contained in the ordinance and regulations. Thus the Board's decision was at least fairly debatable and supported by substantial evidence.

[f] **Heidrich v. City of Lee's Summit**[193]

Developers of a residential subdivision have carried on a longstanding feud with the city regarding the development of an adjacent 138-acre parcel. The land had been annexed into the city in 1992 and was zoned for a planned business district. Various site plans were adopted for a phased development of the acreage, some of which were invalidated by the court. In 1996 a preliminary site or development plan was submitted by an owner of a portion of the parcel. This precipitated a need to amend the original site plan for one of the phases of the development. Eventually the city approved the amendment to the site plan. The neighbors than brought this action asserting that the decision, including a decision to amend the zoning ordinance was arbitrary and unreasonable.

The scope of judicial review of either a site plan approval decision or a rezoning ordinance is quite limited. The court applied the "fairly debatable" standard under its general arbitrary and capricious test. All uncertainties about the decision are resolved in favor of finding the governmental decision valid. One argument raised by the neighbors was that the ordinance required development tracts of at least 2.5 acres in size, while this particular development plan only affected a little less than 2 acres. But the development proposal was part of a larger proposal that was larger than 2.5 acres. The court also dismissed the claim that the city had not conducted an adequate traffic study. The issue of traffic congestion was raised during the public hearings and the city planner testified that he did not believe a study was required to deal with the modifications to the original site plan. The preliminary site plan contained a condition of a unifying architectural scheme. The court minimally reviewed the architectural plans in concluding that the proposed new development was consistent with the overall architectural scheme for the office park. All of the claims of the plaintiff regarding to the decision were within the sound discretion of the city. There was no evidence that the discretion afforded the city was exercised unreasonably or arbitrarily.

[g] **Village of Key Biscayne v. Tesaurus Holdings, Inc.**[194]

In February 1998, the Village granted provision approval for Tesaurus for several variance and special exception requests for a mixed use development. The approval was specifically conditioned on site plan review at a later date of the proposed residential development. The provisional approval constituted a finding that the proposed development complied with the master plan. In August 1999, the developer

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[192] See County Council of Prince George's County v. Curtis Regency, 121 Md.App. 123, 708 A.2d 1058, *cert. denied*, 351 Md. 5, 715 A.2d 964 (1998).
[193] 2000 WL 690156 (Mo.App.)
[194] 761 So.2d 397 (Fla.App. 2000).

returned with the site plan encompassing the residential development. The Village disapproved of the site plan since it was inconsistent with the general plan. The developer sought judicial review.

The trial court found that the site plan denial was a violation of the developer's due process rights triggered by the original approvals. The developer had the burden to show that the site plan was consistent with the master plan. Since the master plan did not allow for residential development in the area subject to the plan, there could be no property interest in having the site plan approved. Approval of the site plan would have required a finding of consistency. That was impossible and thus there could be no violation of the developer's due process rights.

[h] **Hill v. City of Clovis**[195]

Plaintiff's predecessor in interest executed a subdivision agreement with the city whereby the subdivider would provide certain street, landscaping and irrigation improvements. A subsequent agreement between the plaintiff and the city required a $ 55,000 right-of-way acquisition fee but gave the plaintiff a credit in fees for constructing the central travel lane improvements. Final subdivision map approval was given the plaintiff who completed the subdivision, but never completed the improvements as promised. Several years later the parties entered into another agreement whereby plaintiff agreed to construct public road improvements in another part of the city. The city never paid the plaintiff for the cost of the improvements. Plaintiff sought a declaratory judgment as to the status of his deposit and the credit and the unpaid contract price, while the city cross-complained for damages, measured by the cost of having the improvements completed by a third party and a set-off against the amount owed under the later contract. The trial court basically offset both of the parties' claimed amounts, but awarded the city attorney's fees.

The court applied the Subdivision Map Act.[196] The Act specifically deals with the relationship between a subdivider and a city, especially where the city is requiring improvements be made by the subdivider. If the subdivider is obligated to build improvements, the city has 120 days from the filing of the final plat to acquire the interest in the land where the improvements are to be made. In this case the city failed to acquire title to the land within that time period. Under the Act the local government has two options in connection with offsite improvements. It can require all improvements be completed prior to final map approval or it may approve the final map and execute a mutual agreement with the subdivider to complete the improvements. The court interpreted the Act's time period as only applying where map approval is refused by the city and not where final map approval is granted. Since the city approved the final map, the 120-day time period did not apply and therefore the subdivider was obligated to make the improvements even though the city did not acquire title to the lands until well after the deadline had passed.

[i] **Smith v. City of Eufaula Planning Commission**[197]

Smith filed a PUD with the commission seeking to develop a 36 acre tract for manufactured housing. After a public hearing the commission conditionally approved the PUD. Smith was required to provide for perimeter fencing and an engineering report

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[195] 80 Cal.App.4th 438, 94 Cal.Rptr.2d 901 (2000).
[196] Cal.Gov't Code §§ 66410 et seq.
[197] 2000 WL 303057 (Ala.Civ.App.)

regarding the adequacy of water pressure to serve fire control needs. The city eventually filed a report showing a lack of water pressure and the commission withdrew its conditional approval. After a year a second PUD application was filed and additional testimony proffered showing that steps would be taken to improve water pressure in the area. The application was not approved on a 3-3 vote of the commission.

Under Alabama law, a commission must approve or disapprove a PUD or subdivision plat application within 30 days of submission. The court interpreted the statute as treating a tie vote as a vote to disapprove. The statute also required the commission to state its reasons for its disapproval in writing. The court found that the record of the hearing and the minutes of the commission satisfied the writing requirement. Extensive discussions were held regarding the water pressure issue that showed why the commission was not going to approve the PUD.

[j] **Urrutia v. Blaine County**[198]

This case involved two separate subdivision plat applications. Both developers submitted plats for acreage located in a rural residential zone allowing density no greater than 1 unit per 20 acres. The Planning and Zoning Commission recommended both be approved. Both preliminary and final plat approvals were granted. A neighbor challenged both decisions and a trial court remanded the decisions to the County Board of Commissioners. Given a second opportunity the board voted to deny both plats as not conforming to the comprehensive plan.

In Idaho, judicial review of an administrative zoning decision by the trial court is treated as appellate review. Further review by the Supreme Court is not of the trial court's decision, but of the agency decision and the agency record. Agency findings of fact are deferred to unless clearly erroneous. Thus the district or appellate court should not substitute its judgment for that of the agency even if there was conflicting evidence in the record. The agency decision will be reviewed under the substantial evidence test to see if the decision was arbitrary, capricious or an abuse of discretion. Idaho treats the comprehensive plan as only a guide for development. There is no mandatory consistency requirement between the plan and the zoning or subdivision ordinance. The county had originally found that both plats complied with the zoning and subdivision ordinances, but one of the two did not meet the requirements of the plan. The county subdivision ordinance required the plat to conform to the comprehensive plan, but the court found that the only compliance required is that the plat comport with the overall objectives and goals of the plan. There is no independent plat requirement of consistency with the plan. Thus the county's decision to reject both plats on that basis was in violation of its statutory mandate. The court in dicta also found that one of the two plats was filed prior to the effective date of the 1994 comprehensive plan. Idaho has an early vesting rule so that the ordinance in existence at the time of the filing of the application applies even though it may be amended later.

[k] **Cathedral Park Condominium Committee v. District of Columbia Zoning Commission**[199]

Developers wanted to construct a nine-story addition to an existing apartment building that was listed as a historic landmark. The site abutted the National Zoo and a portion of Rock Creek Park. The developer planned to follow the original designs for the

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[198] 134 Idaho 353, 2 P.3d 738 (2000).
[199] 743 A.2d 1231 (D.C.App. 2000).

addition that were abandoned in the 1930's due to the Depression. The developer planned to rehabilitate portions of the tract near the park. The site was located in a MFR zoning district whose FAR requirements would be violated by the proposed addition. In order to implement the plan, the developer filed a PUD application with the commission and sought rezoning relief from the FAR restrictions. The developer also sought waivers or variances from some other performance standards including rear yard requirements. After several public hearings where the neighborhood committee participated, the commission approved the PUD finding that it would be consistent with the comprehensive plan.

Judicial review of a PUD decision is limited and deferential under the arbitrary, capricious or abuse of discretion standard. In addition, the court applied the substantial evidence test to review the commission's findings of fact. Deference was also given to the agency's interpretation of its own regulations and ordinances. Plaintiff argued that the increased density allowance clearly violated the plan's objectives of only allowing low-density development. In reviewing the commission's decision the court looked at various portions of the plan and its density objectives. The court found that the PUD's higher density levels were tempered by the large lot and the amount of open space that would be left even after the expansion. The court excused the commission's failure to address the plan's objective that development around historic parks, such as the National Zoo, be low density, because overall the project appeared to be consistent with the plan. Another plan objective was to create buffer zones between developed areas and parks. The commission determined that the tree preservation plan and open space areas were sufficient to meet that requirement. There would be little visual impact on both Rock Creek Park and the National Zoo. The court also deferred to the commission's interpretation of its regulations relating to the preservation of open space. Infill development was specifically mentioned in the plan as something that needed to be reviewed closely to determine that open or green space not be eliminated. But the court remanded the decision to the commission to revisit the question of consistency between the open space portions of the plan and the PUD. The court found that the commission analyzed the effect of the addition on the historic architectural features of the existing building. There was substantial evidence in the record to support the findings that there would be no adverse effects caused by the addition. Finally, the court deferred to the commission's analysis and findings regarding the waiving of various standards that were needed to allow the PUD to be constructed.

[l] **Davis v. Planning Board of the City of Somers Point**[200]

In January 1991, McDonald's received preliminary site plan approval for one of its restaurants that included several variances and waivers. A New Jersey statute in 1993 automatically extended the preliminary site plan approval through December 31, 1996. In January 1997, McDonald's sought a further extension as allowed by statute through December 31, 1997. In August 1997, it filed for final site plan approval that reduced the size of the building and the interior seating and changed some of the access points. Plaintiff participated at the Planning Board public hearing and argued that the board had no jurisdiction to vote on the final site plan since there had been significant changes from the preliminary site plan. The board disagreed with this contention and approved the final plan. Under New Jersey law, the filing of the preliminary plan insulated the applicant from future changes in the zoning ordinance. The statute also only required the preliminary site plan to be in tentative form for discussion purposes.

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[200] 327 N.J.Super. 535, 744 A.2d 222 (2000).

Modifications to the preliminary site plan are to be expected and thus in order to cross the threshold of significant changes which require a new preliminary site plan, the changes must substantially change the nature and impact of the planned development. In this case, the downsizing of the building and the access changes did not amount to a substantial or significant change.[201] On the merits, the scope of judicial review of the board's site plan decision is limited to determining whether the decision meets the legal requirements and is founded on adequate evidence. While plaintiff argued that there would be substantial negative externalities the court found that the approval of the final site plan was consistent with the preliminary site plan and the ordinance.

[m] **Blaha v. Board of Ada County Commissioners**[202]

In May 1996 the owners of a 40-acre tract sought preliminary plat approval for an 8-lot subdivision. The Eagle City Council reviewed the plat since it was within an area of city impact even though it was located outside of the city's boundaries. As the city began reviewing the final plat application, several neighbors stated their opposition to the development and argued that the private road designated to provide access failed to meet city street standards. The city went ahead and approved the plat subject to several conditions including compliance with the Ada County Highway District regulations. The developers then sought two variances to avoid having to comply with a number of county regulations. The board approved the plat and noted that to comply with ACHD regulations, the public road/private road intersection would have to be extensively reconstructed which was not needed given the small number of vehicle trips generated by the new subdivision. The board also found that the private road was in substantial compliance with city street standards. The board thus approved the plat and the neighbors sought judicial review.

The court first found that the board had the power to grant the variances relating to the intersection design standards, although that was not one of the express powers granted to counties to issue variances. As to the city's street width standards, the court found that the private road should be governed by the county's standards, not the city's, so that no variance was actually needed. In resolving the potential intergovernmental conflict because the plat is located in an area of impact for the city, the court determined that the county has the exclusive power to review and approve plats in that area. The city's review must only be advisory in nature because to give it veto authority would be to infringe on the "constitutional rights" of the county. The court interpreted its state constitution as creating dual sovereign bodies, the county and the city, neither of which could infringe upon the sovereign powers of the other within one's territorial limits.

[n] **City of Colorado Springs v. Securcare Self Storage, Inc.**[203]

An owner of a 4.4 acre tract sought to develop by constructing mini-warehouses for self-storage. It received administrative approval for the initial development plan in

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[201] In Macedonian Orthodox Church v. Planning Board of Randolph Township, 269 N.J.Super. 562, 636 A.2d 96 (1994) the court found a significant change where the building and parking area were doubled in size between the preliminary and final site plans.

[202] 2000 WL 1253823 (Idaho). In a related case dealing with the city's approval of this same plat under a statute giving the city the power to review plats within a designated extra-territorial area see Blaha v. Eagle City Council, 2000 WL 1256889 (Idaho). In that case the court found that the city's order was only an interlocutory order and therefore not appealable.

[203] City of Colorado Springs v. Securcare Self Storage, Inc., 2000 WL 1335887 (Colo.)

1995. It modified the plan shortly thereafter to add a service station on a one acre portion of the tract. The amended plan was submitted to the planning commission for its approval. After hearing local opposition the commission rejected the plan finding it incompatible with the surrounding residential neighborhood. The zoning ordinance, however, zoned the tract for commercial uses, including both types of proposed uses. The city council upheld the commission's denial of the development plan. The owner sought judicial review.

The procedural posture of the case was governed by Colorado Rule of Civil Procedure 106(a)(4) that limits review to see if the governmental body exceeded its jurisdiction or abused its discretion. The ultimate issue in this case was whether the city ordinances authorized the city to deny a development plan for a use permitted by the zoning ordinance. Thus the court had to explore the zoning powers of the city. Colorado Springs is a home rule city giving it non-preemptible powers over local or municipal matters, including zoning. Thus the city has plenary authority, subject only to other constitutional limitations and its own charger, to determine how to zone and plan. The zoning ordinance provided for specific districts where uses are either permitted, conditional or prohibited. The zoning district here listed mini-warehouses and service stations as permitted uses. In order to develop land one must receive a building permit for any structure. Building permits require the receipt of development plan approval before they can be issued. The procedural and substantive requirements for development plan approval were set forth in the ordinance. The planning commission was given the specific authority to review development plans applying a compatibility criteria. In looking at these zoning ordinances as a whole, the court interpreted them to allow the commission to review and then deny development plans that do not meet the criteria listed in the ordinance. Otherwise, the development plan review system would be superfluous for permitted uses. There was no ordinance language exempting permitted uses from the development plan review process. There is no absolute right to operate a permitted use under the zoning ordinance.[204]

[o] **In re Appeal of Busik**[205]

The Busiks own a 83.23-acre tract of land located in a rural-residential zone. In 1991 they submitted a preliminary plat to subdivide their parcel into 7 residential lots. They agreed to a condition imposed by the township to enter into an agreement with a neighboring landowner with respect to the terms and conditions governing the use of a road that traverses both of their parcels. With that and other conditions, the township approved the preliminary plat. The Busiks were able to comply with all of the conditions except the one requiring an agreement with the neighbors. They sought final plat approval and requested to have that condition removed. The township approved the final plat, but still made it subject to the agreement condition.

The court determined that both the preliminary and final plat decisions are appealable under Pennsylvania law. If the Busiks were concerned about the agreement condition, they should have challenged the imposition of that condition within the time

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[204] The court had to distinguish several cases that suggested that permitted uses had to be allowed. See Sherman v. City of Colorado Springs Planning Commission, 763 P.2d 292 (Colo. 1988); Sherman v. City of Colorado Springs Planning Commission, 680 P.2d 1302 (Colo.App. 1983); Western Paving Construction Co. v. Board of County Commissioners, 181 Colo. 77, 506 P.2d 1230 (1973). Two dissenting justices argued that land use ordinances should be construed in favor of allowing the free use of land and thus permitted uses should be allowed "as of right." 2000 Wl 1335887 at *10 (Kourlis, J. dissenting).

[205] 2000 WL 11147778 (Pa.Commw.)

frame allowed following the approval of the preliminary plat. By failing to challenge the preliminary plat decision and, in essence, accepting all of the conditions, the subdivider waived his right to challenge those conditions in the future. Even though the Busiks attempted to negotiate in good faith with their neighbors, they cannot attack the validity of the condition at this point in the review process. The court noted that the Busiks were in a difficult position since they would have had to challenge the preliminary plat decision within 30 days, hardly enough time to see whether they could comply with the condition. But the court would not rescue a party from accepting what they now believe to be imprudent conditions.

[p] **Madison River R.V. Ltd. v. Town of Ennis**[206]

In April 1998, plaintiff sought preliminary plat review to build a campground for 73 recreational vehicles. The Planning Board recommended that the application be denied because it was incomplete and would create substantial traffic and sewage problems. The application was forwarded to the Town Council. Plaintiff sought to have one councilman recuse himself because of his alleged bias against the project. The councilman refused to recuse himself. The council voted to deny the application.

The court found that the councilman was not required to recuse himself because the evidence was not clear that he had prejudged the case or that he had an economic interest in the outcome. The pre-hearing comments by the councilman were equivocal in tone and raised legitimate questions about some of the possible negative externalities that would arise if the development was approved. Under Montana law the town was required to give a written statement specifying the reason for the denial of the preliminary plat. The 30-day time period for filing an appeal does not begin to run until that statement was filed. Thus the fact that the statement was filed after the complaint was filed by the plaintiff in this case would not affect the outcome. The court found that the trial court had not violated the plaintiff's due process rights by failing to hold a hearing. It had been the position of the plaintiff that review was on the record for which no new evidence would be allowed. As such there was no constitutional requirement for a hearing. The court further found that the town's decision was not arbitrary, capricious or unlawful. While there was some debate as to the traffic and sewage impacts, there was enough evidence to support the town's denial decision. Finally, the court rejected the plaintiff's regulatory takings claim because insufficient facts were alleged to show that the value or the usefulness of the property has been substantially diminished. There were no allegations that the plat denial had the effect of denying all economically beneficial use to the parcel in question.

[q] **Largent v. Klickitat County**[207]

In 1996 Largent files a preliminary plat application with the county seeking to create a 20 residential lot subdivision out of a 9.64 acre tract. The plat was amended to include only 16 lots in a two-phased development. The owner received permission to use an on-site sewage disposal system from the regional health district and was granted permission to tie into a drinking water supply system. The plat included the construction of a private road. Under county regulations the road was classified as an urban access route and thus required a 32-foot wide right of way and the use of bituminous surface treatment. The owner seeks a variance to construction only a 20 foot gravel road on a

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[206] 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

[207] 101 Wash.App. 1033, 2000 WL 896411 (unpublished opinion).

40 foot right of way. The county denies the variance and the owner seeks judicial review.

The county's decision to deny the variance is based in part on the inadequacy of the sewage and drinking water commitments. The commitments are only for residential purposes while the plat shows a mixture of residential and commercial uses. In reviewing an administrative ruling, the court only looks at the record and applies the substantial evidence test as to factual issues. The potential development of several lots for commercial use in the second phase supports the board's decision that there is an inadequate showing of public services to the platted area. Where there is a disputed set of facts the court will not substitute its judgment for that of the board's.

The court also upholds the decision not to grant a variance as to the appropriate road surface and right of way width. The private road is properly classified as an urban access route. There is no evidence of special circumstances that would justify the granting of a variance. The only evidence in the record was the owner's claim of financial hardship, which by itself is insufficient to support a variance. Evidence that variances to allow the use of gravel surfaces to other developers is also not sufficient to overturn the variance decision.

The court inextricably finds that *Nollan-Dolan* are inapposite since the case does not involve an exaction or a physical invasion. The regulations here do no require the dedication of the land, they merely set forth minimum surfacing and width requirements for the private road. Thus, the court concludes that *Del Monte Dunes* limits *Nollan-Dolan* to the exaction or dedication decision. It then applies the Washington regulatory takings analysis that asks whether the decision denies the owner a fundamental attribute of property ownership. Such attributes include the right to possess, the right to exclude and the right to make some economically viable use of the land. The plaintiff bears the burden of proof on that issue. If no fundamental attribute of property ownership is involved, then the court must determine whether the ordinance serves the public interest or is merely a subterfuge to require the regulated party to confer a public benefit. The court finds that the regulation does not interfere with the right to possess or develop the land. By replatting the land into a less dense configuration, the owner can avoid having the road classified as an urban access road and thus avoid having as wide a right of way required. The court then applies a substantive due process analysis and finds, not surprisingly, that the road regulations served a legitimate public purpose. Likewise it concludes that the ordinance is not unduly oppressive as to the owner so that he is not being singled out to provide a public benefit. The mere fact that the surfacing and width requirements add some expense to the owner's plans does not render the requirements oppressive.

1.06 NIMBY Syndrome

[1] Telecommunications Facilities (TCFs)

[a] **Petersburg Cellular Partnership v. Board of Supervisors**[208]

The Telecommunications Act of 1996 continued to have a significant impact on the land use litigation scene. It is clear that the Act federalized the law of zoning and

[208] Petersburg Cellular Partnership v. Board of Supervisors, 205 F.3d 688 (4th Cir. 2000). The district court opinion reported at 29 F.Supp.2d 701 (E.D.Va. 1998) is analyzed at Kramer I, note 1 *supra* at § 1.06[1]l].

planning insofar as most TCFs are concerned.[209] Section 704 of the Act,[210] imposed several procedural and substantive standards that must be met by local governments who attempt to regulate TCFs. Local governments must create a written record that supports their TCF decision under the substantial evidence scope of judicial review. The key substantive standards are that a decision cannot prohibit or have the effect of prohibiting the provision of telecommunications services, the decision cannot be based on the environmental effects of radio frequency emissions, the decision cannot unduly discriminate against a service provider and the decision must not be a wrongful entry barrier for potential service providers. Failure to comply with one or more of these statutory mandates can lead to a Section 1983 cause of action. Almost all of the litigation to date has focused on the prohibition, non-discrimination and substantial evidence standards.

In this case the TCF provider sought a discretionary permit to construct a 199-foot tower on a land zoned for commercial use. The Planning Commission recommended that the permit be issued, subject to several conditions. Some community opposition was heard at the Board of Supervisors meeting. Eventually, the Board decided to deny the permit. The district court found that the Board had not satisfied the substantial evidence test because the record was found to be both "modest" and "speculative." The Board appealed. The Fourth Circuit's decision was fractured and precedent setting at the same time. Judge Niemeyer and Judge King agreed that the Board's decision was not supported by substantial evidence. Judge Widener dissented on that issue. But Judge Niemeyer found that the Act is unconstitutional under the 10th Amendment. Neither of the other two judges agreed on that issue. Since Judge Niemeyer, on constitutional grounds, and Judge Widener on statutory grounds, found that the district court decision was erroneous, the result of the opinion was to reverse the district court and reinstate the Board's permit denial decision.

While the Fourth Circuit had previously defined the substantial evidence test to provide for a "soft glance" rather than a "hard look",[211] there is nonetheless a review role for the court. Substantial evidence falls between the mere scintilla and preponderance of the evidence standards. In this case, the lack of substantial community opposition and arguments made, on the record, to the Board, does not support the Board's decision to deny the permit. While several concerns were raised, they were all disposed of by the permit applicant at the hearing. One argument was that the tower would interfere with a nearby airport, but the applicant had received permission from the FAA to locate the TCF and place a light on top of it, eliminating any true concern about airplane safety.

The county urged, and Judge Niemeyer, accepted, the claim that the Act's provision imposing the substantial evidence standard violates the Tenth Amendment by coercing local governments to employ "intrusive federal rules" in their zoning and land use regulatory processes. According to Judge Niemeyer, the Act, while containing a non-preemption clause, has the effect of requiring state and local governments to employ both the procedural and substantive standards of the Act. The county first argued that the Act's substantial evidence standard is different than that required under

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[209] See Kenneth Baldwin, The Telecommunications Act of 1996: Developing Caselaw of Towering Proportions, 1998 Inst. on Zoning, Planning & Eminent Domain 8-1; Kramer I, note 1 *supra* at 1.06[1] and Kramer II, note 1 *supra* at § 1.06[1]. In 1998 I reviewed 5 cases, in 1999 I reviewed 25 cases and this year I am reviewing 26 cases.

[210] 47 U.S.C. 332 (c).

[211] See e.g., AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423 (4th Cir. 1998) and AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment, 172 F.3d 307 (4th Cir. 1999), discussed at Kramer I, note 1 *supra* at §1.06[1][d].

Virginia law for the review of local zoning decisions. Virginia courts employ a very deferential standard to review both legislative and administrative zoning decisions.[212] The classic Euclidean fairly debatable standard is employed by the courts to review local decisions.

Judge Niemeyer argued that by altering the state scope of judicial review the Act has two substantial detrimental effects on federalism.

> First, the very act of imposition, without a meaningful opportunity for a state to opt out, compromises state and local sovereignty. And second, regardless of the relative effects of the federal and local standard, the imposition of a federal standard on a local board confuses the electorate as to which governmental unit, federal or local, is to be accountable for a legislative decision made by a local board.[213]

The revival of Tenth Amendment jurisprudence with *Printz v. U.S.*,[214] has led to a time of substantial uncertainty as to how far the courts will go to protect the dual sovereignty structure embodied by that amendment. The commandeering of local legislative processes is seen as a threat to the union. Judge Niemeyer somewhat bombastically observed:

> Moreover, when the federal government commandeers state and local legislative processes to carry out its own goals, not only is the federal power aggrandized and the state power enslaved, but also the lines of separation are blurred, causing a loss of accountability to the people and confusion by them. When a local legislative body acts under a standard imposed by the federal government, even if the federal standard is comparable in effect to state standards, a significant risk arises that the citizens of the community will not know whether the legislative act is the produce of Congress or of their local legislature. This confusion inevitably frustrates a normal democratic response.[215]

The federal government is free to preempt state and/or local police powers acting pursuant to the Commerce Clause. It is also empowered to employ incentives to encourage state and/or local action. But it cannot coerce or unilaterally erase the line between state and federal sovereigns. The Communications Act coerces the county to employ the federal standard if it is to engage in zoning and planning. While state courts can be required to apply federal law,[216] state or sub-state legislative bodies may not be required to apply federally mandated standards. Thus Judge Niemeyer would invalidate the Act's provisions relating to the imposition of the substantial evidence standard but would retain the remaining provisions in the Act.

[b] 360 Communications Co. of Charlottesville v. Board of Supervisors[217]

In a case decided one week after *Petersburg,* the Fourth Circuit did not have to deal with the constitutional issues in again reviewing a local decision not to issue a permit for a TCF. Plaintiff sought to build a single tower on a ridgeline in order to provide

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[212] See e.g, City Council of Virginia Beach v. Harrell, 236 Va. 99, 372 S.E.2d 139 (1988). An exception appears to apply for "socio-economic" zoning, whatever that may be. Board of Supervisors v. DeGroff Enterprises, 198 S.E.2d 600 (Va. 1973).

[213] 205 F.3d at 700.

[214] Printz v. U.S., 521 U.S. 898 (1997).

[215] 205 F.3d at 701.

[216] See e.g., Testa v. Katt, 330 U.S. 386 (1947).

[217] 211 F.3d 79 (4th Cir. 2000).

adequate wireless service to a portion of the county. The Board held a hearing at which it heard some 10 citizens complain about the tower. The Board voted unanimously to deny the permit saying it would conflict with the county's comprehensive plan and open space plan. The district court found that there was no reasonable alternative location and that the Board had exhibited a hostility to the application that required the issuance of an injunction to order the Board to issue the permit.

Under the Fourth Circuit's deferential view of the substantial evidence test, the court determined that the district court had abused its discretion in not finding substantial evidence in the record to support the permit denial decision. There was both near-unanimous citizen opposition and inconsistency with the comprehensive plan. While the applicant's evidence showed that its design and location would minimize the intrusive nature of a tower, it is up to the Board to make the determination of compatibility. Thus, there was substantial evidence in the record to support the decision.

As to the prohibition claim made by the plaintiff, the district court had found that no reasonable alternative existed whereby wireless services could be provided. The court reviewed the evidence that showed that there were other alternatives, including having 6 towers at lower mountaintop or ridgeline elevation or even more towers at lower elevations. The court emphasized the Act's intention to leave as much local control as possible. Thus, the definition of what are reasonable alternatives must be undertaken with that objective in mind. The PCS applicant has the heavy burden of proof to show that there are no reasonable alternatives to the provision of adequate service. The evidence in this case was disputed and therefore the applicant had not sustained its burden. The district court's decision was reversed and the Board's decision to deny the permit was reinstated.

[c] **Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners**[218]

The county had adopted an amendment to its zoning ordinance imposing a stipulation in all TCF permits preventing the TCF from interfering with county public safety communications. When SWB sought a permit for a tower, the permit included the stipulation along with various conditions regarding the need to respond to complaints about any alleged interference. The county had communicated with the FCC prior to the adoption of the ordinance and prior to its review of SWB's permit application. The FCC responded that it considered the county regulation in the radio frequency interference (RFI) area preempted by the Act.

The court applies the traditional tripartite preemption analysis to determine if the RFI regulations are preempted. It first examined whether the Act expressly preempts local RFI regulations. It found no express statutory preemption language. It then determined whether the federal scheme of regulation occupies the field so as to leave no room for state regulation. The court reviewed not only the Act, but the various statutory enactments dealing with the FCC. In addition to the statutes, the court looked at the FCC regulations dealing with RFI. The extent of federal involvement in RFI issues was deemed to be so pervasive that there was an implied intent to occupy the field.

As in *Petersburg* the county made a claim that the FCC statutes and regulations violate the federalism principles embodied in the Tenth Amendment. Without the hyperbole of Judge Niemeyer's concern over the commandeering of local legislative powers, the court simply concluded that even historic or classic police powers exercised by the state may be preempted by federal action taken pursuant to a constitutionally

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[218] 199 F.3d 1185 (10th Cir. 1999).

granted power. Here the Commerce Clause provided sufficient authority for the federal government to act. When it acts it can choose to remove state and local governments from areas of traditional powers. Thus the preemption of RFI issues does not violate the Tenth Amendment.

[d] Industrial Communications & Electronics, Inc. v. Town of Falmouth[219]

In 1990 the Town enacted an amendment to the zoning ordinance dealing with TCFs that allows them to be located in two districts as a conditional use. In 1997, plaintiff purchased a parcel of land where there were some existing TCF towers. The parcel had been the situs of the towers prior to the enactment of the 1990 ordinance. In 1998, plaintiff sought a permit to replace the existing towers with a single tower. The permit was denied as well as a variance from the setback requirements. A second application was denied also.

The first argument made by the plaintiff was that there was not substantial evidence in the record to support the town's decisions. The First Circuit defines substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The approach is deferential, but possibly not as deferential as the Fourth Circuit. One preliminary issue the court dealt with involved an interpretation of the zoning ordinance. The plaintiff argued that all it was proposing was a structural alteration to existing towers. Applying state law, not federal law, to resolve the interpretational issue, the court determined that plaintiff's permit applications were for new towers, not merely alterations to existing towers. In addition, the court found that the proposed changes to the non-conforming uses were not authorized by the zoning ordinance because the changes were of such a nature as to be more than a mere expansion. The court also found substantial evidence in the record to support the denial of the variance from the setback requirements. Under Maine law, an applicant for a variance has the burden of proving that the 4 statutory criteria have been satisfied.[220] One of the factors or criteria is that the land cannot yield a reasonable rate of return without a variance. Here the plaintiff did not submit any evidence that the parcel would not yield such a return if the towers were repaired rather than being replaced.

Plaintiff also asserted that the town's decision violated the non-prohibition standard of the Act. The court admitted that this standard may be violated by a single permit decision.[221] But where there is not a general prohibition, the plaintiff bears a very heavy burden of proof to show that the individual decision has the effect of prohibiting the provision of wireless services. Again, the plaintiff failed to sustain its burden since it was already providing such services from the existing towers. There was also not sufficient evidence to show that reasonable alternative sties were not available. Both of those factors are critical if a TCF operator is to prove that an individual decision prohibited or had the effect of prohibiting wireless services. Finally, the court found no evidence to support the claim of discrimination in favor of other wireless operators even though the Board had on 4 other occasions granted the discretionary permit required to build a TCF. The Act does not require a local government to waive its zoning requirements to allow competition, where a wireless provider already has existing

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[219] 2000 WL 761002 (D.Me.).

[220] See Goldstein v. City of South Portland, 728 A.2d 164 (Me. 1999), analyzed in Kramer I, note 1 *supra* at §1.07[1][b][i].

[221] See Town of Amherst v. Omnipoint Communications, Inc., 173 F.3d 9 (1st Cir. 1999), analyzed in Kramer I, note 1 *supra* at §1.06[1][e].

service that is properly permitted. Unless the plaintiff was able to show that no other sites were available to provide competitive service, the town does not violate the non-discrimination standard by enforcing its zoning ordinance against a PCS provider.

[e] **SNET Cellular, Inc. v. Angell**[222]

SNET sought a discretionary permit to place a TCF tower on a parcel of land zoned for single family residential use. It also sought a variance since the maximum height for any tower was only 35 feet. Several hearings were held before the town's zoning board of review. During the pendency of the application, the town enacted a moratorium ordinance on TCFs pending completion of a TCF plan. The SNET application, however, was exempted from the moratorium. The board eventually denied both the permit and variance requests. Shortly thereafter the town changed its zoning ordinance to allow TCFs as of right in industrial districts, as special uses in commercial districts and as accessory uses in any district if attached to an existing structure. SNET challenged the board's decision as violative of both the Act and Rhode Island law.

This court adopted the same deferential approach to applying the substantial evidence test as did the Fourth Circuit, notwithstanding language to the contrary in several earlier First Circuit opinions. The court differentiated between a soft glance scope of judicial review for decisions relating to compliance with the local zoning regulations with a harder look at decisions affecting either the discrimination or prohibition standards. In applying the substantial evidence test to the board decision, the court reviewed the standards for the issuance of both the discretionary permit and the variance. In neither case did the applicant meet the requirements. The court reviewed the factors of compatibility with neighboring uses, consistency with the purposes of the comprehensive plan, compatibility with the orderly development of the town and environmental compatibility. Given the soft glance scope of judicial review, the court had no difficulty finding that the town met the substantial evidence standard.

As to the prohibition claim, the court noted that these are essentially fact-specific inquiries where a total local prohibition is not being challenged. The parties had both sought summary judgment on this issue, but the court determined that in this case, and in general, summary judgments should not be granted unless the evidence on the impact of the regulatory scheme has been presented to the local government. Because SNET urged that both the permit and variance denials, along with the zoning ordinance amendment prohibited SNET from providing service, no one local entity was provided the technical evidence on where the towers needed to be located. Thus, a trial on the merits had to be conducted before the court could determine whether the town's actions prohibited the provision of wireless services.

Finally the court rejected the claim that the town violated the Act's requirement that an application for a TCF be reviewed within a reasonable period of time. In this case the time between the application being filed and the final decision was 15 months. Because the zoning board of review is made up of volunteer citizens, a city official testified that setting hearing dates is often a lengthy process. Since the Act does not set a bright-line test for determining reasonableness, the court determined that under the circumstances involved here, a rather lengthy delay would not be unreasonable.

[f] **New York SMSA Limited Partnership v. Town of Clarkstown**[223]

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[222] 99 F.Supp.2d 190 (D.R.I. 2000).

[223] 99 F.Supp.2d 381 (S.D.N.Y. 2000).

Three competing PCS providers sought three separate permits to build TCFs at different locations in order to remedy a lack of service in one portion of the town. The town's zoning ordinance clearly favors applications combining locations in order to minimize the number of towers that have to be built. In reviewing a competitor's earlier filed application, the town held several meetings in order to facilitate co-location. An apparent agreement was reached with all of the competitors to co-locate on the one tower. Nonetheless, the plaintiff went ahead with its application for a separate tower, notwithstanding its earlier indication that it would co-locate. After a series of meetings, the town voted to deny the plaintiff's permit application, although it did not approve the first application as the town was trying to work out some problems with the location. Eventually the first application was approved prior to the trial in this case.

The Second Circuit generally takes a harder look at local decisions under the Act, than the Fourth Circuit.[224] Nonetheless, the federal court is not to substitute its judgment for that of the local government. The court first dealt with the prohibition standard because plaintiff claimed that there would be a lack of wireless services to a portion of the community. Where the service gap can be filled with less intrusive means than that proposed by the plaintiff, however, a local government may deny a permit without violating the prohibition standard. Here the availability of co-locating plaintiff's facility on the now-permitted site will avoid the problem of a hole in the service area.

The court found that a Board resolution adopted after the initial decision to deny plaintiff's permit satisfied the in writing requirement. Likewise the court found that there was substantial evidence in the record supporting the denial decision. Numerous board meetings and the policy underlying the ordinance minimizing TCF locations were sufficient to uphold the decision.

[g] Cellular Telephone Co. v. Zoning Board of Adjustment of Ho-Ho-Kus Borough[225]

Plaintiffs sought discretionary permits and variances in order to locate a TCF on Borough-owned land they had leased for that purpose. The land was located in a residential zone, but the existing site was being used by the Borough for auto maintenance and storage purposes. The Board, after 2 years and 44 public hearings denied the variances because they determined that the quality of existing service was sufficient, there would be a detrimental impact on the neighboring properties and that the visual impact of such a large structure on a small site would be contrary to the comprehensive plan.

The plaintiffs claim that the effect of the variance denials is to effectively prohibit wireless services in violation of the Act. The court rejected plaintiffs' claim that the Board cannot hear evidence on the quality of existing service within the community. In this case, several residents made tape recordings of telephone conversations to prove that the existing TCFs were providing sufficient service. The plaintiffs attempted to rebut that evidence with testimony of their engineers regarding holes in the service area and the inadequacy of the existing facilities. In making their decision the board will have to determine whether there is a "significant gap or gaps" in local service.[226]

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[224] See e.g., Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2nd Cir. 1999), analyzed at Kramer I, note 1 *supra* at §1.06[1][b].

[225] 197 F.3d 64 (3rd Cir. 1999), *aff'g in part and rev'g in part*, 24 F.Supp.2d 359 (D.N.J. 1998).

[226] The court is adopting the test announced by the Second Circuit in Sprint Spectrum, L.P.. v. Willoth, 178 F.3d 630 (2nd Cir. 1999) analyzed at Kramer I, note 1 *supra* at §1.06[1][a].

The township had denied a permit to locate a TCF at the plaintiff's designated site. The district court found that the decision violated the prohibition provisions of the Act and was not supported by substantial evidence. The Third Circuit applied a "significant gap" approach to resolving prohibition claims. The provider must prove that such a gap exists whereby the area is not being adequately provided with cellular service and secondly, if such a gap exists is the provider's plan the least intrusive means to solve the problem. As a general matter a gap exists "in personal wireless services when a remote user of those services is unable either to connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication."[227] Under the Act's prohibition standard, a reviewing court is not required to apply the substantial evidence standard. Instead the Act absolutely prevents a local government from engaging in decisions that prohibit or have the effect of prohibiting wireless services. Since the plaintiffs provided evidence that there may be significant gaps, the town's decision to deny the variances cannot be upheld on a motion for summary judgment.

The court also reviewed the plaintiffs' challenge that the board's decision was not supported by substantial evidence. Here the court adopted a middle of the road approach to the substantial evidence test, neither too deferential nor too intrusive. Substantial evidence is such evidence "as a reasonable mind might accept as adequate to support a conclusion."[228] The court required the factfinder to explain its reasons for rejecting or discrediting competent evidence supporting a contrary decision. This is not usually required of local zoning decision-makers under most state's law. The court found that the board's findings as to the negative impacts of the proposed TCF were supported by substantial evidence because the board had reports from neighboring communities on such effects as well as citizen testimony. But the board's decision that existing service was adequate, based on the lay person testimony of several individuals who had taped a few calls was not supported by substantial evidence. The court also required the board, on remand, to apply New Jersey law on the issuance of variances. The board will have to follow the four step procedure of first identifying the public interest at stake, second, identifying the detrimental effects if the variance is issued, third, imposing conditions to minimize the detrimental effects and fourth, balance the positive (public interest) with the negative (detrimental impacts) factors.[229]

[h] **APT Pittsburgh Limited Partnership v. Penn Township Butler County**[230]

After searching for a suitable site to locate a TCF in some hilly terrain, plaintiff selected a site located in a rural residential zoning district. The township amended its zoning ordinance restricting TCF towers to the light industrial districts shortly after plaintiff's search had been completed. Plaintiff then sought a site within the allowed districts but was unable to locate a technologically feasible site that was available. Plaintiff then sought a variance from the Zoning Hearing Board or such alternative relief as the Board would give in order to allow the tower to be built. The board denied the permit and issued a written decision.

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[227] 197 F.3d at 70.

[228] *Id.* at 71.

[229] See e.g., Coventry Square, Inc. v. Westwood Zoning Board of Adjustment, 138 N.J. 285, 650 A.2d 340 (1994); Sica v. Board of Adjustment, 127 N.J. 152, 603 A.2d 30 (1992).

[230] 196 F.3d 469 (3rd Cir. 1999).

In addition to making prohibition and substantial evidence claims under the Act, the plaintiffs also alleged that under state law, the ordinance impermissibly excludes TCFs from the township where they are needed to provide effective wireless service.[231] It concurred with the holding in *Ho-Ho-Kus,* that the substantial evidence test does not apply to a prohibition claim. The reviewing court is to engage in a de novo review. Likewise, when the court reviews the state law issue of exclusionary zoning as applied to a TCH, de novo review, rather than the substantial evidence test is to be employed.

Pennsylvania zoning law employs the traditional presumption of validity, but with the caveat that proving an ordinance that totally excludes an otherwise legitimate use effectively rebuts that presumption.[232] Once rebutted the burden shifts to the government to show that the ordinance bears a substantial relationship to public health, safety and general welfare. There is no de jure exclusion since TCFs are allowed in several zones, but the plaintiff argued there was de facto exclusion since those districts were either unavailable for use or unsuitable due to topographic conditions. The court found that the plaintiff's evidence was not sufficient to show that the ordinance was de facto exclusionary merely because one potential site owner refused to lease a parcel of land for the TCF. The fact that it might be more expensive to locate the TCF in another location does not crate an exclusionary ordinance. Therefore, plaintiff did not sustain its burden of proof on the state zoning law issue.

The court applied the same rationale regarding the prohibition claim as it did in *Ho-Ho-Kus.* While an individual denial may constitute a violation of the prohibition standard, the plaintiff must show that there is a significant gap in local service. The plaintiff had not presented evidence that co-locations were not available within the township to overcome the existing gaps in service. Without that evidence plaintiff could not prove that such gaps exist and that its proposal would be the least onerous means by which the gaps could be overcome.

[i] Omnipoint Communications Enterprises, L.P. v. Newtown Township[233]

The township denied the plaintiff's request for permission to locate a TCF on the top of an existing apartment building since it was neither a permitted or accessory use in that zoning district. The district court granted the plaintiff's partial motion for summary judgment. The Third Circuit gloss on the Act's prohibition standard requiring a party to show that there are significant gaps in service and that the proposed TCF is the least onerous means of filling those gaps is applied again. Because the trial court did not have that test before it, the record was incomplete on the first issue, namely whether there were significant gaps in service within the township. On that basis, the court remands to the trial court to hold the required de novo proceeding under *Ho-Ho-Kus* to make that determination. There had been evidence before the township board that other wireless providers had coverage without gaps. If that proved to be true, it would effect both the finding of a significant gap and whether less onerous alternatives were available. The court refused to answer whether a violation of the Act would provide the

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[231] For a similar approach to the substantial evidence test see Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board, 72 F.Supp.2d 512 (E.D.Pa. 1999).

[232] See e..g, Farrell v. Worcester Township Board of Supervsiors, 85 Pa.Commw. 163, 481 A.2d 986 (1984) ; Exton Quarries, Inc. v. Zoning Board of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967).

[233] 2000 WL 979952 (3rd Cir.).

plaintiff with a Section 1983 cause of action since that issue was not ripe given the required remand to the district court.[234]

[j] Omnipoint Communications Enterprises, L.P. v. Charlestown Township[235]

Plaintiff executed a lease to co-locate a TCF on an existing tower owned and operated by the Pennsylvania Turnpike Commission in order to provide continuous service along the Turnpike. The township refused to issue a permit because the tower is located in a rural residential zoning district and such towers are only allowed in limited industrial districts. The Commission tower was treated as a non-conforming use. Evidence at the township hearing showed that other sites were available that would deal with the alleged gaps in service. The court applied the *Ho-Ho-Kus* significant gap test to determine whether the denial effected a prohibition of service. The township conceded that the only district where TCFs are allowed would not fill in the gap in service along the Turnpike. They also conceded that co-locating the facility on the existing tower was the least onerous means of filling in the gap. Given those two concessions, the township clearly violated the *Ho-Ho-Kus* tests and thus prohibited the plaintiff from providing service within the township. Thus the plaintiff's motion for summary judgment was granted.

The court then dealt with the issue of whether a Section 1983 cause of action was stated for a violation of the Act. While the Act does not expressly foreclose such actions, the court finds the Act sufficiently comprehensive to infer congressional intent to find such a foreclosure. Because the Act provides for a clear, detailed process that allows for a quick and complete remedy, the intent of Congress appears clear that no other remedial devices are needed. The only remedy not authorized by the Act that Section 1983 authorizes is the right to seek attorney's fees. Since the Act is silent on the issue of attorney's fees the court felt that Congress intended not to allow such fees to be recovered.[236]

[k] Cellular Telephone Co. v. Zoning Board of Adjustment of Borough of Harrington Park[237]

Plaintiff sought use and bulk variances to place a TCF on a lot located in an industrial zone that was the site of several existing non-conforming structures. After 6 hearings the board denied the variances. The district judge commented that the briefs

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[234] The use of Section 1983 in Act cases has led to disparate results within the federal district courts. *Compare* Omnipoint Communications v. Penn Forest Township, 42 F.Supp.2d 493 (M.D.Pa. 1999)(no 1983 cause of action); AT&T Wireless PCS, Inc. v. City of Atlanta, 50 F.Supp.2d 1352 (N.D.Ga. 1999) (same), *rev'd*, 210 F.3d 1322 (11th Cir. 2000); Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board, 72 F.Supp.2d 512 (E.D.Penn. 1999)(same);National Telecommunications Advisors, Inc. v. City of Chicopee, 16 F.Supp.2d 117 (D.Mass. 1998)(same) *with* AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000) discussed at § 1.06[p] *infra* (§1983 cause of action valid); Omnipoint Communications, Inc. v. Planning & Zoning Commission, 91 F.Supp.2d 497 (D.Conn. 2000)(same) at § 1.06[1][o] i*nfra*; Cellco Partnership v. Town Planning & Zoning Commission, 3 F.Supp.2d 178 (D.Conn. 1998)(same); Sprint Spectrum L.P. v. Town of Easton, 987 F.Supp. 47 (D.Mass 1997)(same); Omnipoint Communications Enterprises, L.P. v. Chadds Ford Township, 1998 WL 764762 (E.D.Pa.)(same).

[235] 2000 WL 128703 (E.D.Pa.)

[236] See cases cited in note 220 *supra* for the split in authority on this issue.

[237] 90 F.Supp.2d 557 (D.N.J. 2000).

were worthy of a play by Pirandello and that a lot of the board's statements contained in a 36 page resolution were pretextual and not factually supportable. Nonetheless, the court upheld the variance denial decision under the Act's substantial evidence test. In addition, the court found that no state law violation had occurred.

Dealing with the state law issues first, the court relied on *Ho-Ho-Kus* and its review of New Jersey variance law. New Jersey reviews variances using "positive" and "negative" criteria. The positive criteria stress how the proposed use will benefit the public welfare while the negative criteria stress the potential detriment to the public good as well as the inconsistency with the comprehensive plan. The court found that the board's reasons for finding that the proposed use did not satisfy the positive criteria were not supported by substantial evidence. The board ignored the evidence of gaps in service and ignored the plaintiff's FCC license that created a prima facie case that the services were in the public interest. The court, nonetheless upheld the decision based on the board's concerns with the negative criteria for the issuance of variances. The board found that the site was overutilized and its existing uses inconsistent with the industrial zoning district. Testimony of the borough's planners supported this finding and plaintiff never provided any true rebuttal testimony relating to overcoming the negative impact the TCF would have on the public welfare. Plaintiff also did not provide evidence to support its assertions that this site was the only site available to deal with its gaps in coverage. This lack of evidence not only defeated plaintiff's right to a variance under state law but effectively conceded the argument that the denial decision left significant gaps in service. The court also chided the board for its consideration of radiation emissions, since the Act clearly precludes local government's from making that a part of their decision-making process. The court also overturned the board's attempt to charge the plaintiff with the costs of hiring an expert in the field of EMF radiation emissions, since the board did not have authority to consider those issues.

[l] **Vertical Broadcasting, Inc. v. Town of Southampton**[238]

Plaintiff leased a portion of a 50 acre parcel located in a single family residential district for the purposes of constructing a TCF. The lease was made contingent upon receiving town approval for the TCF. The land was presently being used as a sand mining operation. Three other TCFs exist within a 3-mile radius of the proposed site. Plaintiff sought a special exception under the town's zoning ordinance that allowed public utility uses in residential districts upon issuance of such a permit. The review process was halted by the town when it insisted that plaintiff seek an interpretation from the town ZBA that its proposed TCF tower was a public utility structure. The town then amended its zoning ordinance requiring all TCF applicants to seek a zoning amendment to a newly-created district that would allow public service uses. Plaintiff then filed for the needed zoning change and a public hearing was held. The ZBA then required the plaintiff to file a environmental impact statement about the proposed zoning change under the state's environmental quality review act. Six years after the initial request for a special exception was sought, the town accepted the EIS submitted by the plaintiff. The town, however, did not get around to actually denying the zoning change until 1 year after the FEIS was submitted. It submitted a 24-page report concluding that the TCF would have adverse environmental effects, adverse effects of property values and

[238] 84 F.Supp.2d 379 (E.D.N.Y. 2000).

adverse affects on the character of the community.[239] Plaintiff then filed this 1983 claim against the town and the town board arising from their treatment of his application.

The town asserted that the claims under the Act were time-barred because they were not filed within 30 days of the decision to deny the zoning change. While the court expressed some doubt that the 30-day period was intended to have the effect of a statute of limitations, the plaintiff did not appropriately brief that issue, so the court decided to go along with several other federal district courts that had treated the period as a statute of limitations.[240] Thus, claims under Section 332 of the Act were dismissed. Plaintiff also asserted claims under the prohibition standard contained in Section 253 of the Act. But the court concluded that plaintiff had not asserted a cause of action under that section. The type of action challenged by the plaintiff clearly falls under Section 332 and not under Section 253.

Plaintiff also brought claims under the various provisions of the civil rights act including sections 1981, 1982 and 1985. The court found that 1982 and 1983 only deal with racial discrimination claims that were not involved in this case. Thus, it concluded that those claims were frivolous. It also dismissed the 1985 claim since that conspiracy statute also requires a finding of racial motivation or animus. But as to plaintiff's 1983 claim the court refused to grant the defendants' motion to dismiss. The 1983 claim was based on two separate constitutional violations, equal protection and due process. The equal protection claim is the classic selective enforcement or treatment claim that is normally very hard to prove. Since this case was decided prior to *Olech,* the court treated the essence of such a claim as involving an element of malicious or bad faith intent to injure.[241] At this preliminary stage of the litigation, the court was willing to allow the plaintiff to prove his case of improper motive.

The due process claim was judged under the Second Circuit's reasonably strict view of what constitutes a protectible property interest.[242] Only a clear entitlement to the relief sought will be protected under the due process clause. What is a protectible property interest is a question of law. In most cases there is clearly no entitlement to a proposed zoning change, such as that requested by the plaintiff. The plaintiff sought to overcome the general rule by asserting that the Act created an entitlement as to TCFs. While the Act created various procedural and substantive hurdles that the local government must meet, it did not create a vested right to a permit under all circumstances. This would be the case even if the court found that plaintiff was entitled to be reviewed under the earlier zoning ordinance that merely required the issuance of a special exception. In that case as well, there is no entitlement to a discretionary permit. The due process claims against the board members who allegedly demanded bribes was also dismissed because there was no entitlement to the zoning change underlying the alleged solicitation of the bribes. The court also refused to dismiss the claim that the zoning ordinance amendment requiring plaintiff to seek a zoning change since further evidence was needed to prove whether the ordinance bears a rational relationship to a legitimate governmental objective.

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[239] The court also noted that during this period, the principal owner of the plaintiff corporation was accused, tried and then acquitted of offering bribes to town board members to favorably vote on the zoning change. 84 F.Supp.2d at 384. Plaintiff claimed that in fact the two board members solicited a bribe in exchange for their vote and then made false misrepresentations about him triggering the criminal action.

[240] See e.g., Bellsouth Mobility, Inc. v. Parish of Plaquemines, 40 F.Supp.2d 372 (E.D.La. 1999); Cellco Partnership v. Town Plan & Zoning Commission of Farmington, 3 F.Supp.2d 372 (D.Conn. 1998); OPM-USA, Inc. v. Board of County Commissioners, 7 F.Supp.2d 1316 (M.D.Fla. 1997).

[241] See e.g., Latrieste Restaurant v. Village of Port Chester, 188 F.3d 65 (2d Cir. 1999).

[242] See Natale v. Town of Ridgefield, 170 F.3d 258 (2d Cir. 1999) analyzed at Kramer I, note 1 *supra* at § 1.02[1][a].

[m] **Airtouch Cellular v. City of El Cajon**[243]

The city's zoning ordinance allowed TCFs as a conditional use in a number of zoning districts. Plaintiff sought a CUP to construct an array of dishes and towers on and adjacent to an existing water tower located in a single-family residential district. The Planning Commission held several public hearings and heard from many neighbors who opposed the CUP. The commission recommended that the CUP be granted. The neighbors sought review of the decision by the City Council. After further public hearings, the council voted to deny the CUP and listed 7 reasons to support its decision. Plaintiff then brought this action claiming that the denial decision was not supported by substantial evidence, discriminated against the plaintiff and violated the non-prohibition standard under the Act.

The majority of Act litigation has occurred on the East Coast, but since the Act, in essence creates a federal common law relating to the three standards, the California district court follows the lead of the earlier decisions of those courts. In finding no violation of the substantial evidence standard, the court relied on the *Ho-Ho-Kus* definition of substantial evidence, namely that it is more than a scintilla and such evidence as a reasonable mind might accept as adequate to support a conclusion. Because the parties stipulated that the city would bear the burden of proof that the denial decision was based on substantial evidence, the court did not have to opt for the two competing views on allocating the burden of proof.[244] The court found that aesthetic concerns by themselves would not constitute substantial evidence to support a denial decision. But in this case the city had voice concerns about placing TCFs in residential districts and the neighbors had experienced some inconvenience from the existing TCF located on the proposed site. This was sufficient under the substantial evidence standard to uphold the decision.

The court also found that the non-discrimination standard was not violated even though the city had approved a TCF on the site about 2 years prior to plaintiff's application. The city's concerns about over-intensive uses in residential districts was sufficient to show no discrimination between the earlier granted and plaintiff's rejected CUP. There had been no community opposition to the prior CUP application while in this case there had been substantial opposition, based in part on the experiences with the TCF already in place.

On the prohibition issue, the court agreed with the Second and Third Circuits, that the standard is whether the decision creates a significant gap in service even if the challenged decision is an individual permit decision. The city had urged that the views of the Fourth Circuit,[245] requiring a TCF provider to show a blanket or general prohibition in order to show a violation of the Act be adopted. In determining whether there is a significant gap or gaps in service, the focus is on the protection of PCS users, not PCS providers. Evidence of the plaintiff's own witnesses showed that other sites were available, even if they were not as desirable as the proposed site. The court here placed the burden of proof on the plaintiff to show that the prohibition standard was violated, notwithstanding the fact that the overall burden was on the city to show that the Act was

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[243] 83 F.Supp.2d 1158 (S.D.Cal. 2000).

[244] Compare Sprint Spectrum v. Board of County Commissioners, 59 F.Supp.2d 1101 (D.Colo. 1999) and Century Cellunet of Southern Michigan, Inc. v. City of Ferrysburg, 993 F.Supp. 1072 (W.D.Mich. 1997)(burden on permit applicant) with Cellco Partnership v. Town Planning & Zoning Commission, 3 F.Supp.2d 178 (D.Conn. 1998)(burden on city).

[245] AT&T Wireless PCF v. City Council of Virginia Beach, 155 F.3d 423 (4th Cir. 1998).

not violated. The evidence did not show that there would be significant gaps in service for plaintiff's users nor was there an absence of alternative, feasible sites.

Plaintiff also alleged equal protection, substantive due process and regulatory takings claims. The court had no difficulty dismissing all of those claims as well. The equal protection claim was a derivative of the discrimination claim because of the earlier permit approval received by a competitor. The city, however, only needed to show that it had a rational basis for distinguishing between the two applicants. The evidence that supported no violation of the discrimination standard clearly was sufficient to meet the rational basis standard under the equal protection clause. On the substantive due process claim, plaintiff would have to show that the decision had no substantial relationship to the public health, safety, morals or general welfare. That could be proven under these circumstances through evidence showing improper motive, racial or personal animus by city officials.[246] There was no such allegations made in this case. On the regulatory takings claim, the plaintiff made the novel assertion that the denial decision constituted a *Lucas* taking of its rights under its FCC license. The court does not decide the thorny issue of whether a FCC license constituted a property interest under the 5th Amendment, since it found that plaintiff was able to operate under the license through two existing TCFs in the city.[247] In addition, because the plaintiff had not been able to show that other sites were not available, it could not prove that the denial decision had decreased the value of the FCC license.

[n] **Telecorp Realty, LLC v. Town of Edgartown**[248]

Plaintiff sought to co-locate its equipment on an existing TCF tower. They sought the required discretionary permit from the Planning Board. The board denied the permit giving 4 reasons including overloading the tower, locational difficulties, aesthetic impacts and public health concerns. The plaintiff sued claiming the decision violated both the substantial evidence and non-discrimination standards of the Act.

The court determined that the board's decision was not supported by substantial evidence. It applied the traditional test for what constitutes substantial evidence, that being whether a reasonable mind might accept as adequate the evidence submitted in support of the conclusion. The only evidence regarding the potential overloading of the tower was submitted by the plaintiff and supported its view that the tower could easily support plaintiff's additional structures. The board engaged in no independent study to prove otherwise. The locational difficulties reason also was not supported by substantial evidence since the board had approved three other PCS providers placing facilities on the tower without any objection that the site created problems. Assertions that the site is not the best site and that there are other alternatives by themselves did not meet the substantial evidence test. Finally, the court agreed with a number of other decisions that generalized concerns about aesthetic and visual impacts of the tower are not sufficient under the substantial evidence test.[249] In fact the record evidence showed that the

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[246] See Omnipoint Communications v. Penn Forest Township, 42 F.Supp.2d 493 (M.D.Pa. 1999) analyzed at Kramer I, note 1 *supra* at § 1.06[1][o].

[247] There are apparently two views on whether a FCC license constitutes a property interest. In MLQ Investors, L.P. v. Pacific Quadracasting, Inc., 146 F.3d 746 (9th Cir. 1998) the court suggested that it was while in In re Ridgely Communications, Inc., 139 B.R. 374 (D.Md. 1992), the court reached an opposite conclusion.

[248] 81 F.Supp.2d 257 (D.Mass. 2000).

[249] See also Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2nd Cir. 1999) analyzed at Kramer I, note 1 *supra* at § 1.06[1][b]; Omnipoint Corp. v. Zoning Hearing Board, 20 F.Supp.2d 875 (E.D.Pa. 1998).

board felt that the configuration proffered by the plaintiff's was less visually disturbing than the facilities already utilizing the tower. The court, in general, views the Act as creating a policy to prevent local governments from doing what the town was doing here, preventing a TCF from operating because of unquantifiable local concerns that would, if allowed to prevail, prevent companies from providing modern communications facilities to the citizenry. The court seemed to apply a healthy skepticism to the town's decision to deny the permit.

[o] Omnipoint Communications, Inc. v. Planning & Zoning Commission[250]

This is another challenge to a permit denial based on the lack of substantial evidence in the record. Plaintiff sought to remedy several gaps in its service by constructing a TCF on a commercially zoned tract adjacent to an interstate highway. The commission requested an independent peer review study as required by the town's zoning ordinance for TCF permits. The commission voted to reject the permit application based on its finding that the existing tower upon which the facility was to be located cannot support the additional weight. Several other reasons were given by the commission when it notified the plaintiff in writing of its decision.

The court applied a "hard look" approach to its review role under the Act's substantial evidence standard. The first two stated reasons for rejection related to adverse neighborhood impact and visual obtrusiveness. The court, however, found no evidence in the record to support those conclusions. Instead it found evidence that plaintiff agreed to take steps to avoid and/or minimize these negative impacts. The court placed a difficult burden on the town to give objective reasons for its findings on visual impacts without specifying how the plaintiff could decrease those adverse impacts and still provide appropriate levels of service. The court found that the findings on the inability of the tower to support the additional facilities was also not supported by substantial evidence. The commission noted that no existing tower could support the proposed facility but that could not serve as a basis for its finding that the tower sought to be used could not support the additional equipment. In fact, the zoning ordinance encouraged PCS providers to co-locate, yet the commission ignored that policy in reaching its conclusory findings. The court also found no evidence to support the commission's finding that the tower would be located closer than 500 feet to an existing residential structure. The court appeared to be re-trying the case de novo under the rubric of the substantial evidence test. The cases in the past few years have ranged from a "soft glance" to a "hard look" to even a de novo review under the substantial evidence test. This decision appears to go about as far any in second-guessing a municipal decision not to allow a TCF.

In a subsequent order, the court awarded attorney's fees to the prevailing plaintiff under § 1988 assuming without discussion that plaintiff had a § 1983 cause of action for violation of the Act.[251] It did find that the time spent by plaintiff's counsel was excessive and to reduced it by 20%. The billing rates of between $ 100/hour for associates and $ 300/hour for partners was deemed appropriate for the area.

[p] APT Minneapolis, Inc. v. Eau Claire County[252]

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[250] 83 F.Supp.2d 306, 91 F.Supp.2d 497 (D.Conn. 2000).

[251] See cases in note 220 *supra* that discuss the disparate views of the courts on this issue.

[252] 80 F.Supp.2d 1014 (W.D.Wis. 1999).

Plaintiff sought to construct a TCF on land owned by the City of Eau Claire. The location was chosen because it would fill a gap in service along a heavily-traveled section of interstate highway. The land, however, was located in an unincorporated area of the county. The parcel was within an airport zoning district that did not allow a tower of the height proposed by APT. APT therefore filed for a variance from the height restrictions. The county had previously allowed the city to construct a tower on the same parcel after the FAA determined that the tower would not pose a threat to air navigation. A similar FAA finding was submitted by APT regarding its proposed TCF. The county refused to issue a variance for the second tower but did grant a variance for a single tower, either the existing one or a replacement tower that would be as high as the proposed second tower. APT refused to co-locate and brought a second variance application that at first tabled until such time as APT could produce evidence that co-location was not feasible. Such evidence was produced, but the board voted to deny the variance and sent APT a written notice stating the reasons for the denial.

In applying the substantial evidence test, the court found that the notice was sufficient even though it did not tie in the reasons with specific findings based on the record. One of the reasons given for denying the variance was self-imposed hardship created by APT that defeated a finding of unnecessary hardship. In most variance cases unnecessary hardship requires a finding that there would be no reasonable use of the parcel in the absence of the variance. That standard is inapplicable here because it is city-owned land under a lease to APT that is already being used for a TCF. Since APT rejected the offer to co-locate or build a replacement tower, the county determined that it had suffered no hardship. The court agreed that there was substantial evidence in the record to support the county's hardship rationale. There was no evidence that building a replacement tower or reinforcing and expanding the existing tower were not feasible alternative uses for the parcel. The court aligned itself with those courts that assign the burden of proof to the party challenging the local decision, further buttressing its conclusion that the county's decision complied with the Act.[253]

APT also alleged that the decision violated the non-discrimination standard of the Act. Only unreasonable discrimination is prohibited under the Act and there was no evidence in the record to show that the county had granted variances to other PCS providers under similar circumstances. Because there was a legitimate basis for the county to deny the variance due to a lack of unnecessary hardship, it is not unreasonably discriminatory for the plaintiff to have been denied the variance even though its competitors have been allowed to provide service within the area covered by the proposed tower.

Finally the court found that the variance decision did not have the effect of prohibiting the provision of PCS. There was no evidence in the record to show that this was the only site that could fill in the significant gaps in service alleged by APT. Even if there were such gaps, however, the decision by the county to allow co-location on a single tower, acted to fill in those gaps. It was APT that created the gap by not acceding to the variance order authorizing a single tower at a height meeting the APT request.

[q] **AT&T Wireless PCS, Inc. v. City of Atlanta**[254]

AT&T received an administrative permit to construct a TCF. The permit was revoked and AT&T was instructed to seek a special use permit. The permit was denied by the City Council that did not provide a written reason or reasons for the denial. They

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[253] See cases cited in note 230 *supra*.

[254] 210 F.3d 1322 (11th Cir. 2000).

sought relief under the Act. The district court found that the city violated the Act because its decision was not supported by substantial evidence in the record. The sole issue on appeal was whether AT&T had stated a cause of action under § 1983 so that it would be entitled to recover attorney's fees under § 1988.

The court analyzed whether the Act created a private right enforceable under § 1983. The court applied a three-part test to determine whether that right exists.[255] The court must determine whether Congress intended that the provision in question benefit the plaintiff. Secondly, the plaintiff must demonstrate that the asserted right is not so "vague and amorphous" that its enforcement would strain judicial competence. Finally, the statute must unambiguously impose a binding obligation on the States. The Act clearly was intended to protect PCS providers by eliminating state or local impediments. Therefore, AT&T, as the victim of an inadequately-justified decision, was an intended beneficiary. The Act provided clear guidelines for the local governments in order to comply with its requirements. Finally, the Act umambiguously imposed a binding obligation on the States to comply with the Act's various standards. The court also found that the Act does not show a congressional intent to preclude a separate remedy under § 1983. There was nothing in the Act to impliedly preclude the application of § 1983. The Act also does not have a remedial process that evinced an intent to preempt all other remedies that would otherwise be available. Thus, a § 1983 cause of action can be stated by a PCS provider where a local government violates the Act.[256]

[r] **Omnipoint Communications MB Operations, LLC v. Town of Lincoln**[257]

In 1997, the town, acting through its town meeting structure, adopted a TCF overlay ordinance in order to preserve the unique characteristics of the town. The overlay district consisted of six parcels scattered through the town. Two of the parcels are owned by the town and the other four are owned by various non-profit organizations. The ordinance required TCF operators to get a discretionary permit and meet a number of performance standards before a TCF could be erected. Omnipoint sought to lease a portion of a parcel owned by one of the non-profits in order to serve the northern part of the town and a major thoroughfare that traversed through the town. The non-profit, however, refused to lease a portion of its parcel. Omnipoint also contacted various other property owners outside of the overlay district. It finally executed a lease with a NCU in one of the town's residential districts. It then sought either a use variance or a discretionary permit to expand a NCU from the town. After a public hearing, the town's board of appeals denied either of the two requests on the basis that it did not have the power to amend the zoning ordinance by placing a TCF outside of an overlay district.

Omnipoint argued that the board's decision was not supported by substantial evidence. The court applied the classic definition of substantial evidence, namely whether there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The board's decision did not violate the substantial evidence test since it was based on a reasonable interpretation of the town's TCF ordinance. The court also found that the board acted reasonably in not expanding the existing NCU into a different type of use. The operation of a garage and gas station is not the same as a

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[255] The test is derived from Blessing v. Freestone, 520 U.S. 329 (1997).

[256] Judge Carnes, dissented in part, on the issue of the application of § 1983. 210 F.3d at 1330. For cases finding that the remedial scheme is sufficiently comprehensive to imply a preemption using an "occupation of the field" theory see the cases cited in note 220 *supra*.

[257] 2000 WL 1089511 (D.Mass.).

TCF. The court will defer to the board's interpretation and application of its own zoning ordinance.

Omnipoint also argued that the decision violated the prohibition standard by creating significant gaps in coverage within the town. Relying on the *Ho-Ho-Kus* reading of the prohibition standard, the court determined that individual decisions may violate the standard even where the town allows some TCFs. Plaintiff presented evidence that the only allowable site to serve the northern sector of the city was unavailable. The city could not rebut that evidence and could not counter the plaintiff's testimony that there were gaps in service. The existence of a significant gap in service constitutes a violation of the prohibition standard. The existing TCF ordinance, as interpreted by the board, cannot remedy the gap problem since it did not designate any other site that could fill the gap. Thus, the town's ordinance and decision violated the Act. The remedy granted is a mandatory injunction requiring the town to within 30 days issue any discretionary permit and/or variance that will permit Omnipoint to erect its TCF on the site of the NCU.

[s] **Cellco Partnership v. Town of Douglas**[258]

Plaintiff sought to locate a TCF within the town limits. At that time the town had no TCFs, with service being provided by TCFs located in nearby towns. Under the town's zoning ordinance, TCFs are not a permitted use and in addition, no structure may be built higher than 35 feet. In addition there is no variance provision in the ordinance. Nonetheless, plaintiff sought a permit to build the TCF on a hill, adjacent to the town's water tower. The permit and variance applications were denied and upheld on appeal. The ZBA in its written statement provided several reasons why the permit and variance should be granted, but then stated that to grant the application would be to nullify the terms of the zoning ordinance.

Plaintiff argued that the decision violated both the substantial evidence and non-prohibition requirements of the Act.[259] The court only dealt with the substantial evidence claim, since it found that the ZBA had made findings that supported the issuance of the permits. The town tried to rely on a post-decision affidavit by one of the ZBA members, but the court disallowed that evidence as contrary to the clear congressional intent to require the town to fully elucidate its decision based on the record before it, as opposed to some post hoc rationalizations. The court also noted that since the town ordinance did not allow TCFs anywhere, a single denial of a permit and variance request was sufficient to violate the prohibition standard as well. Thus the town was ordered to issue the necessary permits and variances to allow the TCF to be constructed.

[t] **Freeman v. Burlington Broadcasters, Inc.**[260]

A radio broadcaster and a volunteer fire and rescue service received a permit to construct a tower on the express condition that it not interfere with TV reception in homes in the area. Subsequently, a PCS provider co-located its facilities on the existing tower. In response to a number of radio frequency interference complaints by residents of the town, several notices of violation were issued and were appealed to the town's ZBA. The ZBA found that there was continuous and widespread radio frequency interference, but it refused to enforce the permit condition since it determined that the

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[258] 81 F.Supp.2d 170 (D.Mass. 1999).

[259] The court calls these provisions as well as the non-discrimination provision, the "NIMBY" provisions of the act. 81 F.Supp.2d at 171.

[260] 204 F.3d 311 (2nd Cir. 2000).

condition was preempted by federal statutes and regulations dealing with radio frequency interference. Neighbors and the town that issue the permit sought state judicial review. That case was removed to the federal court.

The First Circuit initially had to determine whether the district court had subject matter jurisdiction over the issue. As long as there is a well-pleaded claim arising under federal law, the district court has subject matter jurisdiction. The court carefully scrutinized the nature of the federal preemption claim, that was raised not in the complaint but as an affirmative defense. It concluded that the case was properly removed based on the federal preemption defense. The court also noted that the district court should not hear the state law claims asserted by the plaintiff.

The federal preemption defense is based on the occupation of the field prong of preemption analysis. The field is the area of regulation of radio frequency interference. In order to occupy the field the federal regulation must be so pervasive as to make reasonable the inference that Congress intended to leave no room for state or local regulation. In reviewing the extensive FCC regulation of radio broadcasting, the court concluded that federal law had occupied the field of radio frequency interference. The FCC statutes and regulation clearly evince an intent to occupy the entire field of technical matters relating to radio broadcasts. That obviously included the sub-field of interference. The FCC had taken the position that its regulations preempt the field as well. That position is entitled to *Chevron* deference so that if it represented a reasonable accommodation of the conflicting policies that were committed to the agency's discretion by law, a reviewing court will not overturn those policy choices. The plaintiffs tried to argue that under the Act, Congress did not intend to fully preempt local decision-making for TCFs. But this case involved a party with an FCC license to engage in radio broadcasting and only secondarily a PCS provider covered by the Act. Thus, the ZBA was correct in finding that it could not apply the permit condition requiring the permit holder to resolve radio frequency interference issues.

[u] **Adelman v. Town of Baldwin**[261]

In another non-TCF case, plaintiff sought a CUP to construct a television tower. The town's zoning ordinance authorized towers as a conditional use in highlands and rural districts. Plaintiff planned to devote most of the 325 acre tract for open space and public, passive recreational uses. A vote to have a moratorium on the permitting of all towers was instigated by a community organization, but the electorate defeated the moratorium ordinance. The Planning Board then held public hearings and voted to conditionally approve the CUP. A neighbor appealed to the ZBA which affirmed the decision on a 3-2 vote.

Judicial review of CUP decisions focus on the Planning Board's actions, not those of the ZBA or the trial court. The substantial evidence test is used. At the Board level, the applicant bore the burden of proof to show that the standards for a CUP have been met. While there was some initial confusion regarding the allocation of the burden of proof, the Board was properly instructed before it rendered its final decision on the burden of proof issue. The neighbor also asserted that members of the Planning Board were biased in favor of the CUP applicant. The chair of the Planning Board had disclosed prior to the hearing that he was employed by a corporation in the business of building and servicing antennas, although the business had no dealings with this particular tower proposal. The Board allowed the chair to continue and at the time of the CUP decision, the chair was no longer employed by that corporation. The court found

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[261] 2000 ME 577, 750 A.2d 577

that there was no conflict of interest, nor were there ex parte contacts by the chair, who had technical expertise on the subject matter of the CUP application that was imparted to other members of the Board. There was no extrinsic evidence relied on by the Board when it rendered its decision. The court also held that the plaintiff had not sustained his burden of proof to show that the zoning ordinance was not consistent with the comprehensive plan. The plaintiff's argument was that the ordinance by allowing towers in a wide area violated the plan's objective of maintaining the rural character of the town. The court, however, noted, other provisions of the plan that clearly favored the free and unfettered use of land, essentially taking a minimalist approach to land use controls. By not having many restrictions on land use, the ordinance was consistent with the plan's free use goals. Finally the court found that there was substantial evidence in the record to support the CUP decision, especially since the court was not to substitute its judgment for that of the Board's. There was testimony supporting the planned height of the tower, the lack of adverse effects on the surrounding property values and conditions designed to mitigate any negative externalities.

[v] **Telespectrum, Inc. v. Public Service Commission of Kentucky**[262]

This case presented a different perspective on the far-reaching effects of the Act, because it involved not a local governmental entity but a state agency. Plaintiff applied to the PSC for a certificate of public convenience and necessity to construct a TCF. The proposed site is in a rural, unincorporated area, not governed by any zoning ordinance. The nearest home is located about 412 feet from the proposed tower site. Plaintiff presented evidence that this was the best site to provide PCS service for the surrounding areas. Both a neighbor and a nearby town filed objections with the PSC. The PSC denied the permit with a written statement saying that it had to be cognizant of the interests of nearby residents in balancing the public and private interests involved in issuing a certificate.

The PSC argued that the federal court lacked jurisdiction under the 11th Amendment to hear this case. Since plaintiff was only seeking equitable relief, however, the case fell under the *Ex Parte Young* exception to the application of the 11th Amendment. [263] Where a party is seeking to direct state officials, in their official capacity, to permit it to build the TCF, the claim fits within that exception. The court also found that the Act's remedial scheme was not so pervasive as to allow it to infer that Congress intended the Act to preclude potential equitable remedies for redress violations of the Act.

The court easily found that the PSC decision was not supported by substantial evidence as required by the Act. Applying the traditional definition of substantial evidence, the court found no credible evidence in the record to justify the permit denial decision. The only evidence in the record was the testimony and letter of the neighbors who stated that the TCF would cause a diminution in their property values and would cause them to be exposed to harmful microwave emissions. Concerns about health risks are not relevant under the Act, and the unsubstantiated claims about loss in property value cannot sustain the decision. Plaintiff had placed into evidence expert testimony from a real estate appraiser that contradicted the layperson conclusions of the neighbors. Since the PSC made no written statement claiming other shortcomings in the

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[262] 2000 WL 1269388 (6th Cir.), *aff'g*, 43 F.Supp.2d 755 (E.D.Ky. 1999).

[263] See also Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862 (6th Cir. 2000).

permit application and the evidence in the record did not support their conclusion, the plaintiff was entitled to its equitable relief.

[w] **SBA Communications, Inc. v. Zoning Commission**[264]

SBA is in the business of locating and building TCFs that it then leases space to the various PCS providers. It determined that a gap existed in coverage around a major highway interchange. It located a parcel of land and sought a permit to build a TCF. The parcel was located in an industrial and commercial zone that allows TCFs with a discretionary permit. There are some nearby residential uses. After reducing the height of the proposed tower to 93.5 feet, the Commission still denied the permit. It provided a written statement for the denial decision. Two of the stated reasons for denial was the failure of SBA to look for co-location alternatives and the diminution of property values on the nearby residential uses.

The court noted that under *Oyster Bay* the level of scrutiny of the local zoning decision is less deferential than would usually be the case for federal court review of such decisions. Under Connecticut law, when a board reviews a discretionary permit application, it must grant the permit if the proposal meets the relevant standard enumerated in the ordinance. The court closely examined all five of the reasons given by the board to justify its denial decision. Without deciding the allocation of the burden of proof left open in *Oyster Bay,* the court accepted the board's conclusion that SBA failed to exhaust co-location alternatives as a grounds for denying the permit. The applicant must show that they examined alternative sites and the city identified several existing utility poles that might support a TCF. The applicant, however, need not look at every possible site identified by the city before it can get a permit. While the diminution in property value factor may generally be considered in this case the language used by the city raised some questions since it spoke in terms of perceptions relating to property value diminution. A decision cannot be based on perceptions regarding property values, but must be based on competent evidence that the TCF will diminish such values. The only evidence supporting that finding was extra-record evidence that should not have been considered. Thus there was no basis for denying the permit on this ground. The court further found that the other reasons were improperly relied on including concerns regarding the proper FCC standards, concerns regarding health and safety risks and a failure to provide plans for the antennae structures. Since there was substantial evidence in the record based on SBA's failure to exhaust co-location alternatives with several identified sites, the court granted the defendant's motion for summary judgment. The court noted that when SBA re-submits its application with a study of the co-location identified by the commission, the commission will have to issue the permit unless new evidence is found providing additional grounds to deny the permit.

[x] **Northeast Towers, Inc. v. Zoning Board of Adjustment**[265]

Plainitff owned a .75 acre tract of land located in a residential zone. There was a home on the parcel and an existing 97 foot tall tower. The tower was a NCU. The plaintiff expanded the number of antennae on the tower over time. In 1993 it sought a variance to replace the existing tower with a higher tower. It also needed variances from the setback and side yard ordinance requirements. There were 3 other towers within a tenth of a mile from the plaintiff's tower. The variance application was denied by a

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[264] 2000 WL 1276834 (D.Conn.)

[265] 327 N.J.Super. 476, 744 A.2d 190 (2000).

unanimous vote. The ZBA found that its location in a residential zone and the expansion of the NCU were inconsistent with the ordinance and the plan. Plaintiff had also admitted that alternative sites were available to co-locate its antennae. The trial court found that the proposed use was an inherently beneficial use under New Jersey law and would not affect nearby properties to a great extent because of the existence of the NCU tower and therefore reversed the ZBA decision. While some federal cases under the Act have found that TCFs are inherently beneficial uses, this court found that the New Jersey Supreme Court had rejected that status for TCFs.[266] Instead a TCF may be an inherently beneficial use if its location is appropriate. In this case, the location in the midst of a residential zone, made the tower a non-beneficial use. As such, the denial of the variance was justified and supported by substantial evidence in the record.[267] In addition, greater deference was owed to board decisions denying variances than to board decisions granting variances. The trial judge clearly substituted his judgment for that of the ZBA's and thus the ZBA decision should be reinstated.

[y] **Stephenson v. Town of Garner**[268]

Plaintiff executed a lease option with Sprint for the location of a TCF. The option was conditioned on the grant of a CUP from the town. Sprint filed its CUP application, but after local opposition arose, the town voted to deny the application. Sprint sought judicial review that led to a reversal and remand. The second public hearing also led to a denial of the CUP. Judicial review followed and to resolve the problem the city offered Sprint a lease for the use of its existing water tower to site the TCF. Sprint agreed to the consent judgment and the plaintiff instituted this suit based on the theory that the town had interfered with the contractual relationship between Sprint and the plaintiff.

The court dismissed an alternative claim that the city by intentionally refusing to follow the court's first remand decision engaged in unfair and deceptive trade practices. The remand order merely required the town to conduct further proceedings. It did not order the town to issue the CUP. Thus there was no unfair trade practices action.

As to the interference with contract claim, the court found that the individual aldermen were immune from liability under *Scott-Harris* where they were taken action in the sphere of legislative activity. The CUP determinations were non-ministerial in nature, even after the first remand. The CUP decision is clearly discretionary, requiring the aldermen to act in a legislative manner. Furthermore, the actions were not illegal since they followed the appropriate procedure for the review of CUP applications. The claim against the town, however, involved more than the CUP denials. It entailed the execution of the lease with Sprint to locate the TCF on a town-owned water tower. The court found that at this summary judgment stage the plaintiff had made a prima facie case of satisfying all the elements of the tort claim. As to the town's immunity, the court found that the action of leasing governmental property is a proprietary function for which immunity did not attach. Thus as to this final claim the court remanded for a trial.

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[266] See Smart SMR v. Fair Law Board of Adjustment, 152 N.J. 309, 704 A.2d 1271 (1998).

[267] For other cases upholding the denial of variances for a TCF see AWACS, Inc. v. Clemonton Zoning Board of Adjustment, 160 N.J. 21, 733 A.2d 453 (1999); New Brunswick Cellular Telephone Co. v. Borough of S. Plainfield Board of Adjustment, 160 N.J. 1, 733 A.2d 442 (1999); New York SMSA Ltd. Partnership v. Board of Adjustment, 324 N.J.Super. 166, 734 A.2d 826 (1999); New York SMSA Ltd. Partnership v. Board of Adjustment, 324 N.J.Super. 149, 734 A.2d 817 (1999).

[268] 136 N.C.App. 444, 524 N.E.2d 608 (2000).

[z] APT Pittsburgh Limited Partnership v. Lower Yoder Township[269]

APT, believing that it needed to fill a gap in coverage, leased a parcel of land located in a conservation district in the township. It then applied for a building permit to construct a TCF. The parcel already contained a water tank. The permit was denied and APT sought a variance from the Zoning Hearing Board. It also challenged a number of township ordinance provisions as they affected its plans. The township allowed TCFs in its industrial district. APT showed that several other TCFs had been built in the conservation district. APT did not provide any evidence regarding its alleged gap in coverage, nor specific information about the location of other TCFs. The board denied the variance request in writing and APT then filed this action alleging violations of the Act and state law.

The court interpreted the Act as a compromise between federal and local land use powers. The result was that local governments retain their primary land use control function subject to the substantive standards of non-prohibition and non-discrimination and the procedural standards of having a writing and applying the substantial evidence test to review those decisions. The court rejected the APT prohibition claim because the ordinance on its face allowed TCFs in the light industrial district. While not naming TCFs specifically the ordinance allowed broadcasting, radio and TV station facilities and then had a catchall provision allowing other compatible uses. The ordinance did not have the effect of prohibiting TCFs because the provider failed to sustain its burden of proof that there would be a significant gap in coverage should the TCF not be located where the provider so designated. There was no evidence in the record to support a finding of a gap and substantial evidence to show that wireless services were available within the township. Even if the provider can show a significant gap, the provider must show that its proposed TCF will be the "least intrusive means" of filling the gap.[270] The court rejected the attempt by APT to file a post-hearing affidavit to buttress its case. Even if the affidavit was admitted, however, there was still substantial evidence in the record to support the conclusion that wireless service was not prohibited by the township.

On the non-discrimination claim, the court again placed the burden of proof on APT to show discrimination in its denial decision and that the discrimination was unreasonable. Proving discrimination required APT to show that providers of "functionally equivalent services" were treated differently. There was no evidence in the record to prove that competitors were allowed in construct TCFs in the conservation district. In fact, the only evidence adduced showed APT had been allowed in build a TCF in the zone. It was not unreasonable for the township to determine that after it had permitted a number of TCFs that the cumulative impact was such that it should not allow any more.

Finally, the court applied the substantial evidence test to the decision, noting that the court should grant a degree of deference to the local decision-maker. The substantial evidence test did not apply to the non-prohibition and non-discrimination standards, but applied to the decision not to grant the variance. Again the burden of proof of entitlement to a variance is placed on the applicant. APT did not show unique physical circumstances or the existence of unnecessary hardship that was not self-imposed. There was evidence concerning the impact on the neighboring properties that also supported the board's decision. The court stressed the fact that APT failed to

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[269] 2000 WL 1262849 (W.D.Pa.).

[270] The court relied on the *Penn Township* analysis to allocate the burden of proof and require the least intrusive standard. See § 1.06[1][h] *supra*.

produce any evidence that it considered alternative tower heights and designs or alternative sites. Without those factors, it will be hard for the provider to claim that it is entitled to a variance.[271]

[aa] **Proper v. Southwestern Bell Mobile Systems**[272]

SBC received a special use permit to construct a 250-foot TCF and an accessory building in an agricultural and rural residential district in the Town of Duanesburg. A building permit ensued and a neighbor challenged both permits as violations of the town's zoning ordinance. The town refused to follow up on the challenge so the neighbor sued SBC directly seeking injunctive relief preventing them from using the TCF until the violations were corrected.

The zoning ordinance had a maximum building height limitation of 35 feet. But under the terms of the zoning ordinance the TCF was treated as being a public utility structure and not a building. The plaintiff's interpretation would require the TCF owner to seek both a special use permit and a variance, a result that would not be reasonable given the specific requirement that TCFs need a special use permit. The court also found that the increase in the number of antennae placed on the tower did not require SBC to seek additional permits. None of the issued permits placed a limit on the number of antennae that could be placed on the tower. Thus the neighbor was not entitled to injunctive relief since no ordinance violation was proven.

[2] Group Homes

[a] **Marriott Senior Living Services, Inc. v. Springfield Township**[273]

Marriott wanted to build a multi-unit senior assisted living center in a portion of the township zoned for single-family residential uses. It began negotiations with township officials in January 1996. The applicable zoning district did not allow such a use, although it did allow for non-profit educational institutions and family day care home uses through a discretionary permit process. Plaintiff filed an informal sketch plan with the township as a prelude to seeking a zoning change. Further negotiations led Marriott to change the proposed structure from a three to a two-story building. Marriott was informed by a member of the board of commissioners that there was no support for the proposed zoning amendment and sketch plan and it would be futile to move ahead with the proposals. Plaintiff then sent a demand letter to the township asserting that they had not met the requirement of the Fair Housing Act Amendments(FHAA) of making a reasonable accommodation to the needs of the prospective handicapped residents of the senior assisted living center.

The township argued that the plaintiff's case was not ripe for judicial review since they had neither filed a formal request for a zoning change, nor had they submitted a preliminary or final sketch plan. Under the FHAA, the party claiming a lack of

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[271] The court also dismissed the state law claim that the ordinance was exclusionary since it did not allow a beneficial use. Since the ordinance, as interpreted by the court, allowed TCFs in the light industrial district, there was not a total exclusion. While Pennsylvania law shifts the burden of proof once a prima facie case of exclusion is made, no prima facie case was set out by APT. See Fernley v. Board of Supervisors of Schuylkill Township, 509 Pa. 413, 502 A.2d 585 (1985).

[272] 266 A.D.2d 607, 697 N.Y.S.2d 743 (1999).

[273] 78 F.Supp.2d 376 (E.D.Pa. 1999).

reasonable accommodation must afford the local authority a reasonable opportunity to consider the project in reasonably final form, to hold public hearings and to give reasons for its decision. In this case the lack of a preliminary sketch plan submission by Marriott deprived the township of an opportunity to review a formal proposal. Even though Marriott received both formal and informal notice of the board's lack of support for the project, that does not excuse them from going ahead with the proposal. Thus, the as applied FHAA case was dismissed on ripeness grounds.

Marriott also asserted a facially discriminatory FHAA claim against the township. Normally, facial invalidity claims are ripe for review. A facial FHAA claim requires the plaintiff to show that the local ordinance treated someone protected by the FHAA in a different manner than someone not protected. There was no such showing in this case. The ordinance merely listed the allowed uses within a single-family residential zone without making any distinction between multi-family units in general and multi-family units serving the handicapped. Thus, the court dismissed the facial invalidity claim. The court did not dismiss the disparate impact claims under the FHAA and the Americans with Disabilities Act because insufficient facts were presented to the court to determine whether the township's zoning scheme, in fact, impacts disable or elderly persons in an impermissible way.

[b] **Borden v. Planning and Zoning Commission**[274]

An alcohol rehabilitation center was a NCU in a residential zone. In response to several changes to state mandated performance standards, the center had to make some building changes. The center met with town officials and discussed the best way to accommodate the required changes. Two options were raised, changing the zoning ordinance to make the center a conforming use or changing the NCU provisions to allow for an expansion of the facility. Eventually the parties agreed to allow the building of a second story over the existing footprint of the building if the center agreed to tear down another structure that was not being used. Plaintiff was a neighbor of the facility who brought this action for judicial review of that decision. The court, however, found that plaintiff had not exhausted her administrative remedies and thus lacked standing to sue. The court treated the eventual order as part of a zoning enforcement action. Enforcement actions are appealable to the board of adjustment. By not seeking administrative review of the site plan approval decision, the plaintiff was not entitled to seek judicial review of that decision.

[c] **Welsh v. Town of Amherst Zoning Board of Appeals**[275]

Neighbors appealed the ZBA's decision to issue a use variance covering an 11-acre tract to allow the construction of a 100 unit senior citizen housing complex. The area was zoned in a suburban-agricultural district. Judicial review of the issuance of a variance uses the substantial evidence test. The evidence before the ZBA showed that the landowner could not realize a reasonable return without the variance. In addition, the parcel was located between two wetlands and at a major intersection. The ZBA found that the proposed use would not alter the essential character of the area and that the hardship was not self-imposed. Thus the decision to grant the variance was upheld.

[d] **County of Charleston v. Sleepy Hollow Youth, Inc**.[276]

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[274] 58 Conn.App. 399, 755 A.2d 224 (2000).
[275] 270 A.D.2d 844, 706 N.Y.S.2d 281 (2000).

Plaintiff owned a private non-profit organization that planned to operate a home for six to eight emotionally disabled children. They applied for a license from the state to operate such a facility. They leased a home in the county to house their group home. Neighbors sent letters to the state opposing the issuance of the state permit. After one rejection, the state issued the permit. Under South Carolina law,[277] where a local government objects to a proposed site for a group home, a neutral third party must be appointed and a committee of the group home owner and the government official have 45 days to locate an alternate site. The final selection of a site is by majority vote. No agreement could be reached on a neutral third party and the plaintiff continued to prepare the house for the residents. Eventually the plaintiff abandoned the original site, but then sued the county under the FHAA for damages.

The FHAA clearly prohibits discrimination against handicapped persons and those providing group homes for such persons. Under the South Carolina procedure for locating group homes there was no guidance or criteria as to who may invoke the procedure. The county instigated the procedure in response to neighborhood opposition. The court examined the potential liability of the county under three theories. The first is whether the decision was based on intentional discrimination. The second is based on the application of a facially neutral ordinance that as a disparate impact or discriminatory effect. The third is where the local government fails to make a reasonable accommodation for people with disabilities. In order to prove intentional discrimination, plaintiff need not prove evil or hostile motive. A benign or paternalistic motive may be sufficient. But the plaintiff has the initial burden of producing evidence to show that housing opportunities were motivated, at least in part, by the disabled status of the potential residents. The court, while hesitant to search the minds and hearts of the county officials, nonetheless concluded that there was enough circumstantial and direct evidence to allow the case to go to trial. Neighborhood opposition to the group home residents clearly showed a prima facie case of discrimination that would have to be explored in depth at the trial. Thus the court remanded the damages suit for a trial on the merits.

[e] **Light of Life Ministries, Inc. v. Cross Creek Township**[278]

In 1980 the township enacted a zoning ordinance classifying lands owned by a predecessor of the plaintiff as agricultural. The plaintiff's predecessor was granted a CUP to allow it to continue to operate a group home on the premises. In 1992, plaintiff purchased the facility from the predecessor and in 1995 began to make improvements. Upon the complaint of several neighbors, the township ordered the plaintiff to discontinue its use of the property. The trial court modified the township's order by limiting its effect to new or expanded operations, allowing the plaintiff to continue operations at the then-current levels. Plaintiff then sought a CUP from the township to expand its operations. The township planning commission and the board of supervisors both granted the CUP, but imposed 23 conditions. Plaintiff challenged 5 of those conditions under the FHAA. A trial court found that 4 of the 5 conditions were not supported by the evidence but remanded to the township for further evidentiary support of the condition limiting residents. The township held further hearings and reaffirmed this condition.

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[276] 340 S.C. 174, 530 S.E.2d 636 (S.C.App. 2000).
[277] S.C.Code § 6-29-770.
[278] 560 Pa. 462, 746 A.2d 571 (2000).

In interpreting zoning ordinances, Pennsylvania follows the canon of construction that favors the unfettered use of land, in other words you construe against broader governmental regulatory powers. Rather than limit group homes to the definition of a dwelling or farm dwelling that was contained in the ordinance, group homes are separately treated through a conditional use provision. Thus, the intermediate appellate court's decision to deny the CUP was reversed and the CUP reinstated with the conditions contained in the second township decision.

[f] **San Miguel v. City of Windcrest**[279]

The owners of a business for the care of elderly persons operated out of their home were sued by the city to limit the number of persons to be cared for to two, rather than the four that were currently being cared for. The injunction was based on the zoning ordinance's limit of no more than 2 individuals not related by blood, marriage or adoption from residing in a single family dwelling. The court found that the city had shown a probable injury because it had shown that one of its ordinances was being violated. Because monetary damages are not adequate in cases of ordinance violations, the trial court properly found that the city had met its burden of showing irreparable injury. The court also rejected the owners' claim that the issuance of the injunction upset the status quo that is normally to be preserved in cases seeking preliminary injunctive relief. But since the status quo was a violation of the zoning ordinance, a court did not have to countenance such violations. Whether the ordinance is valid or constitutional will have to await a trial on the merits. In the meantime, the ordinance should be complied with. Finally the court found that the potential remedy of contempt of court should the owners not comply with the injunction was appropriate since the injunction was to be removed should the owners receive a state license authorizing them to operate an assisted care living facility in their home.

[g] **Mackowski v. Planning & Zoning Commission of Town of Stratford**[280]

Plaintiff owned two parcels of land and wished to develop affordable housing units for the elderly. He filed a permit application with the commission to build a 43 unit apartment building, dedicating 11 of those units as affordable under the applicable statutes and ordinances. The commission unanimously denied the application giving several reasons for its decision including inconsistency with the general plan, effect on nearby historic structures, adverse effects on the neighborhood and some technical deficiencies. The trial court found that as to one of the stated reasons, adverse neighborhood impact, there was substantial evidence in the record to support the denial decision.

Connecticut law segregates appeals from denials of affordable housing projects from denials of other land use permits.[281] The affordable housing procedures set the burden of proof on the town to show that substantial evidence in the record supported the denial decision. As with the Telecommunications Act, the governmental agency must state its reasons on the record for the denial.[282] In addition, the town must show

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[279] 2000 WL 1153710 (Tex.App.—San Antonio).

[280] 59 Conn.App. 608, 757 A.2d 1162 (2000).

[281] Conn.Gen.Stat. § 8-30g governs appeals from affordable housing project denials.

[282] *See generally*, Christian Activities Council, Congregational, v. Town Council, 249 Conn. 566, 735 A.2d 231 (1999).

that the reasons for the denial outweigh the benefits that are statutorily presumed to follow from the construction of affordable housing projects. While there were a number of concerns raised about the scope of the project, the evidence did not show that significant dislocations would occur or that the existing traffic or sewage conditions would be harmed. There was not evidence to show that the public interests supporting a denial decision outweighed the need for affordable housing.

[h] **Rogers v. Town of Norfolk**[283]

Plaintiff had operated two licensed group child care facilities in the region for many years. She selected a site in the town suitable for the establishment of another facility. The parcel was located in a residential zone and contained a home with a footprint of 3169 square feet. Under the town's zoning ordinance a child care facility is an allowed use in the zone, but there is a 2500 square foot limit to the size of the structure. The plaintiff was informed that because the footprint limit was exceeded she could not be given a building permit for a child care facility.

Plaintiff asserted that the footprint limitation is facially invalid under a Massachusetts statute that affords educational and religious institutions certain protection from local zoning regulation.[284] Normally one would prove a violation of the so-called Dover Amendment by showing that the zoning ordinance either prohibited or required a special permit for a child care facility or otherwise acted in a way to nullify the protections afforded to such a facility.

The court analyzed both the validity of the ordinance facially and as applied. The ordinance is presumed valid, thereby placing the burden of proof on the plaintiff to show why it should be per se invalid. The court applied the test that if the footprint regulation furthered a legitimate municipal interest and that its application rationally related to that interest it would be facially valid. Under that test the court found this provision valid since it served the important municipal aim of protecting the residential character of neighborhoods. This was especially true in this town, because 95% of its total area was zoned for residential uses. The town also showed that the footprint regulation did not have the effect of excluding child care facilities because over 90% of the existing residences in the town had footprints smaller than 2500 square feet. Another way to find an ordinance facially invalid is to see if it singles out protected uses for special treatment. The majority found no singling out, although the dissenting justices thought that the footprint regulation was clearly invalid since it only applied to child care facilities and no other type of accessory uses.

But the court then held that as applied, the ordinance was invalid. Under the Dover Amendment the court must strike a balance between preventing local discrimination against certain types of uses and respecting municipal concerns. In this case plaintiff proposed to use the existing house and out-buildings. The house was well screened and buffered from neighboring houses. The application of the footprint requirement would impose substantial costs on the plaintiff and not appear to achieve any of the objectives. Because the residential character of the neighborhood would not be served through the application of the footprint regulation to this particular home, the court found the ordinance invalid as applied.

[3] Mining and the Extractive Industries

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[283] 432 Mass. 374, 734 N.E.2d 1143 (2000).

[284] Mass.Gen.L. c. 40A, § 3 as interpreted in Trustees of Tufts College v. Medford, 415 Mass. 753, 616 A.2d 433 (1993).

[a] **Gun Lake Association v. County of Aitken**[285]

An operator of a hot-mix asphalt plant sought a CUP. The planning commission and the county approved the CUP with some stated conditions attached along with an agreement to impose other conditions in the future. The future conditions were developed with the assistance of a citizen's advisory committee. Neighbors sought judicial review of the decision. Minnesota has a "deemed approved" statute that is triggered by a failure to act within 60 days of a CUP application. The actual county decision to conditionally approve took place some 62 days after the initial application, but since it was an approval, the statutory provision was not violated. Judicial review of a CUP decision is under the deferential arbitrary, capricious and abuse of discretion test. The neighbors argued that the decision was defective because the county allegedly did not follow statutory procedures. The court, however, did not find any irregularities in the county's decision-making process. The neighbors also asserted that use of a non-governmental body to help develop the conditions deprived from the due process of law and violated Minnesota's open meetings law. The court, however, found no due process violation, since the board held public hearings on the CUP application and the neighbors were present and made comments at those hearings.

[b] **Fred McDowell, Inc. v. Board of Adjustment**[286]

Plaintiff operated a sand and gravel extraction business as a NCU. At the time the NCU was set, the operation covered a 295 acre parcel. They sought a permit to mine an adjacent 211 acre tract. The Board denied the permit. The 211 acre tract was purchased several months after the 211 acre tract. Prior to 1976, the plaintiff has maintained a scale, weigh house and maintenance building on the 211 acre tract. Due to the construction of an interstate highway bisecting the two tracts, the plaintiff ceased all use of the smaller tract in 1976. The mining licenses received by the plaintiff during this time covered both tracts, although no extractive activities took place on the 211 acres. In 1988, however, the Board refused to issue a mining license for the smaller tract, noting that the application for that tract was insufficient. The Board determined that the 211 acre tract was not part of a unified parcel on which sand and gravel were being extracted at the time the zoning ordinance became effective and that the plaintiff's activity on the smaller tract was insufficient to establish a NCU for mining purposes. Between the time mining began and the present, the township underwent substantial residential growth, including areas immediately adjacent to the 211 acre tract.

The scope of judicial review of permit decisions by a board is the arbitrary, capricious and abuse of discretion test. There is a strong presumption of validity and the reviewing court may not substitute its judgment for that of the board's. Under New Jersey law, the treatment of NCUs is somewhat more tolerant than most states since NCUs may be restored or repaired in the event of partial destruction of the NCU.

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[285] 612 N.W.2d 177 (Minn.App. 2000). *See also* Mountain Protection Alliance v. Fayette County Zoning Hearing Board, 757 A.2d 1007 (Pa.Commw. 2000) where an environmental group's appeal of a decision to allow a mining operation through the issuance of a special exception was found by the court to be premature.

[286] 334 N.J.Super. 201, 757 A.2d 822 (2000). For another case dealing with an aggregate mining operation see Morse Bros, Inc. v. Columbia County, 165 Or.App. 512, 996 P.2d 1023 (2000) and Port of St. Helens v. Land Conservation & Development Commission, 165 Or.App. 487, 996 P.2d 1014 (2000), two cases arising under the complex Oregon system of mandatory planning, state objectives and mining operations.

Nonetheless, NCUs are restricted to the character and scope of the use extant at the time the ordinance making the use non-conforming was enacted. Likewise, NCUs, being inconsistent with the comprehensive plan should be made conforming as soon as possible, but the town is not able to take active steps to extinguish them. Normally, expansion of NCUs to new or larger areas is not permitted without getting a variance. New Jersey, however, recognizes the diminishing assets doctrine for mining operations that allows expansion over an area covered by the mineral deposits.[287] But there are some limits on the extent to which a mining operator may expand its excavations. There must be some "outward manifestation of intent" to utilize the entire parcel. The application of the diminishing assets doctrine requires a fact-sensitive inquiry. The court must view the facts with the objective that NCUs normally are contrary to the general welfare. In this case the board considered the evidence of prior use of the 211 acre tract, the extent of the mining operations when the NCU was created and other signs of the owner's intent regarding the use of the smaller tract. The court found that the board's decision was not unreasonable and arbitrary. The weighing of the deleterious impact on the surrounding uses was proper, even though the residential development antedated the mining operations.

[c] **Skenesborough Stone Inc. v. Village of Whitehall**[288]

In earlier litigation, plaintiff had challenged a village ordinance that prohibited all mining operations within the village, unless the operations were a NCU. The earlier decision found that there was no constitutional challenge to the ordinance, but it remanded on the issue of whether plaintiff's activities amounted to a NCU.[289] At the trial the plaintiff offered evidence of some quarrying activities for the year prior to the enactment of a moratorium ordinance in 1995, followed by the prohibition ordinance several months later. Other witnesses called by the village had no recollection of any mining operations going on during that period of time. The trial court found that the evidence did not support a finding that a NCU had been created covering the 400 acre tract. The overriding public policy in New York is to restrict and then eliminate NCUs. While New York has adopted the diminishing assets doctrine to mining NCUs, there are limits to the application of that doctrine.[290] There was no evidence showing the extent of the mining operations on the 400 acre tract prior to 1995. The ultimate issue being a question of fact relating to the credibility of the witnesses, the appellate court deferred to the findings of the trial court regarding the existence of a NCU.

[d] **Native Village of Eklutna v. Board of Adjustment**[291]

The owner of a 160 acre tract of land located in a light industrial zone sought to conduct a granite quarrying operation on a portion of the tract. The quarry would be adjacent to an existing mining operation. The comprehensive plan also called for the area to be dedicated to industrial uses due to the existence of the quarry. The owner

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[287] See Township of Fairfield v. Likanchuk's, Inc., 274 N.J.Super. 320, 644 A.2d 120 (App.Div. 1994). The diminishing assets doctrine is explored in depth in Bruce Kramer, "Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches," 14 U.C.L.A.J of Env'tl L. & Policy 42 (1996).

[288] 708 N.Y.S.2d 171 (App.Div. 2000).

[289] See Skenesborough Stone, Inc. v. Villlage of Whitehall, 254 A.D.2d 664, 679 N.Y.S.2d 727 (19??).

[290] See Kramer, Note 273 supra.

[291] 995 P.2d 641 (Alaska 2000).

sought a CUP from the Planning and Zoning Commission. The planning staff recommended that the CUP be issued with a number of conditions. The commission granted the CUP after having the owner submit various environmental and traffic studies. The native village corporation sought to overturn the decision.

In Alaska, judicial review of a CUP decision is narrow and a strong presumption of validity attaches to that decision. Deference is given to agency interpretations of zoning ordinances and decisions will be reviewed under the substantial evidence test. The village corporation argued that the commission failed to consider the effect of the mining operations on the cultural resources of the area. The village argued that the area to be mined had special meaning to the native Alaskan members of the village. The one report conducted by the owner that concluded that there were no cultural resources effected by the mining plan was cursory and unsupported by substantial evidence. The village corporation offered testimony that the granite hills gave the village its name and was important to the members of the community. Thus, the CUP decision must be remanded to see whether, on balance, the need for industrial development in the area outweighs the need to preserve the cultural resources.

[e] **Vulcan Materials Co. v. Greenville County Board of Zoning Appeals**[292]

Between 1989 and 1992, Vulcan leased several tracts to determine their suitability for the mining of granite. They spent over $ 1,000,000 in their exploration and testing activities. In 1995 they developed a mining plan and began to seek the needed permits to operate a mine. By 1996 local opposition surfaced to the preliminary extractive activities on the leased tracts. In September 1996 the county zoned the land for suburban residential development. Vulcan applied for a certificate of NCU status. It was denied on the basis that there was no indication of actual mining or occupancy of the site at the time the ordinance went into effect.

Because the South Carolina zoning enabling statute had changed in 1994, the court had to determine the proper scope of judicial review. It found that the new statute equates the findings of a ZBA with the findings of fact by a jury. Thus the scope of judicial review of factual issues was quite limited. The court, however, engages in de novo review to see if the board's actions are correct as a matter of law. There was also some problem in determining whether the new statutory scheme changed the procedures for seeking judicial review of zoning decisions, but the court ultimately found that the appeal was made in a timely fashion. There was also a discrepancy in the record regarding two separate meetings or hearings by the ZBA. In one of the hearings, there was not a sufficient number of ZBA members present to constitute a working quorum so the document issued by the chair and secretary of the ZBA was ineffective. The findings of fact and conclusions of law differed between the hearings. The court determined that only the findings and transcript of the hearing where a sufficient number of board members were present could be considered. The factual issue was whether the removal of overburden accomplished by the plaintiff prior to the enactment of the ordinance constituted a mining operation so as to provide NCU status. The court found that the actions taken by the plaintiff clearly met the ordinance's definition of mining. The expenditure of nearly $ 2,000,000 and the physical activities on the land constituted mining even though the plaintiff had not received the final permit needed by the state to

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[292] 2000 WL 1121363 (S.C.App.). *See also* Riverwatch v. County of San Diego, 76 Cal.App.4th 1428, 91 Cal.Rptr. 322 (1999) where the court extensively reviewed the environmental impact report required under CEQA for the development of a quarry.

begin quarrying operations. In a similar vein, the court also found that plaintiff had a vested right to mine for many of the same reasons they had achieved NCU status.

[f] **Wende v. Board of Adjustment of the City of San Antonio**[293]

In 1997 the city entered into a nonannexation agreement with the owners of several quarries in exchange for a promise by the quarry owners to pay an amount equal to the ad valorem taxes they would have owed had the quarries been annexed. Shortly before the end of the agreement that would free the city to annex the land, several owners executed a mining lease on some new tracts of land. The first annexation ordinance did not cover the newly leased areas. The city then adopted a second annexation ordinance encompassing these tracts. The city zoned the original quarries for mining operations, but the two new areas were zoned for residential uses. The owners sought to register these areas as NCUs. The city agreed and several neighbors challenged that decision.

The quarry operator challenged the standing of the neighbors and an adjacent town. The statute specifically authorized taxpayers to appeal decisions of a board of adjustment.[294] That gave the individual neighbors standing. The adjoining city was an aggrieved person because the new quarrying activities would effect the residents of the city. The scope of judicial review of a board decision is merely to determine whether the board abused its discretion. It is not to determine whether there was substantial evidence in the record to support the decision. A failure to analyze or properly apply the law would constitute an abuse of discretion. The court, however, is quite limited in its review of factual findings. The board's decision will be upheld under any possible theory of law, even if the board had not considered that theory when it made the decision. The board only cited the existence of the leases as the basis for finding that a NCU existed. The mining operators had two additional theories, actual preexisting use and the diminishing assets doctrine that the board did not mention. But the court found that it may affirm on a ground not cited by the board only if that ground applied as a matter of law. The court found that neither of the two additional grounds met that standard. It then examined the preexisting lease theory and found that insufficient to support the finding of a NCU since it misapplied the law. In order to qualify for NCU status, the owner must engage in actual, rather than merely contemplated uses. Acquiring and setting aside a parcel for a use is not sufficient. The leasing of land for mining purposes is not putting the land to the actual use of mining. If the city ordinance was interpreted in any other way it would lead to an absurd result. The mining operator had submitted evidence that several permits to quarry had been received prior to the adoption of the zoning ordinance. There was also some evidence that one of the tracts at been used for quarrying at some time in the past. But that mining use had ceased well before the ordinance was enacted and the permits received did not constitute actual mining operations. While the court acknowledged the near-universal acceptance of the diminishing assets doctrine, the court refused to apply it to this case as a matter of law. The last minute leasing of the new tracts raised several questions as to whether the doctrine would apply to the existing quarrying operations. Thus the court reversed the board's decision finding that the mining operator had a NCU on the two newly-leased tracts of land.

[4] Agricultural Operations

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[293] 2000 WL 1059643 (Tex.App.—San Antonio).

[294] Tex.Loc. Gov't Code § 211.011(a)(2).

[a] **Richardson v. Township of Brady**[295]

The township enacted a confined animal feedlot operation (CAFO) that limited the number of animals that could be maintained in an agricultural zone. Typically, a single farm could maintain up to 300 animal units, as defined in the ordinance. A discretionary permit could be obtained to allow for greater density if certain performance standards were met. Richardson sought a variance to house some 4200 pigs in a nursery-swine operation. After seeking to amend the zoning ordinance, Richardson sought and received a discretionary permit to house up to 1999 swine. He believed that the minimum number of swine needed to operate profitably was closer to 4200. After further attempts to amend the ordinance failed, Richardson sought to overturn the CAFO ordinance on due process and equal protection grounds.

In order to prevail on a per se substantive due process challenge, a party must prove that the regulation fails to advance or legitimate governmental interest or utilizes an unreasonable means to advance a valid governmental interest. The purpose of the ordinance is to deal with the odor producing nature of CAFOs. The ordinance assigned a ratio of animal units per month based on the odor creating characteristics of the individual animal. Preventing odoriferous neighbors is clearly a legitimate governmental interest. Richardson argued that the ordinance is an unreasonable means of achieving that interest. The fact that the ordinance equally weighted horses, cows and swine, even though swine produce less waste did not make the ordinance unreasonable. The court clearly is taking a deferential approach to reviewing the reasonableness of the means chosen by the township.

Richardson also alleged that the ordinance as applied violated his substantive due process rights because it was arbitrary and irrational. The fact that Richardson was raising young swine and that young swine do not produce as much or as pungent a waste as mature swine does not make the ordinance irrational. The ordinance while making reasonably crude or large classifications was still not arbitrary. While the Sixth Circuit has, on occasion, taken a hard look under a substantive due process challenge, decided that there was a rational relationship between the animal unit per month classification and the problem of odor control.[296]

Richardson further alleged that his procedural due process rights were violated because of a delay in the township's processing of his requested ordinance amendment and the Zoning Board of Adjustment's failure to interpret the CAFO ordinance in a manner more beneficial to him. Clearly there was no property interest in a proposed zoning amendment that would give rise to any procedural due process claim. There is no entitlement to have a zoning ordinance changed at your request. Likewise, there was no property interest in having the ZBA determine that the ordinance should be interpreted as Richardson desired. The concurring judge correctly pointed out that if Richardson had no protectible property interest under the procedural due process claim, he also had no protectible property interest under the substantive due process claim. The judge noted that there appeared to be such a distinction made in the 6th Circuit that

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[295] 2000 WL 875402 (6th Cir.).

[296] The court distinguished Berger v. City of Mayfield Heights, 154 F.3d 621 (6th Cir. 1998) and Curto v. City of Harper Woods, 954 F.2d 1237 (6th Cir. 1992). In Berger, the court invalidated an ordinance requiring weeds to be cut down, but only on lots larger than one acre in size while in Curto the court invalidated an ordinance restricting the number of cars that could be parked in a garage that did not account for the size of the garage or parking area. Both of those cases appear to me to take a much harder look at municipal land use choices under the substantive due process regime.

is unjustified. The judge stated: "there is no logical basis for making such a distinction, at least in connection with real property zoning cases."[297]

[b] **Perkins v. Madison County Livestock & Fair Association**[298]

The Association owned and managed the county fairground. There was an arena in the fair that held rodeo events. In addition, during the week of the fair, various mechanized events such as tractor pulls were conducted at the arena. In 1993 the Association sought a discretionary permit and variance to construct a multi-purpose racetrack. The fairgrounds were located in an agricultural district that did not allow racetracks, but did allow go-cart tracks. In addition, the ordinance required a 200-foot setback from any property line and a 600-foot setback from any residences. The county zoning board approved the discretionary permit but denied the variance. The Association went ahead with its plans ignoring the setback requirements and other conditions placed on the discretionary permit. In 1996 figure-eight racing began both during the fair and at other times. Plaintiffs are adjacent property owners who claim that the Association violated the county zoning ordinance and operated a nuisance with its racing events. The trial court found that the county zoning ordinance applied to the Association and that the Association had violated the requirements of that ordinance. It did not find, however, that the racing was a nuisance although it did enjoin further use of the racetrack until the requirements of the ordinance were complied with.

Under Iowa law, during the time a county fair is held, no city ordinance or resolution can impair the authority of the Association in its sole and exclusive control over the fair.[299] But the ordinance held applicable here is a county ordinance, not a city ordinance. The court thus concluded that the county ordinance was not subject to the statutory preemption applicable to city ordinances. The Association also claimed that it had a NCU by virtue of the arena whose construction had antedated the county's zoning ordinance. But the owner of a NCU may lose its NCU status where it exceeds the established NCU. Enlargements or extensions of NCUs are not favored and normally not allowed. The racetrack and its use for motorized racing events was deemed to be substantially different from the rodeo-type arena. Thus, the Association was in violation of the county zoning ordinance when it expanded its operation.

The court also reviewed the trial court determination that no nuisance existed. The definition of a nuisance has both statutory and common law bases. If a normal person living in the community would regard the invasion as offensive, seriously annoying or intolerable, a nuisance finding is justified. The Association tried to argue that the plaintiffs came to the nuisance, since the fairgrounds had been in its present location prior to the time some of the plaintiffs built their homes. But it wasn't the fairgrounds that caused the nuisance, it was the later expansion into racing that was the cause of the injury. That expansion only took place after all of the plaintiffs' had built their homes. The court found that while the racing was somewhat limited in the number of dates when racing was actually held, it was still a very obnoxious and annoying use. As to some, but not all, of the plaintiffs, the interference was sufficient to support a finding that the races constituted a nuisance. The court looked at the impacts on the

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[297] Id. at *10. He cited Silver v. Franklin Township, 966 F.2d 1031 (6th Cir. 1992); Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) and G.M. Engineers & Associates, Inc. v. West Bloomfield Township, 922 F.2d 328 (6th Cir. 1990) as cases supporting the dual definition of a protectible property interest.

[298] 613 N.W.2d 264 (Iowa 2000).

[299] Iowa Code § 174.3.

home, such as noise, dust and fumes and not the secondary effects such as traffic and lights.

[c] In re Conditional Use Permit[300]

A farmer applied to the Board of Commissioners siting as the Board of Adjustment for a CUP to allow him to construct two CAFOs housing approximately 6600 hogs. A public hearing was held at which substantial public opposition to the CUP was voiced. The Board denied the CUP, giving several grounds including impact on the roads, pollution, offensive odors, failure to specify where the manure would be disposed of by land spreading and lack of county resources to monitor compliance with the environmental laws applicable to CAFOs. The county's zoning ordinance set forth various performance standards for CAFOs in agricultural districts.

One issue is whether the ordinance limited the county to reviewing just the listed performance standards when it made the decision to issue or deny a CUP for a CAFO. In interpreting the zoning ordinance and its conditional use provisions, the court found that the county was not limited to reviewing solely the laundry list of performance standards. While meeting those specific standards is a necessary condition to getting a CUP, it is not sufficient by itself. By definition a CUP is given where the county determines that the use will not interfere or injure surrounding parcels. The court noted that one of the reasons given for the CUP denial was the lack of enforcement of environmental regulations at the state level. That is not a relevant factor to be considered, since it places the onus on an individual for the state's apparent or real failures to enforce the law.

The court applied, and amplified, the appropriate scope of judicial review that it had announced last year in *Coyote Flats*.[301] Review by the trial court is de novo and independent of the county's decision. Yet the trial court is not to act as a one person board of adjustment and determine whether it would issue or not issue the CUP. Once the trial court made independent findings of fact, it must apply those facts to the county's decision to see it was arbitrary or capricious. In this case, the trial court did not follow the *Coyote Flats* mandate and thus the case is remanded for a new hearing.

[d] R.L. Hexum & Associates, Inc. v. Rochester Township Board of Supervisors[302]

A food processor sought CUPs to expand its wastewater-spraying operations in connections with a fanning plant. The existing operations are located in an agricultural urban expansion zoning district. The expanded area is in the same zoning district and is located adjacent to the existing sprayfield. Plaintiffs are neighbors who opposed the CUPs at the public hearings. The board approved a consolidated CUP allowing the expansion project to take place after soliciting comments from county and state officials. Under the applicable zoning ordinance conditional uses are those which are similar to agriculturally-related uses.

While not being as deferential to zoning agencies interpreting their own zoning ordinances, the court found that the interpretation given by the county was reasonable. The ordinance defined a farm, but did not define farming or agricultural operations. The

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[300] 2000 SD 80, 613 N.W.2d 523.

[301] Coyote Flats, L.L.C. v. Sanborn County Commission, 1999 SD 87, 596 N.W.2d 347 analyzed at Kramer I, note 1 *supra* at § 1.07[4][b].

[302] 609 N.W.2d 271 (Minn.App. 2000).

court refused to apply the definition of farming found in a state statute that prohibited corporations from engaging in, or owning, farmland. The court instead applied a plain meaning approach to the term farming. The canning operation aside, the spraying occurred on land that is used for the sowing of grass seed and other plants. The spraying is not a separate function from the farming operations as would be the operation of a retail and supply business. While the land was located in an area marked for eventual transition to urban uses, the immediate area was still largely farmland and was not close to any existing residential areas. The decision to allow the spraying was reasonable and consistent with the objectives of the zoning ordinance.

[e] **Dail v. York County**[303]

As more and more counties exercise zoning powers, conflicts arise not only in the agricultural arena, but in the silvicultural arena as well. The Dails own a 37 acre wooded tract located within a rural residential zoning district. Forestry is allowed as a permitted use without the need of a CUP. They notified the county that were intended to harvest timber and comply with the State Forester's regulations relating to best management practices for silvicultural operations. They also told the county they would not comply with county regulations relating to forestry operations since they believed the county regulations were preempted by the state rules. The key regulation that the Dails apparently did not want to comply with was the need for a buffer zone around the cut. The Dails filed this action for a declaratory judgment regarding their right to remove timber without the need for complying with the county regulations.

The county argued that the case should be dismissed since the plaintiffs did not exhaust their county administrative remedies. There had been no permit filed and no review made of their silvicultural operations plan. No exhaustion is required where the party is essentially attacking the ordinance per se and not as applied to their property. The issue in this case was solely the legal issue of whether the county ordinance was preempted by the state statute and regulations. One state statutory provision expressly prohibited counties from imposing permit requirements on silvicultural operations. The plaintiffs argued that the county review of the forest management plan was the functional equivalent of a permit and therefore was preempted. The court, however, disagreed finding that the county's submission and approval requirements did not create a permit system. The court also found that the county ordinance prohibiting clear cutting was not preempted by the state statute that did preempt county prohibition of silvicultural operations. The clear cutting ban was merely a ban of one method of silvicultural operations and not the same as a total prohibition against logging. Finally, the court found that the buffer zone requirement was not preempted by the state's determination that the plaintiffs were using best management practices. That determination was made by the State Forester and was only a guideline for use in forestry activities. Therefore there was no preemptive power in the guidelines that do not have the force and effect of state statutes or regulations.

[f] **Wilbur Residents for a Clean Neighborhood v. Douglas County**[304]

A farm corporation sought a permit to operate a two-stage lagoon operation to process and treat waste that after treatment will be reduced to approximately 3% solids

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[303] 259 Va. 577, 528 S.E.2d 447 (2000).
[304] 166 Or.App. 540, 998 P.2d 794 (2000).

and will be capable of being applied by irrigation as fertilizer. The wastewater will be sprayed on adjacent farmland. The state issued a permit for both the lagoon and the spraying operations. The land was located in an exclusive farm use district that allows, as a conditional use, the disposal of solid waste with accessory buildings. Neighbors challenged the issuance of the permit to LUBA. While the statute dealing with solid waste facilities referenced a different type of facility than that proposed by the plaintiff, the court nonetheless found that the plaintiff's application fell within the parameters of the CUP provisions. The court did not deal with the spraying operation, since no county permit was sought. The CUP was for the lagoon and accessory buildings, both uses allowed under the ordinance and statute. The court did not express an opinion as to whether the spraying operation required any type of land use permit.

[g] **Friends of the Creek v. Jackson County**[305]

The City of Ashland operated a wastewater treatment plant that historically discharged treated water into two streams. The state restricted the ability of the city to discharge and the city purchased an 846-acre tract in an exclusive farm use zone outside of the city limits for the purpose of spreading the solid waste as a fertilizer. The city initially sought a CUP from the county but withdrew the application after it determined that the proposed operation should be permitted as of right in the EFU. The county planning director agreed with the city that the proposed spreading/fertilizer operation was consistent with the goals of the EFU zone. An environmental organization appealed the county's decision to LUBA. LUBA determined that the spreading operations required a permit that had not been applied for and therefore remanded the case back to the county. The court found that there were factual and legal issues that needed to be resolved regarding the need for a permit and the need to follow the notice and public hearing requirements for such permit deliberations. Thus it agreed with LUBA that a remand to the county was required to develop a full record on those issues.

[h] **Altenburg v. Board of Supervisors of Pleasant Mound Township**[306]

The township and the county adopted several ordinances impacting CAFOs. One required new CAFOs feeding 300 animal units or more to seek a CUP. The ordinance also established pollution control and setback standards. The township then adopted a moratorium ordinance to study the CAFO problem and during that study period, the county enacted its own land use ordinance restricting CAFOs. After studying the problem, the township adopted a new comprehensive plan and zoning ordinance that limited the number of animal units that could be fed at a CAFO. The township ordinance was much stricter than the county ordinance. Plaintiffs operated a CAFO in the township that had received a CUP, but under the newest township ordinance would be a prohibited use because of the number of animal units involved. They sought to invalidate the township ordinance.

The township argued that the case was not ripe for review since the plaintiffs had not sought a CAFO permit. But since the ongoing feedlot operations were a prohibited use they could not be granted a permit, nor could they be issued a variance. Thus they did not have to exhaust their administrative remedies. One argument made by the plaintiffs was that the township ordinance was preempted by, or in conflict with, the

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[305] 165 Or.App. 138, 995 P.2d 1204 (2000).
[306] 615 N.W.2d 874 (Minn.App. 2000).

county ordinance. Two separate enabling statutes grant those two sub-state entities the zoning power. There is an express statutory provision that limits the power of townships to enact zoning laws that are inconsistent or less restrictive than the county's. Plaintiffs argue that the township ordinance is inconsistent because it forbade what the county allowed. But the court found the language plain because it only prevents the township from having less stringent regulations. They also argued that the county ordinance occupied the field of CAFO regulation, thus preempting township regulation. The court rejected that claim noting that the preemption argument is different when dealing with two sub-state units than when dealing with a state/local situation.[307] The occupation of the field doctrine only exists in substate unit relationships when the state so declares. In this case, the only state declaration is the one prohibiting less stringent standards. Thus the township is not prevented from regulating CAFOs merely because the county has its own CAFO regulatory scheme.

Finally, the court found that the ordinance was not arbitrary or capricious. The scope of judicial review of zoning ordinances is quite deferential, using a fairly debatable standard. In this case the township engaged in a lengthy and substantial study of the problem before it adopted the CAFO ordinance. Whether the ordinance is wise or not is a matter left to the township and should not be disturbed by a reviewing court.

[5] Sanitary Landfills

[a] **State ex rel. Teefey v. Board of Zoning Adjustment**[308]

Teefey owned a 36-acre parcel located in an area zoned for agricultural uses. He owned a home and operated his landscape and nursery business on the tract. A city zoning official issued a notice of violation after he discovered that the owner was using a portion of his tract for a compost pile. The alleged violation was the use of the land as a sanitary landfill, not a permitted use in an agricultural zone. The BZA held a public hearing that found a violation, but that decision was reversed and remanded due to the lack of evidentiary support for the finding that a landfill was being operated on the parcel. The later hearing also led to a BZA determination that the ordinance was being violated. The trial court again reversed.

An appellate court in Missouri reviews the findings and conclusions of the BZA, not the judgment of the trial court. The scope of judicial review is limited to determining whether substantial evidence in the record supports the BZA's decision so that the decision is not arbitrary, capricious or unreasonable. In reviewing the decision, the court must view the evidence in the light most favorable to the BZA. The court also reviews the BZA decision to determine if the proper law was applied. In interpreting city ordinances, the court appeared not to give any deference to the BZA interpretation. Instead it applied the plain meaning approach to see whether the owner's actual operations met the ordinance definitions of a solid waste sanitary landfill. Grass clippings and other lawn debris fit within the definition of solid waste. Likewise, a compost facility, even one that does not apply chemical or other forms of treatment fits

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[307] See e.g., Canadian Connection v. New Prairie Township, 581 N.W.2d 391 (Minn.App. 1998, rev. denied); Blue Earth County Pork Producers, Inc. v. County of Blue Earth, 558 N.W.2d 25 (Minn.App. 1997, rev. denied) and Board of Supervisors of Crooks Township v. ValAdCo., 504 N.W.2d 267 (Minn.App. 1993, rev. denied) which all dealt with alleged preemption by occupation of the field by a state agency, the Minnesota Pollution Control Agency.

[308] 2000 WL 821467 (Mo.)(en banc).

within the definition of a landfill. Thus the BZA decision finding the actions of the owner in violation of the prohibition against operating landfills in an agricultural zone were supported by substantial evidence.

[b] **Metropolitan Development Commission of Marion County v. Schroeder**[309]

An small parcel of land had been used as a service station in a commercial zone. The business was closed and after several years the county BZA granted a variance from certain use restrictions so that a transmission repair and sales business could operate. One of the conditions on the variance was that no more than one vehicle could be stored on the premises for more than 24 hours. The parcel was then sold to Schroeder who erected a barbed wire fence in violation of a county ordinance. After an enforcement action was begun the parties settled their differences. After another year, a county zoning official issued a notice of violation after finding a number of junk cars located on the lot. Schroeder defended his actions by claiming that since he had purchased the parcel he had always stored junk cars there. He also claimed that he was unaware of the condition contained in the variance covering the parcel since the variance had never been recorded.

The court found that laches could not prevent a city from enforcing its zoning ordinance. Likewise the court found that the city had not waived its right to enforce the variance condition. There clearly was no intentional relinquishment of a known right communicated to Schroeder from the county. The trial court had found that Schroeder had a NCU. There was no evidence in the record that the use of the parcel for storage of cars had antedated the zoning ordinance. In fact since the present use was only permitted by a variance, it would be impossible to show that the use was a NCU. The court also rejected Schroeder's claim that the settlement of the earlier violations estopped the county from enforcing the variance conditions. One of the provisions in the settlement was a finding that Schroeder was in substantial compliance with the zoning ordinance. He argued that the county should be judicially estopped from now claiming that his continued use of the parcel for a junkyard violated the ordinance. The court rejected the estoppel claim since the earlier enforcement action reflected a violation of the fencing regulations and not the storage of cars prohibition. The court also rejected the equitable estoppel claim, noting that equitable estoppel is rarely applied against governmental entities. Only where the government's actions would threaten the public interest can equitable estoppel be applied. Here there was no threat to the public interest by the enforcement of the variance condition.

Schroeder also asserted a regulatory takings claim. Here Schroeder does not have a property interest in using his land for the storage of junked vehicles. The bundle of rights acquired by Schroeder also included the bundle of restrictions, such as the variance condition. Schroeder only acquired the right to store a single vehicle on the parcel, and that right has not been infringed upon. The court also found that the variance condition was not unreasonable. The court looked to five factors to determine reasonableness. They should "1. not offend any provision of the zoning ordinance, 2. require no illegal conduct on the part of the permittee, 3. be in the public interest; 4. be reasonably calculated to achieve a legitimate objective of the zoning ordinance; and 5. impose no unnecessary burdens on the landowner."[310] The zoning ordinance placed significant limitations on outdoor storage and operations. The condition achieved

[309] 727 N.E.2d 742 (Ind.App. 2000).

[310] Id. at 754 quoting from Schlehuser v. City of Seymour, 674 N.E.2d 1009 (Ind.App. 1996).

various legitimate state objectives consistent with the zoning ordinance. Thus the enforcement of the condition by the county was appropriate.

[c] **Demolition Landfill Services, LLC v. City of Duluth**[311]

In December 1998, plaintiff sought a CUP for a landfill. In April 1999, the City Council held a public hearing and voted to reject a resolution approving the permit. In May 1999, the council voted to deny the permit. Under state law, an agency must approve or deny a zoning permit, license or other approval within 60 days of its filing. An additional 60 day period is allowed if the agency provided the applicant with a written notice of the extension prior to the end of the first period.[312] It was undisputed that the 120 day period applicable to the facts in this case expired in April 1999, after the initial vote was taken. The issue was whether the first vote rejecting the permit approval was the equivalent of a denial decision. The court looked at the actions of the city in conducting a second vote to affirmatively deny the CUP. That suggested that the initial vote was not a rejection. Since the first vote did not toll the statute, the deemed approved remedy for failing to act was triggered. The statute was not merely directory, but was mandatory, so the court was not willing to allow substantial performance to substitute for complete performance.

[d] **St. Johns County v. Smith**[313]

Smith applied for a PUD for an 89-acre tract. The land had been zoned for open rural that would not have permitted solid waste transfer stations. The PUD provided for all essential public services but further provided that the PUD would not adversely affect the health or safety of the residents nor be detrimental to the environment. Smith sought to modify the PUD to among other things, include a solid waste transfer station. The county staff recommended approval of all of the changes except for the transfer station. The county initially found that the transfer station was incompatible with the original PUD application and would not create a more desirable environment. At the trial court Smith filed an affidavit where he would agree to limit the type of waste that would be processed through the transfer station. The county argued that the affidavit was not admissible since the trial court was limited to reviewing the record. The trial court remanded the decision to the commission to accept the compromise offer contained in the affidavit and approve the PUD modifications.

In Florida, a major modification to a PUD application is the functional equivalent of a rezoning petition. As such the proponent has the burden of proof to show that the change is consistent with the comprehensive plan. At that time the burden shifts to the county to show that maintaining the existing zoning accomplishes a legitimate public purpose. The trial court did not follow the appropriate review procedure. It failed to shift the burden to Smith to show that the PUD modification was consistent with the comprehensive plan. The only evidence in the record was a staff report that had been superseded. In addition, the trial court's review was not consistent with certiorari review which is limited to an determination of whether the county departed from the essential

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[311] 609 N.W.2d 278 (Minn.App. 2000). *See also* Cadiz Land Co., Inc. v. Rail Cycle, L.P., 83 Cal.App.4th 74, 99 Cal.Rptr.2d 378 (2000) where the court found that a CUP for a landfill was consistent with the general plan, but which found that CEQA had not been complied with because the impact on the aquifer had not been adequately analyzed.

[312] Minn.Stat. § 15.99.

[313] 2000 WL 1133079 (Fla.App.).

requirements of law.[314] In addition, the trial court erred in admitting, and then considering, the affidavit and its compromise offer. As a post-record submission it should not have been part of a certiorari review.

§ 1.07 Potpourri

[1] Discretionary Permits

[a] Special Exceptions – Conditional Use Permits

[i] **Harris v. Jefferson County Board of Adjustment**[315]

The Tinkers own a parcel of land in a single-family residential district. In 1996 they received a variance to operate a boat-rental business. In 1998, they sought a special exception to operate a concession stand. The county BZA granted the special exception. A neighbor challenged the special exception claiming that the action of the BZA was ultra vires. The court noted the classic difference between a variance and a special exception, a variance excusing compliance with the terms of a zoning ordinance, a special exception authorizing a use that is allowed by the specific terms of the zoning ordinance. The county zoning ordinance did not provide for a concession stand as a special exception use in a residential district. The county argued that the issuance of the 1996 variance essentially rezoned the parcel to a business or commercial district. A variance, however, cannot amend the zoning ordinance since only the legislative body may do that under the equal dignity rule. A BZA does not have the power to rezone, either de jure or de facto. Thus, the issuance of the special exception was ultra vires.

[ii] **Florida Power & Light Co. v. City of Dania**[316]

FP&L sought a special exception to build an electrical substation on land zoned for commercial use. The Planning and Zoning Board recommended denial of the S/E. The city commission held a public hearing whereby local neighbors protested the proposed location. The city voted unanimously to deny the S/E. The trial judge reversed the city's decision finding that once an applicant for an S/E has met the criteria in the ordinance, the burden shifts to the city to demonstrate that substantial evidence in the record supports their denial decision.[317] The Supreme Court reviewed the nature of judicial review under Florida law. There is first tier review that is conducted by the trial or circuit court. The circuit court reviews the record to determine whether the agency decision is supported by substantial evidence. The second tier review is to the intermediate appellate court or the district court. Review at this level is limited by the nature of common law certiorari review. For most cases, the first tier decision should not be disturbed by the district court. The basic grounds for second tier review are whether the circuit court afforded the parties procedural due process rights and applied the correct law. The district court does not go back and review the original administrative record; that is within the province of the circuit or trial court.

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[314] See Florida Power & Light Co. v. City of Dania, 761 So.2d 1089 (Fla. 2000) at § 1.07[1][a][ii] *infra.*
[315] 2000 WL 968535 (Ala.Civ.App.)
[316] 761 So.2d 1089 (Fla. 2000).
[317] This shifting of the burden of producing evidence was first set forth in Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla. 1986).

In this case the circuit court did not merely review the record to see if there was substantial evidence to support the city's decision. It, in effect, engaged in a trial de novo, reweighing the evidence of the opposing neighbors and FP&L. That was an erroneous application of the law. It should not have applied the standard that shifts the burden to the city, but should have applied the traditional standard of review that the zoning decision will be upheld if there was substantial and competent evidence in the record to support that decision.[318] The Supreme Court declined to review the record itself to determine if there was substantial evidence to support the denial decision. Instead the court remanded the decision back to the circuit court to apply the appropriate scope of judicial review, while reminding the district court, that its role is also not to re-weigh the evidence but to determine if there was an erroneous application of legal principles.

[iii] **Kosalka v. Town of Georgetown**[319]

Plaintiffs sought a permit to construct a trailer/RV campground. Under the town's shoreland zoning ordinance, there are only 3 districts, resource protection, general development and limited residential/recreational development. The situs of the campground made it unclear as to whether it was in the resource protection or limited development district. In situations where there is a controversy the town's ZBA makes the final decision. Campground use is allowed as a CUP in the limited development district if 9 performance standards are met. The CUP was denied by the Planning Board for two reasons, the first being that the situs was in the resource protection district, the second being that the development would not conserve the natural beauty of the area, one of the listed standards. The ZBA concluded that the situs was in the limited development district, but it affirmed the denial decision. The trial court, however, reversed, concluding that there was insufficient evidence to support the finding relating to the standard of "natural beauty". On remand, the ZBA again affirmed the CUP denial decision after taking additional evidence on the issue and making a site visit.

Neighbors who intervened in the administrative and judicial proceeding argued that the ZBA made the wrong situs decision. They had the burden to show that the ZBA decision was arbitrary or an abuse of discretion. Under the ordinance, since the lot was already developed it could be placed in the limited development district even though it may also include wetlands or other environmentally sensitive areas. The owners bore the burden of proof on the issue of whether the ordinance is unconstitutional because several of the standards, including the natural beauty standard, were void for being too vague or were an impermissible delegation of legislative authority. Maine has occasionally used the non-delegation doctrine to strike down grants of land use authority, those instances involved standardless delegations. Such general standards as compatibility or approval do not constrain the unbridled discretion of the administrative decision-maker. The court found that the standard of conserving the natural beauty of the area was likewise standardless. There is no way to quantify natural beauty or to determine how one conserves it. Neither property owners nor the town will know how to create a development plan that meets that standard. This leaves the ZBA and Planning Board in the position of approving or denying permits as they see fit. Thus the decision to deny the CUP because it violated that standard must be reversed and the ZBA ordered to issue the CUP.

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[318] See City of Deerfield Beach v. Vaillant, 419 So.2d 624. (Fla. 1982).
[319] 2000 ME 106, 752 A.2d 183.

[iv] **City of Alpharetta v. Estate of Sims**[320]

BP Oil sought a CUP to construct a convenience store and ten island gas station on land it has an option to purchase. The staff recommended conditional approval of the CUP, including a requirement that 6 large trees be preserved. The city had an ordinance requiring trees to be preserved under many circumstances before a building permit would issue. During the public hearing, BP Oil was ready to protect several of the trees, but the most significant tree could not be saved under the plans submitted by BP Oil. The City Council then voted to deny the CUP. One of the standards for the issuance of a CUP is that the use should not be injurious to the environment. Since BP Oil had not presented evidence, other than its conclusory statement that the one significant tree could not be built, the court found that the city's decision was supported by substantial evidence in the record.[321]

[v] **Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc.**[322]

Under San Francisco's residential hotel unit conversion and demolition ordinance, the city had designated 79 of Astoria's rooms as residential units and 13 rooms as tourist units in 1981. The issue was whether the Astoria was entitled to continue treating the 13 units as tourist units even though a 1987 ordinance would require the Astoria to get a CUP to continue their use only if the units were being used for tourist purposes at that time. The Clinic argued that there was no evidence showing that the Astoria actually rented these rooms to transients in 1987 and that therefore they were not entitled to rent them to transients under the city's ordinance.

A preliminary question was whether the trial court should have applied the primary jurisdiction doctrine and allowed the planning department to make the determination. The court concluded that the issue did not involve the administrative expertise of the planning department but involved issues of statutory interpretation. Therefore no referral to the planning department was required.

The Astoria Hotel is located in a mixed use district where tourist hotels are only permitted as conditional uses. It was conceded that the Astoria never received a CUP from the planning department. It asserted that it may rent 13 of its rooms to tourists because it was a NCU, based on the 1981 certification under the conversion ordinance. The court interpreted the various city ordinances as giving the Astoria NCU status even though it did not show that it was actually using those rooms for tourist purposes at the time of the 1987 ordinance. The use itself lawfully existed by virtue of the 1981 certification. Unless the plaintiff could show that the Astoria abandoned its NCU through nonuse for a period of at least 3 years the Astoria would be able to continue to rent no more than 13 of its units to tourists without have to receive a CUP.

[b] Variances

[i] **Pinnell v. Kight**[323]

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[320] 2000 WL 1036233 (Ga.)

[321] A dissenting justice took substantial umbrage at the trampling on the property rights of BP Oil and the view that CUPs give the city unbridled discretion to deny them. (Carley, J. dissenting). *Id.* at *2.

[322] 83 Cal.App.4th 139, 98 Cal.Rptr.2d 924 (2000).

[323] 2000 WL 944120 (Ga.App.)

An owner of a home in a single-family residential district sought a variance to place a mobile home behind her home so that her grandson could live there. A variance was required since no mobile homes were allowed in her SFR district. The variance was issued with the condition that only her grandson or other family members could live in the home. It provided for an automatic termination of the variance should the family move. Several years later the owner finally moved a mobile home onto her lot. Shortly thereafter the city voted to rescind the variance and she was instructed to remove the mobile home. She was instructed to complete an application for a moving permit that should have evidently been approved prior to the moving of the mobile home. The city considered and denied the moving permit application. Pinnell then sought a writ of mandamus forcing the city to honor its earlier variance and to order the city to approve the moving permit.

Pinnell argued that the zoning ordinance was unconstitutional under state law, since a city could not exclude mobile or manufactured homes for residential districts.[324] Since she did not raise that issue before the city council, however, it cannot be raised for the first time upon appeal. The trial court had found that the earlier variance had been improperly issued due to lack of notice. This court found that the variance was properly issued and notice given both by publication and by a sign on the owner's parcel. Under the city ordinance a variance is a "deviation from the terms of the ordinance that are not contrary to the public interest." There is no requirement of unnecessary hardship and the trial court's review to determine whether hardship existed went beyond the proper scope of judicial review. The fact that the owner had not exercised her right to place a mobile home on her lot for nearly 5 years, did not terminate her continued right to the variance. The court, however, remanded the decision to the trial court to see whether the facts and circumstances justifying the variance or a change in the character of the neighborhood existed so as to justify the rescission decision.

[ii] **Nolan v. City of Eden Prairie**[325]

In 1989 the city approved a subdivision plat and simultaneously issued several variances. In 1998 the developer filed another application for a revised plat. The City Planning Commission voted unanimously to approve the revised plat after consulting with various parties to see whether the shared septic system complied with state standards. Shortly thereafter the city council approved the revised plat by a 3-2 vote. A neighbor challenged the decision, in part based on an alleged conflict of interest between of one of the council members who voted in favor of the plat. In the meantime, the city board of adjustment and appeals denied the requested variances related to the revised plat. The city council then reviewed the board decision and by a 3-2 vote granted the variances.

The conflict of interest charge was based on the fact that the council member shared office space with his brother who was an attorney representing the developer. Under Minnesota law, the court reviewed 5 factors to determine if there was such a conflict. It looked at the nature of the decision being made, the nature of the pecuniary interest, the number of officials making the decision who are interested, the need, if any, to have interested persons make the decision and the other means available to review the decision to insure that the officials did not act to further their own personal interest. The court found that there was no direct conflict in this case. The council member

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[324] See Cannon v. Coweta County, 260 Ga. 56, 389 S.E.2d 329 (1990).
[325] 610 N.W.2d 697 (Minn.App. 2000).

testified that he was unaware of the fact that his brother represented the developer in the related litigation until the day of the vote.

In Minnesota the scope of judicial review of zoning decisions, be they legislative or adjudicatory, is determined under a reasonableness standard. Obviously, the court also reviewed the decision to determine if it properly applied the law. Plaintiffs argued that the city council did not make the required finding of unnecessary hardship. Under Minnesota law, variances may be granted under circumstances other than those where to deny them would essentially constitute a regulatory taking. Undue hardship may merely mean that the owner would like to use its property in a manner that is otherwise prohibited by the zoning ordinance. The court found that the current request for variances must be measured against the earlier decision to issue variances for the same development. In addition, the court found that the land had unique circumstances, including severe slopes. Finally the court found that the issuance of the variance would not alter the essential character of the neighborhood. Thus the decision to issue the variances was reasonable and would not be disturbed by the court. It is clear that Minnesota's treatment of variances is a minority view and makes it much more likely for a developer to receive a variance than in most other states. The court did not distinguish between use and area variances, although it appeared from the facts in this case that only area variances were involved.

[iii] City of Battle Creek v. Madison County Board of Adjustment[326]

The board granted a setback variance to allow for the construction of a garage on a residential lot. The variance was issued because the lot was unusual in that it was bordered by platted streets on three sides. The city appealed the decision and the trial court reviewed the record evidence, including a transcript of the board's proceedings. In Nebraska, the appellate court reviews the decision of the district court to see if that court's decision is an abuse of discretion. Nebraska has a statutory provision on variances that allows them to be granted only if the unusual characteristics of the property existing at the time of the enactment of the ordinance would result in peculiar and exceptional practical difficulties or undue hardship.[327] The board must make findings consistent with the statutory mandate. In this case the board's record did not reflect whether certain exhibits that were presented to the trial court were before the board. There was insufficient testimonial evidence to support the required hardship and unusual circumstances criteria. The district court received additional evidence which it is entitled to do. But that evidence, according to this court was not sufficient to support the statutory requirements. Thus the variance application must be sent back to the board so that their deliberations conform to Nebraska law.

[iv] Craik v. County of Santa Cruz[328]

The county zoning ordinance zoned a parcel of beachfront property as SFR with a minimum lot size of 8000 square feet. FEMA regulations also applied to the lot so that the lowest habitable level of a residence must be 22 or 23 feet about mean sea level. Two adjacent lots were sold to two separate parties. The owner of one lot sought a building permit and a variance to construct a new home. The variance was needed

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[326] 9 Neb.App. 223, 609 N.W.2d 706 (2000).
[327] Barrett v. City of Bellevue, 242 Neb. 548, 495 N.W.2d 646 (1993), interpreting Neb.Rev.Stat. § 19-910.
[328] 81 Cal.App.4th 880, 96 Cal.Rptr.2d 538 (2000).

because of the floor-area ratio, height, setback, parking and decking requirements. The planning commission, after getting a remand from the board of supervisors granted the variance as to all standards. They specifically found that the variances were caused by special circumstances relating to the size and shape of the lot that deprived the owner of the same privileges of ownership enjoyed by his neighbors. They also found that the variance would be in harmony with the general intent and purpose of the zoning ordinance and would not constitute a grant of special privileges to the owner. The neighboring owner challenged the decision as an abuse of discretion.

California, like Nebraska, has a statutory provision setting forth the minimum requirements for the granting of a variance.[329] It specifically authorized variances to be granted subject to conditions that are not inconsistent with the limitations affecting other nearby parcels. In addition, the statute recited the usual requirement that variances must only be granted to prevent undue hardship or practical difficulties due to unusual circumstances not generally affecting other parcels. In California, judicial review of a variance decision is based on the determination that such a decision is quasi-adjudicatory in nature. Therefore the reviewing court applies a substantial evidence test, buttressed by an abuse of discretion standard. The court must review the findings of the decision-maker to determine whether they "bridge the analytic gap between the raw evidence and the ultimate decision or order."[330] However, the reviewing court should not substitute its judgment for that of the decision-maker.

The court rejected the plaintiff's claim that only physical disparities between parcels can justify the issuance of a variance. Under FEMA regulations, the owner would not be able to have part of his habitable premises on the ground floor. Thus the special need for the height and floor area variances. Likewise, while there is a general county policy to limit residences along the ocean to two stories, the policy noted that in appropriate circumstances variances from the policy may be granted. Thus, there was substantial evidence in the record to support the commission's decision to issue the variance.

[v] **Baker v. Browlie**[331]

In the last of 3 reported cases relating to a homeowner's attempt to remodel his waterfront home,[332] the court reviewed whether the conditions placed on an area variance by the ZBA were appropriate. Conditions placed on variances must be directly related and incidental to the proposed use of the property, must be consistent with the spirit and intent of the ordinance and minimize any negative externalities resulting from the variance. Two of the conditions related to the construction of a pagoda and could not be enforced since in one of the earlier decisions the court had found the variance denial arbitrary and capricious and had ordered the ZBA to allow the structure to be built. Since the effect of those conditions would be to bar the pagoda from being built they are contrary to the earlier court holding. Another condition required the metal posts supporting the removable awnings be sunk two feet into the ground. The court found that condition arbitrary since there was no evidence showing that the two foot depth was required for safety purposes. One condition relating to parking was also inconsistent

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[329] Cal.Gov't Code § 65906.

[330] 96 Cal.Rptr.2d at 540 citing Topanga Association for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 113 Cal.Rptr. 836, 522 P.2d 12 (1974).

[331] 270 A.D.2d 484, 705 N.Y.S.2d 611 (2000).

[332] The earlier cases are Baker v. Browlie, 248 A.D.2d 527, 670 N.Y.S.2d 216 (19??) and Baker v. Edwards, 221 A.D.2d 436, 634 N.Y.S.2d 383 (19??).

with the earlier decision and was overturned. One undefined condition was found to bear no relation to the requested area variance and was also annulled. A condition on the seasonal use of the awnings was found to be unreasonable, arbitrary and capricious. Two conditions relating to the size and shape of the proposed porch were found to be reasonable. Finally the condition requiring the owner to submit his plans to the village was also upheld, so long as the village understood that the building project must be allowed. The court's frustration was evidenced by the following concluding remarks:

> It is clear that the protracted litigation between the parties has been fueled by mutual antipathy. Both parties and their respective counsel have advanced arguments that border on the frivolous.. . it is apparent that certain members of the ZBA behaved in a heavy-handed manner. Concomitantly, the petitioners have taken intransigent positions, intractably refusing to compromise. It is the profound hope of this court that with this decision and order, this matter has been resolved, once and for all, and that this matter will not return to this, or any other court.[333]

[vi] **French Quarter Citizens for Preservation of Residential Quality, Inc. v. New Orleans City Planning Commission**[334]

An owner of a drugstore in the French Quarter sought a variance to expand the amount of floor space devoted to his commercial activities. The BZA approved the variance with certain conditions. The property is located in a special district that allowed intensive commercial use, consistent with the historic character of the French Quarter. The ordinance placed a 7500 square foot limitation on floor area. The drugstore wanted to have 12,500 square feet, but only 6700 square feet would be open to the public. The remainder of the area would be administrative space on the second floor of the building. A neighborhood association challenged the BZA action.

The court rejected the plaintiff's claim that courts should apply a "strict scrutiny" scope of judicial review to zoning decisions affecting the French Quarter. The court instead applied the traditional soft glance approach under the arbitrary, capricious and abuse of discretion test. The plaintiff also challenged the BZA's power to issue area variances. The court examined the ordinances and found that the BZA has both the power to hear administrative appeals from permit decisions and the power to grant variances. Louisiana law required the BZA to make a finding that practical difficulties or necessary hardships interfere with the owner's use of the land under the zoning ordinance. The court reviewed the evidence before the BZA and found that the variance was granted in large part due to the owner's agreement to limit the amount of floor space dedicated to commercial sales to a lesser amount than would otherwise be authorized by the ordinance. That evidence was sufficient to show that the BZA decision was not arbitrary, capricious or an abuse of discretion.

[vii] **North Avenue Properties, LLC v. Zoning Board of Appeals**[335]

An owner sought several permits from the city to operate a retail sales business in a planned manufacturing district and to locate an off-street parking facility to serve that business located in a general manufacturing district. They were advised that a variance

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[333] 705 N.Y.S.2d at 615.

[334] 763 So.2d 17 (La.App. 2000, writ denied).

[335] 312 Ill.App.3d 182, 244 Ill.Dec. 469, 726 N.E.2d 65 (2000).

would be needed for both locations because the proposed uses were not allowed in their respective zoning districts. The owner then filed an application for two variances. Plaintiff, a neighboring owner, received notice of the variance request and filed a written objection. The board, after a public hearing, issued both variances. Plaintiff sought judicial review of the board's decision.

In Illinois, both the trial court and the appellate court review the record before the zoning agency to determine whether the findings and orders are against the manifest weight of the evidence or that the agency acted arbitrarily or capriciously. Arguments that are not raised before the agency are waived. The court upheld the trial court's dismissal of certain of plaintiff's claims and proffered evidence because the plaintiff had not raised the claim that the owner and the owner's attorney had failed to provide them information regarding their proposed uses. The court could not take judicial notice of some of the proffered items because the items were not part of the public record or otherwise memorialized to the degree required in order to take judicial notice.

Plaintiff also challenged the board finding that the proposed retail use will have sufficient off-street parking. Under the zoning ordinance where parking is provided at a separate location, the facilities must be in the same possession as the zoning lot occupied by the building for which the parking lot is an accessory use. The owner was required by the ordinance to provide 61 parking spaces. Some of the spaces were arranged through a license agreement with a nearby parking lot operator that the court felt insufficient to meet the ordinance requirement since the spaces were not reserved exclusively for the owner's use. While the owner asserted that the agreement was a lease of parking spots the court looked through at the substance of the agreement to conclude that the agreement was revocable, a hallmark of a license arrangement.

Finally, the court refused to defer to the board's interpretation of its parking requirements noting that as to questions of law a reviewing court is not bound by the agency's interpretation. Only if the language of the ordinance is ambiguous should the court give some weight to the agency interpretation. The court found that the language was unambiguous and required the owner to conform to all of the requirements of the ordinance before a variance should issue. Here, the owner did not comply with the parking requirements and thus no variances should have been granted.

[viii] **Stop & Shop Supermarket Co. v. Board of Adjustment**[336]

A predecessor to the plaintiff received several variances to operate a retail department store on a 9.7 acre tract that was split between two townships. One of the townships zoning ordinances split the tract as well into two separate districts, one commercial, one residential. The variances essentially allowed the use of the entire tract for a retail center and parking area. In 1994, plaintiff sought a certificate of occupancy for a supermarket. Supermarket uses were allowed in the general commercial district attaching to a portion of the parcel. The plaintiff had two alternative plans, one was to use the existing structure with some modifications, while the second was to build a new structure of the same size. The new structure would be located on a portion of tract zoned for residential use. The board of adjustment voted to require plaintiff to seek a new variance to operate the supermarket.

Variances are issued to avoid unnecessary hardship and protect municipalities against constitutional challenges to zoning ordinances. Use variances are not to be liberally granted but if the proposed use is deemed to be "inherently beneficial" the

[336] 162 N.J. 418, 744 A.2d 1169 (2000).

variance should be granted unless the negative criteria outweigh the benefits of the proposed use. Variances are like real covenants, they attach to the land and the purchaser takes the land free from the zoning restrictions to which the variance pertains. The variance having been issue raises a presumption that the use or structure is not offensive to the zoning ordinance. Unless lost by abandonment or non-use, the variance continues to run with the land.[337] This rule comports with the basic tenet that land use regulation regulates land, not the owners of land. In this case the earlier variances gave the prior owner the right to use residentially-zoned land for parking and for a part of the building used to sell clothing. The successor in interest can rely on those variances to continue those types of uses, even where there is a change from ritzy department store to big box grocery wholesaler. The township zoning ordinance allowed both retail and grocery stores in the general commercial zone. Thus it did not distinguish between the two uses so as to justify the claim that there was a change in use. The township cannot require a new variance that would contradict its earlier findings when it issued the original variances. The township may still exercise site plan control to minimize externalities should the plaintiff seek building or construction permits, but they cannot challenge the validity of the earlier variances given the owner the right to use a portion of the parcel for parking and retail sales even though it was in a residential zone.

[ix] **Cole v. Board of Adjustment of the City of Huron**[338]

In November 1997, the owner of three lots sought a variance to construct a service station and convenience store. The board granted the variance notwithstanding some local opposition. A neighbor filed suit that eventually led to a remand to the trial court because they had applied the wrong standard of review.[339] On remand, the trial court again reversed the board decision because it was illegal and in excess of the board's jurisdiction and lacked any findings to support the requirement that special conditions existed requiring the issuance of a variance.

Under South Dakota law, when review of a governmental decision is made through the certiorari process, the only issue presented is whether the agency exceeded its jurisdiction. Under the city's zoning ordinance, an applicant for a variance must prove by a preponderance of the evidence that the variance is not contrary to the public interest and that special conditions exist which constitute an unwarranted or unreasonable hardship. It was clear, however, that the trial court again engaged in a de novo review of the board's decision, contrary to the holding of the first remand. There were findings in the record to support the granting of the variance. While the land was zoned for residential uses, it abutted a state highway where there were already other commercial uses present. It is the board's exercise of discretion that was being challenged, but under the appropriate standard of review for a certiorari petition, that discretion could not be reviewed by a trial court.[340]

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[337] For other cases applying this doctrine see Garibaldi v. Zoning Board of Appeals, 163 Conn. 235, 303 A.2d 743 (1972); Halifax Area Council on Alcoholism v. City of Daytona Beach, 385 So.2d 184 (Fla.App. 1980); Mechem v. City of Santa Fe, 96 N.M. 668, 634 P.2d 690 (1981); Nuckles v. Allen, 250 S.C. 123, 156 S.E.2d 633 (1967).

[338] 2000 SD 119, 616 N.W.2d 483.

[339] Cole v. Board of Adjustment, 1999 SD 54, 592 S.W.2d 175.

[340] There was a dissenting opinion that would have applied the more traditional scope of judicial review to variance decisions that would allow for reversal if the decision was arbitrary, capricious or an abuse of discretion. 616 N.W.2d at 489. (Sabers, J. dissenting).

[2] Intergovernmental Conflicts

[a] **Ventura v. City of Seattle**[341]

Plaintiff operated a rowing club in a marina. The City sought to apply its Shoreline Management Program (SMP) to the club structures. The plaintiff argued that the structures came under the SMP definition of a vessel and were exempt from regulation. The structure consisted of two steel superstructures welded to steel hulls or floats. Once moved to the marina area, they have remained at a single site. The structures contain rooms, including locker rooms and storage areas for shells. At no time did the plaintiff seek a building permit to locate the rowing club structure at its present location. After inspecting the structure, a City inspector noted several potential violations. Plaintiff then filed an action that challenged the notices of violation that were issued.

The SMP definition of a vessel includes "ships, boats, barges or other floating craft which are designed and used for navigation." Applying a deferential approach to an agency's interpretation of its enabling statute, the court found that the city's interpretation is not clearly erroneous. The purpose of the SMP is to protect the shoreline. The plaintiff's interpretation would exempt more structures or facilities that might harm the shoreline environment. The plaintiff also argued that the federal regulation of navigable waters and vessels preempted the city's interpretation. Only if the plaintiff could show that the vessel being regulated operated in interstate commerce could the preemption argument succeed. Since the structures were not being used to navigate in interstate commerce there was no preemption.

Plaintiff also made an omnibus due process and equal protection claim. Since no fundamental right or suspect classification was involved the plaintiff had to prove that there was no rational basis for treating others similarly situated differently. But plaintiff did not produce any evidence of disparate treatment of other rowing club operators and thus there was no equal protection violation. Finally, plaintiff argued that she had received advice from a city official that a new use permit was not required for the type of structure she was building so that the city should be equitably estopped from enforcing the ordinance. Equitable estoppel against a city is always a tough argument. But the court found that at least a triable issue of fact existed regarding various city actions in approving boat moorage permits for the rowing club facility. Likewise, there was some evidence that a building code official defined the term vessel in a way that would have excluded plaintiff's facility. The court rejected the city's claim that a blanket rule prohibits a private party from asserting an equitable estoppel defense based on the actions of a single official since that official cannot surrender the government's police power.[342] Thus, if the plaintiff can prove that there was reasonable reliance and injury caused by a statement or advice given by a public official the equitable estoppel defense may be raised.

[b] **Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corp.**[343]

In 1992 the Railroad began construction of a train maintenance facility in the Village. It was relocating a closed facility from a nearby area. The facility was to be

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[341] 99 F.Supp.2d 1273 (W.D.Wash. 2000).

[342] See Buechel v. State Department of Ecology, 125 Wash.2d 196, 884 P.2d 910 (199$).

[343] 163 N.J. 446, 750 A.2d 57 (2000).

located in a light industrial area that is near a residential area and park. The Railroad never applied to the village for any permits at the time of its initial relocation. The village and the Railroad discussed several additions to the facility over the next year, amid growing public concern about the storage of hazardous materials, pollution and noise. The village then brought a declaratory judgment action seeking to determine if the Railroad was subject to the town's zoning and other ordinances.

The basic issue was whether the Interstate Commerce Commission Termination Act of 1995 (ICCTA)[344] preempted the village from applying its ordinances to the Railroad. In abolishing the ICC and creating the Surface Transportation Board (STB), ICCTA expressly preempted state and local "economic regulation" of railroads. The STB was delegated the authority to determine what type of state and local regulation should be preempted. In an administrative decision, the STB had determined that the ICCTA preempted all municipal zoning regulations as they applied to railroads. They are preempted because they could be used to frustrate transportation-related activities and interfere with interstate commerce. But certain types of health and safety regulations may not be preempted if their application would not have the effect of foreclosing or restricting the railroad's ability to conduct its operations. Further, the STB found that railroads are exempt from local building codes, but may not be exempt from local fire, health, safety and construction regulations and inspections. Railroads do not have to submit to any permit requirements because of the potential for delay. Thus, the village cannot apply its zoning ordinance to the Railroad, but it may not be denied access for reasonable inspection of the premises to determine if health hazards are present. The village may fairly impose its fire, health and plumbing regulations so long as it does not interfere with the Railroad's ability to operate.

[c] **Florida East Coast Railway Co. v. City of West Palm Beach**[345]

As with *Ridgefield Park,* this case involved the application of the ICCTA to a local zoning ordinance. FEC owned a 24.5 acre tract in the city upon which it operated five switching tracks, an office complex, warehouses, storage facilities and two loading and unloading tracks. In 1999, FEC leased a portion of the tract of land to a corporation wanting to use it as an aggregate distribution facility to receive trainloads of limerock and then distribute them to trucks for transportation to the eventual users. The city issued several cease and desist orders to both FEC and the lessee asserting that their operations violated the zoning ordinance. The court found that the transfer of control over the yard from FEC to the owner of the aggregate business was not allowed since the area was zoned for multi-family residential development.

The court had to determine whether the express preemption provisions of ICCTA prevented the city from enforcing its zoning ordinance. While the ICCTA language is written rather broadly so as to support a finding that the federal government has occupied the field of regulation, the key issue was defining the field. ICCTA is exclusively concerned with the regulation of rail transportation. Rail transportation has been the subject of extensive federal regulation for over a century. Thus it is clear that Congress intended to preempt state or local regulation of railroads and transportation. But the city ordinances in this case are not aimed at the railroad or rail operations of FEC. The court drew a very fuzzy line between generally applicable ordinances that target, rather than affect, railroad operations. The court concluded that neither FEC, nor its lessee were engaged in rail transportation activities on the site. The STB has

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[344] 49 U.S.C. § 10102.

[345] 2000 WL 1228657 (S.D.Fla.).

recognized that certain types of non-transportation facilities owned or operated by railroads may not be covered by the ICCTA preemption provisions. The aggregate owner was not processing the rock at the site. The major function being carried out was distribution, from railroad cars to trucks. The court nonetheless concluded that those distribution, as opposed to transportation, operations were not integrally related to the provision of interstate rail service. Thus he concluded that the city ordinance could be applied to stop the changed use of the facility. In a somewhat surprising turn of events, the federal court here narrowly applied preemption doctrine, while the New Jersey Supreme Court in *Ridgefield Park* more liberally applied the same doctrine to prevent local regulation of railroad activities.

[d] **City of Bridgeton v. City of St. Louis**[346]

This case involved a classic battle between two cities regarding the ability of one to impose its zoning ordinance on the other. Both cities are home rule cities. St. Louis owns and operates Lambert Airport. It is located outside of St. Louis and within the corporate boundaries of Bridgeton. St. Louis planned to expand the airport, including a major runway in order to deal with overcrowding. The Bridgeton zoning ordinance did not allow for airport uses in the area covered by the proposed expansion. Bridgeton sued to prevent St. Louis from implementing the expansion program envisioned in the airport's master plan.

Missouri has a statute that provides that "no airport or landing field shall be established or located in any … city.. in violation of any plan . . or zoning regulation restricting the location of an airport or landing field…"[347] That provision, however, had been interpreted in a prior case litigated by these same two cities as only applying to the establishment of a new airport and not to the operation of an existing airport.[348] The court found that the addition of a new runway is not the establishment of a new airport in a new location. Thus the statutory conflict provision was found not to be applicable.

Bridgeton also argued that St. Louis must still seek Bridgeton permits or approvals as part of Bridgeton's home rule status. They argue that until St. Louis exhausts its administrative remedies it cannot begin the expansion project. The court rejected the application of the exhaustion doctrine to this case since it only involved questions of law, suitable for a court to determine.

In dealing with issues relating to intergovernmental conflicts, the court applied a balancing of interests test. The court considered such factors as the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served and the effect the local land use regulation would have on the enterprise. The trial court had applied those factors and determined that St. Louis should be immune from Bridgeton regulation because of the importance of expanding Lambert Airport. The court did consider the fact that the expansion would take over 18% of Bridgeton's land area, including 1900 residences, 6 schools, 2 parks, 6 churches and 75 businesses. While Bridgeton may suffer the area as a whole will receive a substantial benefit from the airport expansion project. Thus the court upheld the granting of an injunction prohibiting Bridgeton from interfering with the expansion project.

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[346] 18 S.W.3d 107 (Mo.App. 2000, trans. denied)

[347] Mo.Rev.Stat. § 305.200(3).

[348] City of St. Louis v. City of Bridgeton, 705 S.W.2d 524 (Mo.App. 1985) held that Bridgeton could not prevent St. Louis from building a parking garage on land owned by St. Louis within the corporate limits of Bridgeton in order to support the airport operations.

[e] Kent County Aeronautics Board v. Department of State Police[349]

In 1984 the State Police conducted a study showing serious problems with the existing radio system. Six years later the Michigan Legislature appropriated substantial funds to construct a new system. After competitive bidding, construction of the approximately 181 new towers was to begin in 1994. In 1997 the State Police notified Ada Township that it was going to construct a tower at a site and that the township needed to issue a CUP authorizing construction or to select an alternate site that met all of the performance criteria needed to comply with State Police requirements. The Township Planning Commission issued the CUP but limited the permissible height to 175 feet and applied setback and other restrictions. The State Police began construction and stopped after the township agreed to look for an alternate site. Several property owners abutting the proposed alternate site then sued the State Police seeking them to continue construction on the original site. The FAA and the Michigan Bureau of Aeronautics both reviewed the tower plans and found that they would not interfere with air navigation. Several other parties filed separate litigation in favor of, or opposing, either the original or alternate site.

The key issue for the court was whether the State Police was exempt from the local zoning ordinances in the construction of the tower. The court interpreted the state statutes granting the State Police the power to construct the radio system. It specifically provided for the alternate site option should the local agency not grant the CUP. The clear impact of that language was that municipalities should not be able to stand in the way of the radio system that was necessary to protect the safety and general welfare of all of the state's citizens. The state specifically gave local governments two options, approve the original site or find a suitable alternative within 30 days. No other options are available. The preemption of local zoning ordinances did not merely apply to the use restrictions. Thus, area or bulk limitations were also preempted by the state statutes. As to the suit by the township, it lacked standing to challenge the constitutionality of a statutory provision enacted by the Legislature. Applying the classic creature theory doctrine of state/local government law, the court found that the federal constitutional protections did not apply to a local governmental unit. The court also upheld the State Police's regulations that set forth the criteria by which alternate sites would be judged.

[f] In re Commercial Airfield[350]

The owner of an airport located within his 600 acre farm was told by the District Environmental Commission that he needed to apply for a permit. The airport facilities included the runway and a maintenance shop. A crop-dusting business operated out of the airport. The Environmental Board found that the state statute and regulations were not preempted by federal statutes relating to airports. The court deferred to the Board's conclusion of law even though they involved issues of federal preemption. While the federal statutes give the FAA exclusive jurisdiction over airspace, they do not preempt local land use regulations. Land use regulation, as opposed to noise regulation or airspace or scheduling regulation, are not either expressly preempted or preempted by

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[349] 239 Mich.App. 563, 609 N.W.2d 593 (2000).
[350] 752 A.2d 13 (Vt. 2000).

the FAA's occupation of the field. Since the land use regulations of the state do not have an impact on air safety concerns, the state is free to apply those regulations.[351]

[g] City of New Rochelle v. Town of Mamaroneck[352]

The city was assisting IKEA, a home furnishings superstore, to locate on a 16.4 acre tract on the eastern border that the city shares with the town. In addition to a lot of local opposition in the city, the town has also actively opposed the project and the city's attempt to condemn the land. In fact the town enacted an ordinance giving its town board review power of major development projects outside of the town if they would impact the town. The city then brought a state court action seeking to invalidate the town's attempt to exercise extra-territorial powers. They asserted 8 state and federal constitutional and statutory claims ranging from a violation of the state constitution's home rule provision to federal due process and equal protection violations. The case was removed to federal court.

The town initially asserted that the city lacked standing since its ordinance only applied to developers and not to other cities. The court, however, found that the ordinance applied to all development projects undertaken that abut, adjoin or was adjacent to the town. Thus the city would fall under the terms of the town ordinance and suffer an injury in fact since the two communities shared a 3.5 mile border. The town also claimed that the suit was not ripe since neither the city nor IKEA had undergone developmental review under the town ordinance. The court agreed that as to the regulatory takings claim, that case was clearly not ripe for review since no final decision had been made. But as to the other claims, including the due process and equal protection assertions, the court found them ripe for review since the injuries arose from the enactment, not the application, of the ordinance.

The court analyzed the federal commerce clause claims under both the dormant commerce clause doctrine and the incidental effect doctrine. Only if the ordinance discriminated against out-of-state interests would it fall under the dormant commerce clause doctrine. Because no interstate interests are effected by the ordinance, only intrastate interests, the court dismissed the dormant commerce clause claims. But under the incidental effect doctrine, the court finds that at this summary judgment stage, allegations have been made that the ordinance will impede the free flow of goods in commerce and thus have an incidental effect on interstate commerce. Because the incidental effect doctrine requires the court to engage in a balancing test, the court wanted further discovery on the issue before it made a definitive ruling.

While it is clear that a sub-state unit does not have either due process or equal protection rights against the state, the city argued that such rights exist as between co-equal sub-state units.[353] Neither the due process nor equal protection clauses apply to the internal political organization of a state. The court found that the general rule should be extended to the situation where sub-state units are suing each other. Their relationship is also a matter of the internal organization of a state and the Fourteenth Amendment should not apply.[354] Thus the due process and equal protection claims are dismissed.

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[351] *See also* City of Cleveland v. City of Brook Park, 893 F.Supp. 742 (N.D.Ohio 1995).

[352] 2000 WL 1220602 (S.D.N.Y.)

[353] See City of Newark v. New Jersey, 262 U.S. 192 (1923); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

[354] *In accord*, South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500 (6th Cir. 1986).

The court also dismissed claims under § 1983. The court found that a municipality may not bring such an action to vindicate its sovereign rights that it alleged were infringed upon. While municipalities are persons who may be liable when they violate other citizen's constitutional or statutory rights, they are not citizens or other persons who may make such claims.[355] The court concluded that § 1983 was enacted to give private citizens a remedy against unconstitutional state action. It would run contrary to that objective to allow municipalities to sue other municipalities seemingly for the purpose of recovering attorney's fees under § 1988.

The court finally declined to exercise supplemental jurisdiction to hear the state constitutional and statutory claims even though the federal suit was kept alive to deal with the commerce clause issue. Because the state law issues were unique and not subject to easy determination, the court found that remanding those issues to the state court was the most appropriate response to its federalism and comity concerns.

[3] Exclusionary Zoning

[a] **City of Freeport v. Vandergrifft**[356]

Vandergrifft asked the city manager whether she could locate a HUD-code manufactured home on a particular site. In response to an affirmative answer she placed a home on the lot. The city manager was replaced and then the city filed a notice of violation alleging that the zoning ordinance did not allow a manufactured home in her single-family residential district. The owner claimed that the zoning ordinance, insofar as it prevented a manufactured home from locating in the district was preempted by the Texas Manufactured Housing Standards Act.[357] The ordinance did not distinguish between mobile homes and manufactured homes in the types of structures that could locate in the single-family residential district. The Act, on the other hand, defined the terms differently. In fact, the Act specifically prohibited cities from categorizing manufactured homes as mobile homes. Because the city's zoning ordinance defined mobile homes as manufactured homes and treated Vandergrifft's manufactured home as a mobile home, it was preempted by the express language of the Act.[358]

[b] **Town of Telluride v. Lot Thirty-Four Joint Venture, LLC**[359]

A major problem in resort areas, especially the ski areas of the intermountain west is the problem of finding affordable housing for the service employees that are required to operate resort-type facilities. This case represents one town's attempt to deal with that problem. In 1994, the town enacted an affordable housing ordinance that required owners engaging in new development to mitigate the effects of that development by generating affordable housing units for 40% of the new employees

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[355] There is a split of authority on this issue. The Fifth, Appling County v. Municipal Elec. Authority, 621 F.2d 1301 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980), Seventh, Rockford Board of Education v. Illinois State Board of Education, 150 F.3d 686 (7th Cir. 1988) and the Eleventh, U.S. v. Alabama, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, 479 U.S.1085 (1987) deny municipalities the right to sue while the Sixth, South Macomb Disposal Authority, note 340 *supra* allow them to sue.

[356] 2000 WL 1035395 (Tex.App.—Corpus Christi).

[357] Tex.Rev.Civ.Stat. art. 5221f.

[358] The court distinguished Texas Manufactured Housing Associates, Inc. v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996) because the Nederland's definition encompassed both mobile homes and manufactured homes.

[359] 2000 CJ CAR 2971, 3 P.3d 30.

crated by the development. For each employee the owner had to find 350 square feet of housing. To comply with this inclusionary zoning requirement, the owner had several options including, constructing the new units and using deed restrictions to keep them affordable, imposing deed restrictions on existing units to achieve affordable housing, paying fees in lieu of deed restrictions or conveying land to the town with a fair market value equivalent to the in lieu fee. After adopting the ordinance, the town promulgated affordable housing guidelines dealing with rental rates and other details. Plaintiff was a developer who challenged the ordinance claiming that it violated a state statute that expressly precluded municipalities from enacting "any ordinance. . . which would control rents on private residential property."[360]

The court first decided the issue of whether the inclusionary zoning ordinance falls within the statutory prohibition of a rent control regulation. There was no statutory definition of rent control. The court applied various canons of statutory construction, including the plain meaning canon and a canon that a court should not create an exception that the plain language does not warrant. The court defined rent control are "allowable rent capped at a fixed rate with only limited increases." In looking at the ordinance and the guidelines, the majority of the court found that its main purpose or function is to suppress rental values below market value. The ordinance was not saved by the fact that it only covered new construction, although in the classic rent control schemes, it is the existing stock that is rent regulated while new housing stock may or may not be rent regulated. The court did not look at the legislative history of the statute's enactment that apparently showed that it was a reaction to a citizen initiative in Boulder designed to impose the more classic type of rent control regulatory scheme.[361]

The second issue related to the fact that Colorado has a form of constitutional home rule that is commonly labeled non-preemptible. As to matters of local concern, the state is powerless to enact legislation that will effect a home rule community. The town is a home rule entity and argued that rent control and affordable housing are matters of local concern. In determining whether a matter is of local, state or state/local concern, there is no single test. The court considered a number of factors, including the balancing of the competing state and local interests, the need for uniformity and the spillover or externality factor. The legislature clearly stated in the statute that rent control was a matter of statewide concern. Such pronouncements are obviously not binding on the courts, but Colorado, unlike California, gives great weight to such self-serving statements. In looking at the uniformity factor, the court found the need for uniform access to markets for rental housing to be an important state concern. There appeared to be some bootstrapping arguments raised here, since the rental market in an isolated area such as Telluride would have little statewide impact. The court also found that rent control is part of a statewide regulatory scheme relating to the landlord/tenant relationship. Finally the court looked at the externality factor and concluded that it too favored a finding of statewide or at least state/local concern. The ordinance noted that the town was concerned with the fact that in the absence of affordable housing, service employees were having to live great distances from the town. That led to regional problems, including traffic and overcrowding in nearby communities. The court did not deal with the fact that the town was seeking to internalize, not externalize, the problem, through the affordable housing ordinance. If the ordinance was effective, regional impacts would be less than if the marketplace was to operate without such regulation.

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[360] Colo.Rev.Stat. § 38-12-301.

[361] The dissenting justices would have found that the town's regulatory efforts were not covered by the statutory prohibition against rent control, in large part because of the statute's legislative history. 3 P.3d at 41. (Mullarkey, C.J. dissenting).

The court also concluded that a number of other states have adopted legislation dealing with rent control and have thus treated it as a matter of statewide concern. Thus, the court found the ordinance invalid because it violated the statutory prohibition against rent control.

[c] **King v. City of Bainbridge**[362]

King owned a parcel of land partially located within the city and zoned for duplex and multi-family residential uses. The ordinance prohibited the placement of mobile homes with a HUD sticker in that district. All homes must receive a permit before they can be located within the city. King placed a mobile home on her parcel. The home was located 90% within the city limits and 10% in the county. She was served with a notice of violation and told to move the home to another part of her parcel that would be outside of the city limits. King ignored the city's warning and improved her mobile home. King did not participate in any city council or city agency hearings that were called to deal with her mobile home. She then filed suit claiming that the ordinance was unconstitutional on its face. The trial court dismissed the suit because King had not challenged the ordinance or its application to her mobile home in the city proceedings. The court found that where an owner challenges the constitutionality of an ordinance on its face, there is no need to exhaust any administrative remedies. Thus it remanded the case back to the trial court to determine whether or not the ordinance was constitutional.

[d] **Bixler v. LaGrange County Building Department**[363]

In 1999, the county granted a permit to neighbors of the plaintiffs to locate a manufactured home on a ½ acre lot. The neighbors asserted that under the zoning ordinance, manufactured homes were mobile homes that could only be located in a designated mobile home park. The county urged that the suit should be dismissed because the plaintiffs had not exhausted their administrative remedies by filing an appeal before the BZA. While normally a party must exhaust her administrative remedies before a trial court would have subject matter jurisdiction, there is an exception to that rule that the court found applicable. The exhaustion requirement is held to apply only to the permit applicant and not to a neighbor challenge, in part because they would probably not have notice and an opportunity to participate in the original permit decision. A building improvement permit decision is normally not subject to a hearing or notice. If a neighbor did have notice of the permit application, the exhaustion procedures would still be optional. Since the neighbors did not have notice of the original permit application and since they chose not to avail themselves of the BZA appellate procedure, the trial court had subject-matter jurisdiction over the complaint.

[e] **Home Builders Association of Maine, Inc. v. Town of Eliot**[364]

The Town has enacted a series of growth control ordinances designed to allow development that is consistent with orderly and gradual expansion of community services. The ordinances require all developers to apply for a growth control permit before they would be entitled to a building permit. There was a limit of 48 growth control permits per year, distributed on a first-come, first-served basis. In a 20 year period, the

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[362] 272 Ga. 427, 531 S.E.2d 350 (2000).
[363] 730 N.E.2d 818 (Ind.App. 2000).
[364] 2000 ME 82, 750 A.2d 566.

cap has been reached 5 times, although in recent years the demand has been close to or exceeded the cap. The plaintiffs sued claiming that the ordinance was a disguised moratorium ordinance that did not meet the state-imposed requirements for such ordinances.

The Town argued that the growth control ordinance was a permanent regulatory program and therefore could not be a moratorium ordinance, that by definition is only applicable for a limited period of time. The court interpreted the statute as dealing with temporary deferments of development whether or not the ordinance creating the deferments was considered temporary or permanent. But the ordinance is not invalid because the state statute prohibited local governments from imposing a total ban on development. This ordinance allowed up to 48 permits per year. There is no withholding of development authorization under the terms of the growth control ordinance. The management, as opposed to the cessation, of growth is a proper subject of local planning efforts. The town has reacted to increases in demand by increasing the caps to reflect that demand and the ability of the town to service the new development.

[f] **Caswell v. Pierce County**[365]

An owner sought a CUP to expand an existing mobile home park in a rural part of the county. At that time the zoning ordinance classified the land as a general-rural zone that allowed mobile home parks at a density level greater than that sought by the owner. Before a decision was rendered the county adopted an ordinance designating an interim urban growth area pursuant to Washington's Growth Management Act that would not allow the residential development to occur. Nonetheless, the county approved the CUP and some variances because it determined that the owner had developed a vested right to have his CUP application judged under the ordinance in existence at that time. A neighbor challenged the decision. The plaintiff claimed that the county's IUGA ordinance failed to comply with the state's GMA. That issue the court concluded had to be brought before the growth management hearings board and could not be reviewed by way of a Land Use Petition Act petition. The court also interpreted the interim IUGA ordinance specifically intended to leave in place the pre-existing general-rural zone which permitted mobile home developments that would not exceed 10 units per acre. Since the owner's development did not violate that density cap, the CUP decision would be affirmed.

[g] **Montgomery Crossing Associates v. Township of Lower Gwynedd**[366]

Plaintiff owned a 67.8 acre tract of land at the intersection of two state highways. The township zoned the land for SFR development. Plaintiff filed a "curative amendment" challenge to the ordinance asserting that there was both de facto and de jure exclusion of both mobile homes and large commercial establishments. Remarkably, the township held 57 separate public hearings on the request and wrote a 108-page decision rejecting the curative amendment. The trial court reversed and granted plaintiff's requested curative zoning changes.

Even where a party is challenging an allegedly exclusionary zoning ordinance, the burden of proof is on that party. Plaintiff had asserted that the existing zoning ordinance did not allow for shopping centers. The township interpreted its general

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[365] 99 Wash.App. 194, 992 P.2d 534 (2000).

[366] 758 A.2d 285 (Pa.Commw. 2000).

business district as allowing shopping centers and most types of commercial uses. The trial court ignored the township's interpretation, a clear intrusion into the deference afforded local agencies in the interpretation of their own ordinances or regulations. While the ordinance might not be sufficient to accommodate a big box retailer who requires substantial space, the ordinance clearly allowed for retailers who would accept a smaller space within the general business district. An ordinance is not exclusionary merely because it does not allow for every type of business model, as long as it does not exclude a particular use or group of uses.

On the claim of excluding mobile homes, the township ordinance included a residential district where mobile homes are permitted. Approximately 45 acres of land were included in that district. The owner of that parcel, however, chose to develop the premises for another type of permitted use. The fact that no other lands are currently zoned for mobile homes does not render the ordinance exclusionary. The developer of the tract of land had the option to develop mobile homes or apartments and chose apartments. The plaintiff cannot claim that the township excluded mobile homes and seek to place them wherever the plaintiff desires.

[h] **Toll Brothers, Inc. v. Township of West Windsor**[367]

A developer sought a builder's remedy to construct a large-scale single and multi-family residential project that would include 175 affordable rental units. He asserted that the existing zoning ordinance violated the *Mt. Laurel* mandate. The 293-acre tract was a part of a consent judgment entered in 1985 dealing with the township's fair share allocation. The township's fair share allocation was fixed at 929 units of affordable housing. The court adopted the trial court's finding that the township ordinance denied residents a realistic opportunity for a fair share of affordable housing because it required inclusionary developers to "front-end" the costs of sewer financing and construction and because several of the existing sites were so environmentally constrained or subject to open space or other requirements that they could not realistically be developed. Thus the builder's remedy was appropriately granted by the trial court to overcome the *Mt. Laurel* violation.

[i] **Dews v. Town of Sunnyvale**[368]

After surveying a major regulatory takings challenge to its zoning ordinance, the town was sued claiming that the ordinance was exclusionary and violated the provisions of the Fair Housing Act and various civil rights statutes. In a lengthy opinion by Judge Buchmeyer the court agreed with the plaintiffs and granted the requested relief. The court described the town as a sylvan 11,000 acres of rolling hills with only 2000 residents, no shopping malls and no apartments. Plaintiffs challenge to the one-acre minimum lot size zoning requirement and a total ban on MFR development was based on the town's alleged intent to exclude minority families and the effect of such an ordinance on the region's black population. One of the plaintiffs had submitted a PUD application for a multi-family development that had been rejected.

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[367] 334 N.J.Super. 109, 756 A.2d 1074 (2000). In a related case the developer brought an action seeking a specific builder's remedy against the township after a consent decree had been entered into several years before relating to the number and location of affordable housing units that had to be built. The court found that the consent decrees had not expired by the passage of time and were enforceable. Toll Brothers, Inc. v. Township of West Windsor, 334 N.J.Super. 77, 756 A.2d 1056 (2000).

[368] 109 F.Supp.2d 526 (N.D.Tex. 2000).

The Fair Housing Act expressly prohibits discrimination in the sale or rental of a dwelling on the basis of rent. It has been interpreted to apply to municipalities who use their zoning powers in a discriminatory manner.[369] There are two ways to show a FHA violation, intentional discrimination or by looking at the significant discriminatory effects. For the civil rights claims under §§ 1981, 1982, 1983 and 2000d, the plaintiffs are required to prove discriminatory intent. Discriminatory effect may be proven by showing either an adverse impact on a particular minority group or harm to the community generally by the perpetuation of segregation. Once the plaintiff makes a prima facie case of discriminatory effect, the burden shifts to the government to show a compelling state interest. Discriminatory intent, on the other had, requires the plaintiffs to establish a fact issue as to whether the defendant's stated reasons for its actions or decisions are pretextual in nature and that a reasonable inference that race was a significant factor in the decision. Using the *Arlington Heights* factors one can prove discriminatory intent indirectly if one can show discriminatory impact, historical background, specific sequence of events, departures from procedural and substantive norms and the legislative or administrative history of the decision.

Because Judge Buchmeyer was holding a bench trial, he was required to weigh the credibility of the various witnesses presented by the plaintiffs and the town on these highly-charged factual issues. By and large the court found the plaintiff's witnesses highly credible while finding many of the defendant's witnesses, including Bob Freilich, less credible. In addition, the court studied the town's demographic and employment history showing a slow and steady growth in population with most of its employment coming in the basic employment sectors. In 1990, the resident population was 94% white, 0.72% black with a slightly higher percentage of Hispanics. The court also reviewed the planning and zoning history of the town starting with the 1965 comprehensive plan. That plan specifically included an anti-growth bias in order to discourage premature development. The court found that one of the reasons for the town's incorporation and anti-growth bias was its fear of public housing projects being located there. The 1965 plan called for MFR development on 93.67 acres out of the total town acreage of 3535 acres. The 1965 zoning ordinance, however, only contained 4 SFR zones, ranging from a 12,000 to a 40,000 square foot minimum lot size. In 1971 the town passed a resolution banning the development of apartments and town houses. The resolution was enacted in response to a developer's request for a townhome development on a 89.3-acre tract. In 1973 the zoning ordinance was amended to require a minimum lot size of 1 acre throughout the town. In 1986 the comprehensive plan was revised. Although the planning consultant recommended inclusion of a substantial MFR district, the plan as adopted allowed cluster residential on 1.93% of the acreage and MFR on 65 acres or 1.16% of the land. The zoning ordinance was then amended and included one duplex district that was not described in the plan and given a density of 2 units/acre, while the MFR district was given a density limit of 4 units/acre. The rest of the town was zoned for SFR with a 1 acre minimum lot size. In 1985 the town rejected a request to participate in the Dallas Housing Authority's, Section 8 program. There was a further revision to the comprehensive plan in 1993. While still in a slow growth mode, the Freilich plan called for more intense development than was presently allowed in the town. There was also an analysis that water and other services were sufficient to allow for the increased density development. The town, however, rejected Freilich's recommended alternative and stayed with the one acre zoning option.

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[369] See Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), *aff'd,* 488 U.S. 15 (1988); U.S. v. City of Black Jack, 372 F.Supp. 319 (E.D.Mo.), *rev'd on other grounds*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

The town lowered all of the recommended density limits for the proposed new residential zoning districts. The land use map located the urban density residential district in one small area and the only other residential district with a density of more than one unit per acre in another area that did not have available sewer services. The town in 1993 also amended its zoning ordinance. The ordinance had very low base densities for the residential districts but allowed a bonus or cluster option to give developers up to an additional 6 density units per acre to concentrate the units and dedicate the remaining area to open space. A density bonus provision for assisted or subsidized housing is conditioned and limited. The result of the 1993 ordinance was not startling in that almost 93% of the town was limited to residential development on one acre or more lots.

The town asserted that one of the plaintiff-intervenors lacked standing to sue because its alleged claim arose out of the tabling of its rezoning petition. The court found that the intervenor had suffered an injury in fact since it was prepared to pay the costs attributable to its project as a condition of the zoning. Another plaintiff organization was found to have standing as a replacement for the original plaintiff who had died several years after the litigation was commenced.

In applying these facts to the law as set forth in *Huntington* and *Arlington Heights*, the court found that the town's zoning and planning regulations had a discriminatory effect on blacks. The ban on apartments placed a disproportionate harm on African-Americans because in Dallas County, African-Americans use rental housing to a much greater extent than whites. In addition, the ban eliminated much of the type of housing that would qualify for various public assistance programs. The one-acre zoning also has a discriminatory effect by increasing the cost of housing. The racial composition of those who can afford housing in the $ 150,000 and over price range is analogous to the racial composition of the town. The court also found that various town actions perpetuate racial segregation in the county. When compared to the adjoining cities of Garland and Mesquite, that both allow substantial MFR development, the racial make-up of Sunnyvale reflected the clear impact to keep minorities out of the town. In looking at the census tracts for those two cities that immediately adjoin Sunnyvale, racial minorities make up a much higher percentage of those areas than they do in Sunnyvale. The court also found that there was no legitimate bona fide governmental interest to support the one acre zoning. The problem of sewage disposal and the use of septic tanks was found to be make weight and solvable by other means. There were also less discriminatory alternatives to the one acre zoning regulation that would still allow the town to achieve its legitimate objectives without excluding African-Americans. Finally the court found that the town acted with discriminatory intent under the FHA in maintaining the one acre zoning and in tabling the rezoning request. In applying the intent standards of *Arlington Heights* to the civil rights claims, the court also found an intent to discriminate based on the historical background of the one acre zoning requirement, the failure to execute cooperation agreements with public housing authorities, the departure from normal procedures when dealing with requests to build MFR and the discriminatory impact of the decisions.

The court ordered that the town be enjoined from implementing its present zoning and subdivision ordinances. It also ordered the town to adopt zoning and subdivision ordinances to remedy the past exclusionary practices, including procedures to encourage the development of MFR and other affordable housing. Finally it ordered the town to take affirmative action to change its reputation as a municipality hostile to MFR and affordable housing and minorities.

[j] **Northfield Development Co., Inc. v. City of Burlington**[370]

The city zoning ordinance contained a manufactured home overlay district. Two separate requests to have the overlay district apply to two parcels were rejected. In the first case, the seller agreed to a $ 2000/acre reduction in the purchase price if the property was not rezoned. The city did not hold a public hearing on that rezoning request. Plaintiff was able to show that only 2 of 12 requests for overlay district rezoning had been approved and none for the prior 3 years. The overlay district set forth various performance standards regarding minimum parcel size. The overlay district was allowed as of right in three extant residential zoning districts. North Carolina law prohibited local governments from adopting zoning ordinances that have the effect of excluding manufactured homes from the entire jurisdiction.[371]

The court found that the plaintiffs had not shown that manufactured homes were excluded from the city. It was admitted that the city had approved 2 overly district petitions. That meant that there was not a total exclusion. In addition, while the language of the ordinance suggested that the overlay district was allowed as of right, the court's reading of the zoning ordinance gave the city the discretionary right to make the overlay district designation. The court, however, did not dismiss the claim that both decisions were arbitrary or capricious.

There was also a procedural dispute over whether the plaintiffs could depose the mayor regarding his alleged bias against manufactured homes. The trial court issued a protective order against the taking of the deposition. But the court found that the decisions in this case applying the overlay district ordinance are quasi-judicial in nature. Therefore the only testimonial privilege that can be asserted is the one that prevents the party from inquiring about the mayor's intentions and motives. The trial court had issued the protective order on the basis of absolute legislative immunity that was too broad given the nature of the decision.

[4] Rezoning

[a] **Wenatchee Sportsmen Association v. Chelan County**[372]

Both Washington and Oregon have comprehensive state-mandated land use control systems. In this case the Washington Supreme Court interpreted and applied various of those provisions with regard to a rural subdivision development. Under the Growth Management Act, counties are required to adopt comprehensive plans that include provisions for the designation of interim urban growth areas (IUGAs). A developer sought approval for a residential subdivision outside of the county's IUGA. The land was zoned recreational residential, allowing densities of up to 1 unit/acre. The submitted plat called for 205 clustered lots with an average density of 1 unit per 1.36 acres. Since 350 acres were to be dedicated to open space the average density was 1 unit per 3.12 acres. The county issued a mitigation of non-significance (MDNS) as to the project after the developer modified its plans in response to a concern about a migratory elk herd. Once a MDNS is issued the developer does not need to prepare a EIS. The county voted to approve the subdivision and a conservation organization sought judicial review under the GMA.

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[370] 136 N.C.App. 272, 523 S.E.2d 743 (2000).
[371] N.C.Gen.Stat. § 160A-383.19(c .
[372] 4 P.3d 123 (Wash. 2000).

Under the Land Use Petition Act (LUPA) governing judicial review of land use decisions, the scope of judicial review is based on the substantial evidence test or a clearly erroneous standard regarding the application of the law to the facts of each case.[373] The review of the MDNS is under the clearly erroneous standard. The court should only overturn a MDNS if the county failed to consider the relevant environmental factors. The court was reviewing two separate county decisions. The first was the rezone of the land to recreational residential and the second was the approval of the plat and site plan that followed the rezoning decision by 2 years. The court found that plaintiffs could not challenge the rezoning decision because under LUPA, such challenges must be made within 21 days after the decision is made.[374] Plaintiff's argument that the rezoning decision allowing for residential development outside of the IUGA should have been raised by direct appeal of the original rezoning decision. Having failed to meet the time requirements for direct appeal, the plaintiff may not collaterally challenge that decision at the site plan or plat approval stage. Since the record showed that the development complied with all of the requirements for density and that the MDNS determination was not clearly erroneous, the county's decision would be affirmed.[375]

[b] Falcke v. Douglas County[376]

A number of states now require consistency between a comprehensive plan and the zoning ordinance. In those states a zoning amendment now requires two separate ordinances, one changing the master plan and the second changing the zoning ordinance. In this case, plaintiff filed 2 such amendments, the first changing a master plan designation from agricultural to a combination of public facilities and commercial and the second changing the zoning ordinance to comply with the amended comprehensive plan. The county planning commission voted in favor of both amendments, although the zoning ordinance amendment was adopted with a slimmer majority than the plan amendment. The Board of County Commissioners voted 3-2 in favor of the plan amendment, but that was insufficient under the zoning ordinance that required a supermajority vote in favor. No vote was taken on the zoning amendment.

The state enabling statute dealing with comprehensive plans requires that they be adopted or amended by the planning commission with a supermajority vote. There is nothing in the state statute requiring the legislative body to require a supermajority vote. But there is a requirement that the legislative body approve the plan or its amendment when submitted by the planning commission. The issue is whether the county ordinance requiring a supermajority vote by the Board of County Commissioners conflicted with the enabling statute. One could argue that there is no conflict, since the county is merely adding a supplementary requirement. But the court found that the enabling act clearly set forth when the legislature wanted a supermajority voting requirement. By not requiring such a vote at the legislative level, the state was making a determination that no supermajority vote should be imposed. Since the Board of County Commissioners

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[373] Rev.Code Wash. § 36.70C.130(1).

[374] The county also argued that the plaintiff had not exhausted its administrative remedies under the GMA, but the court did not feel that a rezoning decision made in the absence of a comprehensive plan triggered the administrative review requirement. 4 P.3d at 126-27.

[375] A dissenting justice felt that the majority's interpretation defeated the legislative purposes underlying the IUGA determination by allowing urban development outside of those areas unless the rezoning decision was attacked within the very short 21 day period. 4 P.3d at 129 (Talmadge, J. dissenting).

[376] Falcke v. Douglas County, 3 P.3d 661 (Nev. 2000).

voted affirmatively on the plan amendment, it was a valid vote and the plan was changed effective with that vote.

[d] **Boris v. Garbo Lobster Co., Inc.**[377]

Garbo purchased a 2.8 tract of land located in the City of Groton's waterfront zoning district. In 1996 it proposed a change to the zoning regulations to permit it to operate a lobster distribution facility on the site. The planning and zoning commission held a public hearing and approved the changes. Judicial review of commission decisions are quite limited to determine if the commission acted arbitrarily, illegally or capriciously. Under Connecticut law, before waterfront zoning ordinances may be changed, comments from the state Commissioner of Environmental Protection, must be sought and be made part of the record, if submitted. In this case, the attorney for Garbo read portions of a letter from the state, but did not place the entire letter into the record. The plaintiffs argued that the statute imposed a mandatory duty to have the commissioner's full comments in the record, in part because the statute uses the word "shall."[378] While the court agreed that the use of the term "shall" oftentimes makes the statute mandatory and not directory, it nonetheless found this statute only directory. The court reasoned that since there were no set penalties for non-compliance and no statement that failure to comply would invalidate the action, it would not interpret the provision to mandate inclusion of the full comment letter.

Plaintiffs also argued that Garbo and the commission engaged in ex parte contacts that were prejudicial. The nature of the ex parte contact was a telephone call from a city planner to an official at Garbo informing him that there would only be a limited number of commissioners present at the next meeting. The commission had earlier tabled the Garbo request so that it was an active matter before the commission when the telephone call was made. While the call was improper and led Garbo writing a letter seeking to further table the matter until the next commission meeting, the ex parte communication merely raised a presumption of prejudice. The burden of showing lack of prejudice was then placed on the city and the applicant. Evidence showed that the phone call was on a procedural matter and was not initiated by Garbo. The delay did not prejudice the rights of the plaintiffs and thus was not a basis for invalidating the decision.

[e] **Buck Lake Alliance, Inc. v. Board of County Commissioners**[379]

Florida is a mandatory consistency state requiring that the zoning be consistent with the plan but that individual development orders also be consistent with the plan. A developer sought site and development plan review for a proposed development. The application was approved by the county's planning staff and forwarded to the County Planning Commission. Plaintiff requested formal hearings on the proposal. The Planning Commission denied the application because the traffic evaluation was incomplete and no management plan for wood storks was included. Both the plaintiff and the developer sought review of the Planning Commission decision from the Board of County Commissioners. The Board ordered the Commission to issue the order upon

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[377] 58 Conn.App. 29, 750 A.2d 1152 (2000).

[378] Conn.Gen.L. § 22a-104(e).

[379] 2000 WL 775571 (Fla.App.). See Board of County Commissioners of Clay County v. Qualls, 2000 WL 1230216 (Fla.App.) where the court applies the fairly debatable scope of judicial review to a denial of a set of rezoning and comprehensive plan amendments made by a landowner.

submission and approval of a satisfactory wood stork management program. Plaintiff then sought judicial review of the Board's decision.

Plaintiff argued that the decision violated the statutory mandate that a development order be consistent with the comprehensive plan. The court reviewed this consistency requirement as requiring the court to determine the objectives, policies, land uses and densities in the comprehensive plan and weigh those against the individual order. Consistency is determined not by review of the zoning ordinances adopted to implement the plan but by review of the order and its place within the plan's objectives. Because the trial court reviewed the consistency of the county's zoning ordinance and not the order, the appellate court remanded while noting that the record seemed to be incomplete in dealing with the consistency issue as defined by the court.

[e] **Willoughby v. Wolfson Group, Inc.**[380]

This was the third in a series of cases dealing with a developer's plan to construct a Wal-Mart on a 30-acre tract. The tract was originally zoned for office campus where retailing was not a permitted use. At the developer's request the town rezoned the land to a town center district where retailing is allowed. Since New Jersey is a mandatory consistency state, the town made a specific finding that the rezoning was consistent with the master plan. New Jersey law also allowed a rezoning ordinance that is inconsistent with the master plan to be adopted if a majority of the full authorized membership of the governing body votes for the rezoning. The earlier decision had found that the rezoning was inconsistent with the master plan, notwithstanding the town's findings to the contrary.[381] The case was remanded to the trial court to see if the town complied with the requirements for the adoption of an inconsistent zoning amendment. The key issue was whether the statute required the town to first make an inconsistency finding before adopting the zoning amendment. The court found that to carry out the objectives of the consistency requirement, a town must first state that the amendment is inconsistent and then give its reasons for adopting an inconsistent amendment. Otherwise the consistency requirement would be meaningless in light of the exception allowing inconsistent amendments by majority vote. The court further noted that a planning board's finding of consistency would not necessarily bind a legislative body's determination of that issue. To hold otherwise would be to give the power to adopt inconsistent zoning amendments to the planning board and not to the legislative body.

[f] **Town of Florence v. Sea Lands, Ltd.**[382]

In 1977, the town rezoned a tract of land from SFR to MFR. In 1986, plaintiff purchased a 1.2 acre tract within the rezoned area. In 1996, after receiving a recommendation from its planning and zoning commission, the town voted to rezone a portion of the MFR district back to SFR, including the parcel owned by the plaintiff. Plaintiff had not received any notice of the second rezoning petition and objected on those grounds. A public hearing was held where supporters of the rezoning presented evidence of the need to lessen density because of traffic and other service problems. Sea Land presented evidence of no change in circumstances from the 1977 rezoning,

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[380] 332 N.J.Super. 223, 753 A.2d 162 (2000).
[381] Willoughby v. Planning Board of Township of Deptford, 326 N.J.Super. 158, 740 A.2d 1097 (1999).
[382] 759 So.2d 1221 (Miss. 2000).

along with a great community need for MFR development. The town unanimously voted to rezone the tract from MFR to SFR.

Under Mississippi law, a rezoning ordinance, be it comprehensive or limited to a single parcel, is treated as a legislative act. The scope of judicial review is deferential with the Euclidean standard of "fairly debatable" governing. Nonetheless, the court found that judicial review of rezoning decisions are governed by a different standard. The city must show that there was a mistake in the original zoning or that the character of the neighborhood has changed. This change/mistake rule, places the burden of proof on the party seeking the change and the standard of proof is clear and convincing evidence. In most cases the rezoning amendment follows the filing of a petition or application by an individual owner. In this case the town initiated the rezoning process, placing upon the town that burden of proof.

The town argued that there were several procedural mistakes made when the 1977 zoning ordinance was enacted. The court, however, concluded that the mistake must be substantive in nature, not procedural, in order to justify the rezoning. The town also argued that the character of the neighborhood had changed, as evidenced by the testimony of residents of the area in support of the amendment. The court, in my opinion, clearly gave a hard look to the conflicting evidence in support of both the town's and the owner's position regarding the alleged changes. It, in effect, reweighed the evidence and found the town's decision arbitrary and capricious because the court did not believe that the alleged changes in the neighborhood were real or significant.

Finally, the court accepted Sea Land's argument that the town should be equitably estopped from rezoning because it relied to its detriment on the existing zoning. While this type of broad estoppel claim would be rejected in most jurisdictions, since there cannot be a vested right to develop under an existing zoning ordinance, Mississippi has recognized the estoppel claim in similar circumstances.[383] In fact, there was no evidence of substantial expenditures, other than the purchase of the land in 1986 that would support the estoppel claim. If the court's position on estoppel is correct, it would appear that no town could change its zoning ordinance and affect a parcel that had been purchased with some hope of development within a rather lengthy period of time. That result cannot stand, although the court did temper its view by suggesting that "One who plans to use his property in accordance with existing zoning regulations is entitled to assume that the regulations will not be altered to his detriment unless the change bears a substantial relation to the public health, safety, morals, comfort, or general welfare."[384] If this last caveat is observed than the equitable estoppel claim should never have been discussed, since the court earlier had found that the rezoning violated the change/mistake rule and was therefore invalid for that reason.

[g] Schrank v. Pennington County Board of Commissioners[385]

In earlier litigation, the court upheld the granting of a CUP to a well drilling business.[386] While that case was pending, the county amended the zoning ordinance specifically listing the well drilling business with accessory buildings to the list of conditional uses authorized by the ordinance. The business then received a CUP under the new ordinance. The same neighbor who challenged the first CUP, brought this action claiming that the ordinance constituted spot zoning. The scope of judicial review

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[383] See Walker v. City of Biloxi, 229 Miss. 890, 92 So.2d 227 (1957).
[384] 759 So.2d at 1229 quoting City of Jackson v. Bridges, 243 Miss. 646, 139 So.2d 660 (1962).
[385] 2000 SD 62, 610 N.W.2d 90.
[386] Schrank v. Pennington County Board of Supervisors, 1998 SD 108, 584 N.W.2d 680.

of zoning ordinance amendments is quite deferential. There is a strong presumption of validity and the court applies the Euclidean fairly debatable standard. The plaintiff was unable to sustain its burden to show that the ordinance is unreasonable or arbitrary. Other listed CUPs also have the ability to have substantial negative externalities. The fact that this particular business was added did not change the nature of the CUP provisions in the ordinance. The court also rejected the claim that this was spot zoning. The amendment does not apply only to this lot but to all parcels located within the zoning district that contained this amended list of CUPs.

[h] **McCollum v. City of Berea**[387]

Plaintiffs own a lot in a residentially zoned district that did not allow manufactured homes. They wanted to demolish their dilapidated residence and replace it with a double-wide manufactured home. A city official denied the permit under his interpretation that the manufactured home fell within the definition of a mobile home. That interpretation was affirmed by the BZA. The court distilled the plaintiffs' claim down to a substantive due process challenge to the reasonableness of the zoning ordinance in its treatment of mobile and/or manufactured homes. The city clearly had the power to enact a zoning ordinance pursuant to a state enabling statute. The decision to limit mobile homes to certain types of zoning districts has as a purpose the preservation of property values. That is a valid public objective that a court should not overturn merely because the plaintiffs argue that the result is to increase the cost of housing or exclude low or moderate income persons from a particular neighborhood. Applying a fairly debatable scope of judicial review the court had no difficulty upholding the validity of the ordinance.[388]

[i] **Harmon City, Inc. v. Draper City**[389]

Plaintiff purchased a 10.277 acre tract of land intending to build a strip commercial shopping center anchored by a grocery store. At the time of purchase the city had zoned the land for residential/agricultural uses, although the master plan designated the area for mixed use. The project obviously could not be built under the existing zoning designation so Harmon sought to rezone the tract to a neighborhood commercial district. The Planning Commission recommended to the City Council that the area be rezoned, but the council voted not to rezone the parcel after holding several public hearings at which time local residents voiced their opposition to the rezoning.

In Utah the scope of judicial review of a rezoning decision is only to determine if the decision is arbitrary, capricious or illegal. There was no issue of legality so the court applied the arbitrary or capricious standard. The court noted that judicial review of zoning decisions may be different if the decision is legislative or adjudicatory in nature. Here the court found that the rezoning ordinance was legislative in nature and therefore applied the traditional soft glance or deferential approach to judicial review.[390] Only if there is no reasonable basis for the decision should it be overturned. In these types of line drawing contests, the fact that the owner can make more money from a more

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[387] 2000 WL 462627 (Ky.App.)

[388] The court relied in part on Texas Manufactured Housing Association v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996) and City of Brookside Village v. Comeau, 633 S.W.2d 790 (Tex. 1982).

[389] 2000 Utah Ct.App. 31, 997 P.2d 321.

[390] Compare this approach with the Ohio Supreme Court's approach in Shemo v. Mayfield Heights, 88 OhioSt.3d 7, 722 N.E.2d 1018 (2000) discussed at § 1.03[1][g] *supra*.

intense use district does not give the owner the right to demand a zoning change. The court rejected the use of the substantial evidence standard for legislative decisions even though a recent Utah Supreme Court decision seemed to apply that standard to a legislative zoning decision.[391] The court attempted to distinguish that case on the basis that it involved a PUD decision and not a rezoning decision, even though the PUD decision ended up requiring a zoning change. The court also defended the decision not to rezone against the claim that it was based solely on "public clamor" and not reasoned thought. There is a "public clamor" doctrine in Utah that applies to adjudicatory decisions such as CUPs, but again the court refused to apply that doctrine to legislative decision-making. Legislators may rely on public interest and clamor while board and commission members making adjudicatory decisions may not.

[j] Northern Trust Bank/Lake Forest, N.A. v. County of Lake[392]

Plaintiff owned a 266-acre tract of land in an unincorporated area of the county that was adjacent to the Village of Mundelein. The area was zoned for rural residential use. On two sides of the parcel, development had occurred to some extent. Plaintiff sought to have the parcel rezoned to a suburban district that allows a mixture of residential, industrial or commercial uses. The county denied the petition to rezone. Plaintiff filed suit and submitted a 662-unit mixed residential development. The trial court allowed the Village to intervene. The trial court found the proposed use unreasonable and refused to set aside the ordinance. Under Illinois law, courts have taken a reasonably hard look at local governmental decisions that restrict the use of land.[393]

The court first had to deal with plaintiff's claim that the Village had no standing to intervene. Under Illinois law, a municipality can challenge a zoning ordinance affecting land outside its boundaries where it has a real interest in the subject matter. The Village proved that it had such an interest because its comprehensive plan and ordinance for the land abutting the proposed development called for residential densities 50% than those sought by the plaintiff. Demands for village services, including police , fire and school provided sufficient interest for the village to intervene.

While Illinois generally takes a hard look at local zoning decisions, there is still a presumption of validity. The court applied the 8-part *La Salle National Bank* test to determine whether the existing zoning was reasonable. Even though an adjacent tract had been rezoned to the suburban district sought by the plaintiffs, the court upheld the trial court findings that the proposed development was inconsistent with the surrounding area. One of the 8 factors required the court to determine whether the ordinance allowed the owner to develop the parcel to its highest and best use. While there was some conflicting evidence on that point, the court found that it was sufficient to support the judgment that the decision not to rezone was reasonable. Since the existing zoning was reasonable, the court did not discuss the reasonableness of the proposed use, since that issue only gets resolved where the court makes the initial finding that the existing zoning is unreasonable.

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[391] See Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, 979 P.2d 332. This point was critical to the dissenting judge who believed that between the statutory codification of the arbitrary, capricious and illegal standard and the *Springville* case, all zoning decisions were to be judged using the substantial evidence test. 997 P.2d at 329-331 (Jackson, J. dissenting).

[392] 311 Ill.App.3d 332, 243 Ill.Dec. 668, 723 N.E.2d 1269 (2000).

[393] La Salle National Bank v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65 (1957).

[k] **Harvey v. Town of Marion**[394]

The Town held a public hearing and voted to rezone land within a 2 mile long corridor along a major highway to commercial. Several property owners within the area objected. Mississippi, like Maryland, follows the change/mistake rule when it comes to non-comprehensive rezoning amendments.[395] Thus the supporter of the rezoning must prove by clear and convincing evidence that there was either a mistake in the original zoning or that the character of the neighborhood has changed.[396] The basis for this shifting of the burden of proof is the presumption that the public interest was best served by the original ordinance that is intended to be permanent until a new comprehensive ordinance is enacted The town argued that there was a mistake in the original zoning because it zoned only the existing commercial property for commercial uses, thus leaving nor room for growth. But a mistake must not be a mistake of judgment but a clerical or administrative mistake. The court, however, affirmed the town's decision because it found that the evidence showing a change was at least fairly debatable. The major cause of the change had been the piecemeal expansion of the commercial zone over the years that added an additional 9 commercial properties, ranging from a bank to an auto repair shop to two convenience stores. The plaintiffs argued that the town went overboard in its expansion of the commercial zone, but those types of line-drawing contests are not subject to effective judicial review under the fairly debatable rule.

[l] **Perry-Worth Concerned Citizens v. Board of Commissioners of Boone County**[397]

An owner filed an application for the county to rezone about 800 acres. The purpose was to allow the construction of a mixed use development. One member of the Board of Commissioners filed a conflict of interest disclosure statement that revealed that his wife owned a 1/5th interest in land near the 800 acre tract. The board voted 2-1 in favor of the rezoning with the deciding vote being case by the commissioner who made the disclosure. A neighborhood group sought judicial review. Under North Carolina law, local governmental officials must not participate in zoning matters where they have "a direct on indirect financial interest."[398] The sole issue is does the statute apply to the situation where a spouse owns adjacent property. The court narrowly interpreted the statute to deal only with the "zoning matters" being actually decided. Since the spouse owned adjacent land, there was no need to disqualify the commissioner. The plaintiffs argued that a liberal interpretation of the statute was required to maintain the integrity of the zoning process and not undermine public confidence. The court found that while a liberal interpretation may be required in adjudicatory or quasi-adjudicatory proceedings, a plain meaning approach was more suitable for legislative actions, such as this rezoning petition. The court refused to apply the more liberal appearance of impropriety standard to legislative actions.

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[394] 756 So.2d 835 (Miss.App. 2000).

[395] The court suggests that several other states adhere, although to a lesser extent, to the change/mistake rule. It lists Colorado, Kentucky, Michigan, New Mexico, North Carolina and Oregon. See 1 Anderson's American Law of Zoning § 5.11 (4th ed. 1996). I question Oregon's inclusion in this list given their now unique form of state mandated planning and zoning directives.

[396] See Concerned Citizens to Protect the Isles and Point, Inc. v. Mississippi Gaming Commission, 735 So.2d 368 (Miss. 1999).

[397] 723 N.E.2d 457 (Ind.App. 2000).

[398] N.C. § 36-7-4-223(b).

[m] **Home Depot U.S.A., Inc. v. City of Portland**[399]

Opposition to big box retailers appears to be continuing. In 1999, the City amended its zoning ordinance to make retail facilities in excess of 60,000 square feet in size no long a permitted use in "industrial districts." In addition, such facilities were made a conditional, rather than a permitted use, in "employment districts." The purpose of the amendment was to protect industrial areas providing a high percentage of family-wage jobs from encroachment of big box retailers. Plaintiff argued the zoning amendment was inconsistent with statewide planning Goal 9 relating to economic development. Goal 9 required local plans to consider an adequate supply of sites for a variety of commercial and industrial uses. Plaintiff argued that the city did not consider the impacts of the zoning amendment on the availability of commercial sites for big box retailers. The court rejected plaintiff's hidden premise that Goal 9 required local governments to make land available for every specific kind of economically productive use that anyone wished to conduct. Unlike several decisions overturning downzoning amendments that actually drastically reduced the amount of land where industrial and commercial uses were allowed,[400] the decision here did not deplete the supply of available lands. The city made adequate findings regarding its obligation to have a zoning ordinance consistent with Goal 9. Courts should not be the forum to resolve policy and planning disagreements. Thus the plaintiff's action should be dismissed.

[n] **Briarwood, Inc. v. City of Clarksdale**[401]

In 1971 plaintiff purchased a 90-acre tract located in an unincorporated area of the county. The land was rezoned from agricultural to MFR by the county. Over the next 20 years major portions of the tract were developed as both SFR and MFR. Many of the apartment unit involved subsidized housing for low income persons. In 1992 the tract was annexed into the city and retained its MFR zoning classification. In April 1998, plaintiff informed the city of its intent to build another 23 units of subsidized low income housing on 2.3 acres. The city adopted a temporary moratorium on all MFR, except for duplexes. During the moratorium period, residents of the area petitioned to have remaining 18.72 acres of the 90-acre tract rezoned to SFR and duplex use. After lengthy public hearings, the city rezoned the land, citing among other factors the high concentration of subsidized housing in the area. The city also noted the changes in the area from the time the area was originally zoned MFR.

As noted earlier, Mississippi is a follower of the change/mistake rule for rezonings. Unlike the H*arvey* case, this court did not shift the burden to the city to prove by substantial evidence that either a change or mistake had occurred. Instead it place on the plaintiff the burden to show that the decision was arbitrary, capricious, discriminatory or not supported by substantial evidence. In fact the court applied the fairly debatable standard to the city's findings relating to whether a change or mistake had occurred. The principal change that the court found supported the rezoning decision was the change from rural farmland to residential development. Most of the court's analysis was spent on traffic and other public safety issues, unrelated to the

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[399] 2000 WL 1285472 (Or.App.)

[400] See e.g., Opus Development Corp. v. City of Eugene, 28 Or LUBA 670 (1995) and Volny v. City of Bend,, --- Or LUBA ---, a*ff'd,* 168 Or.App. 516, 4 P.3d 768 (2000).

[401] 2000 WL 1146974 (Miss.App.).

change/mistake doctrine. It is hard to reconcile the approach taken in this case with the approach taken in *Harvey.*

Plaintiff also asserted a regulatory takings claim through the downzoning. The court did not rely on *Lucas* or *Penn Central* to apply a takings test. Instead, it suggested that a taking could occur where the government prevents the best use of the land or extinguishes a fundamental attribute of ownership. The court found neither had occurred with the downzoning. The land was still economically valuable for SFR or duplex development. While the number of units that could be built were lessened, the loss did not threaten or impair the economic viability of the plaintiff's property. The city heard evidence from the plaintiff about the substantial diminution in property values that would follow the downzoning, but discounted the plaintiff's expert testimony. It instead relied on other experts that the land would retain a substantial amount of its value after the downzoning.

[o] **Rossano v. Townsend**[402]

In 1996, the voters of the City of Alvin approved a provision of their home rule charter establishing procedures for the adoption of a zoning ordinance. Shortly thereafter the local newspaper published a proposed zoning ordinance and an election was held. The ordinance was defeated. The city council enacted a resolution later that year declaring their intent to place another zoning ordinance on the ballot. No public hearings were held and no notice by publication given except for a notice of the general election issued by the city that identified the ordinance as being on the ballot. The ordinance was passed. This second ordinance differed in some respects from the first ordinance. The plaintiffs sought to invalidate the election results based on procedural shortcomings preceding the second election.

The contested charter provision only allowed a zoning ordinance to be voted on after allowing a six-month period after publication of the proposed ordinance along with any zoning maps. The charter provision also mentioned a need for a public hearing. The court found that the second ordinance could not "piggy-back" on the publication of the first ordinance because there were differences between the two ordinances. The requirement of a six-month waiting period encompassed the need for public hearings and comments. The city needed to have published the new ordinance and then waited 6 months to hold an election. It also needed to have a public hearing or hearings during that time period in order to comply with the charter provision. Therefore the election could not stand.

[5] Nonconforming Uses

[a] **Money v. Zoning Hearing Board of Haverford Township**[403]

Plaintiff sought a building permit to replace a deteriorating garage/chicken coop that was a NCU with a smaller nonconforming garage. The garage was to be located in a residential district. The proposed garage was larger than that allowed by the zoning ordinance. The township denied the permit application. Under Pennsylvania law a NCU gives the owner a vested right that cannot be destroyed or abrogated unless it is a

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[402] 9 S.W.3d 357 (Tex.App.—Houston [14th Dist.] 1999).
[403] 2000 WL 963479 (Pa.Commw.).

nuisance, it is abandoned or is extinguished through the eminent domain power.[404] The board relied on other precedents that said that one nonconforming structure may not be replaced by another.[405] This court interpreted *Tantlinger* as only prohibiting the replacement of a different kind of nonconforming structure so that it would not be applicable in this case since the owner was replacing a garage with another garage. The remaining issue was whether there was an abandonment of the NCU. The burden of proof on abandonment is on the party asserting abandonment, in this case the township. The township must prove that the landowner intended to abandon the NCU and that the owner actually abandoned the NCU. The mere non-use of the NCU does not constitute proof of abandonment. The township ordinance provided the period of non-use that would trigger abandonment, namely 6 months, but the township did not offer any proof that the owner had not used the garage for that period of time. The replacement of a dilapidated NCU with another NCU is authorized where the new use is the same as the old. The township may not interfere with the owner's vested right to maintain the NCU, even if it means replacing the structure.

[b] **Kirkpatrick v. Village Council for the Village of Pinehurst**[406]

Plaintiff purchased a 55 acre tract that contained a campground and was zoned for rural residential uses. The campground, however, was a NCU. Under the Village zoning ordinance a non-conforming use of land shall not be enlarged or increased or its use extended to occupy a greater area of land than that occupied when the use became non-conforming. At the time of purchase the campground was physically located on about 13 acres. The owner sought to expand the campground use to include a RV park and increase the number of campsites. During this time the Village adopted a moratorium ordinance affecting all commercial development, pending the revision of the comprehensive plan. Plaintiff requested that his parcel be rezoned so that a campground would be a permitted use. Plaintiff continued to put in infrastructure to expand the campground. The Village rezoned the property into a district that allowed RV parks with a special use permit. Plaintiff sought a SUP for its expanded campground and RV park. After issuing various building permits allowing construction of improvements for the expansion project, the Village denied the SUP. The basis for the denial was the expansion of the park well beyond the intensity of the use that created the NCU.

Plaintiff argued initially that the use was not being enlarged since it was all taking place within the originally 55 acres that was owned by the original campground proprietor. The Village ordinance on NCUs clearly reflected a policy to eliminate such uses and not to allow them to grow. Therefore a definition of the term enlarge that allowed significant growth would be contrary to the terms of the ordinance. Expansion of the NCU from a 13 acre situs to a much larger situs within the 55 acre parcel is prohibited by the ordinance. The court also rejected the plaintiff's assertion that he was merely engaging in renovation of the campground, not an expansion. Sometimes an intensification of a use will not constitute an enlargement. But, again the language of the Village ordinance clearly covered the type of activities undertaken by the plaintiff, whether they were classified as renovations or expansion.

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[404] See Keystone Outdoor Advertising v. Department of Transportation, 687 A.2d 47 (Pa.Commw. 1996), *app. denied,* 548 Pa. 675, 698 A.2d 587 (1997).
[405] See Tantlinger v. Zoning Hearing Board, 103 Pa.Commw. 73, 519 A.2d 1071 (1987).
[406] 530 S.E.2d 338 (N.C.App. 2000).

Finally, the court found that plaintiff did not have a vested right to expand or renovate the campgrounds based on the permits issued to him by the Village. In North Carolina, in order to assert a common law vested right claim, one must show substantial expenditures in good faith reliance on valid governmental approval resulting in the party's detriment. The plaintiff could not have had a good faith belief that he was entitled to expand the NCU beyond the level of use extant at the time the NCU was grandfathered. Prior to the rezoning, plaintiff could not expect that the Village would give him permission to expand his NCU, in clear violation of the terms of the zoning ordinance.

[6] Historic Preservation

[a] **City of Jacksonville v. Huffman**[407]

Several neighbors challenged the city's granting of a permit to construct a medical office building in an historic district. They asserted that their procedural due process rights were violated by the failure to provide them notice of several hearings before a number of different city agencies. The court found that the neighbors were afforded appropriate and timely notice before the Land Use and Zoning Committee held its hearing on the permit application. As to the lack of notice before the earlier Historic Preservation Committee hearing, that shortcoming was overcome by the notice to the Land Use Committee hearing where the neighbors were able to make all of their arguments. Since the Land Use Committee heard the matter in a de novo review setting, the neighbors were not damaged by the lack of notice to the earlier meeting. The court also found that the city permit was not illegally issued since the parties waived their right to contest the lack of notice. There was no evidence in the record showing that the Land Use Committee ignored the presentation of the neighbors. The discretionary decision to allow the building was supported by substantial evidence and was proper.

[b] **Handicraft Block Limited Partnership v. City of Minneapolis**[408]

Plaintiff owned two building in the city's downtown area. Neither of the building are listed on a map showing historic buildings. Nor are the buildings listed on the Heritage Preservation Commission's list of 800 historic structures or sites. The plaintiff entered into an option contract to sell the two buildings in 1998. Shortly thereafter, the city notified the plaintiff that it intended to seek a heritage designation for both buildings. Public hearings were held and the commission recommended designating the exterior of the building for protection. The city planning commission also agreed with the Heritage Preservation Commission's recommendation. The city council approved the designations after additional public hearings. After designation the Heritage Preservation Commission most approve remodeling, repairing, moving or destroying any building if it would affect the exterior. Plaintiffs argued that without the designation the value of the tract would be between $ 3.7 and $ 5.0 million but that after the designation, the value was between $ 0.6 million and $ 1.0 million. Plaintiffs sought judicial review by a writ of ceriorari of the designation decision.

Judicial review by certiorari is only available to review judicial or quasi-judicial proceedings. The court must determine if the designation decision is judicial or

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[407] 2000 WL 728831 (Fla.App.).
[408] 611 N.W.2d 16 (Minn. 2000).

legislative in order to determine if the reviewing court had jurisdiction to hear the appeal. Quasi-judicial conduct is marked by an investigation into a disputed claim, application of the discovered facts to a prescribed standard and a decision binding on the parties. In applying those 3 factors, the court determined that the designation proceedings are more typical of judicial proceedings than legislative proceedings because they involve investigating and determining facts that serve as the basis for the designation decision. The court analogized the designation decision to a conditional use permit decision that is treated as a quasi-judicial action. In this case, the focus of the hearings was on the designation of two buildings. The action would clearly be binding on plaintiff and no one else. In addition, the commission was applying a prescribed standard set forth in the ordinance governing the designation of buildings. All of these factors lead the court to conclude that review by certiorari was appropriate. Since the lower court had dismissed the case the Supreme Court remanded it back to the court for review on the merits.

[c] **Fabiano v. City of Boston**[409]

Plaintiffs own some row houses located in an historic district designed to protect historically significant row houses. Prior to 1986, the parcels were zoned for commercial uses. The area was then rezoned to an historic district where only residential uses were allowed. A comprehensive rezoning of the area was undertaken that led to a rezoning placing the houses in a new more restrictive row house district. Some other properties in the neighborhood that were allegedly similar were rezoned to allow a limited class of commercial uses on the ground floor of the row houses although the upper floors were restricted to residential uses only.

Plaintiffs asserted that the differential treatment in the rezoning ordinance amounted to invalid spot zoning. They argued that their row houses were more suitable for the type of commercial development allowed in the other areas of the historic district, including the fact that their parcels abut a major arterial that is traversed by trolley cars. The City defended its decision largely on the testimony of its planning staff that examined the plaintiffs' row houses are largely architecturally intact and therefore of greater historic value. In addition, plaintiff's houses have almost exclusively been used for residential uses while the other properties being a more liberal use district have been used for non-residential uses. The goal of historic preservation is clearly within the city's power to achieve. As a legislative act, the comprehensive rezoning is entitled to a strong presumption of validity and application of the "fairly debatable" scope of judicial review. The burden of proof is clearly on the party attacking the validity of the ordinance. In this case the plaintiffs need not meet that heavy burden.

[d] **Galveston Historical Foundation v. Zoning Board of Adjustment**[410]

The city created an historic district overlay zone that contained sign restrictions. A sign company was granted a permit to erect two freestanding signs. The Foundation appealed that decision to the ZBA. The Foundation was the lessee of a nearby building. The ZBA dismissed the challenge because it found that the Foundation lacked standing to challenge the issuance of the permit. Judicial review of a ZBA decision in Texas uses the abuse of discretion standard. Where the issue is standing, however, that requires a court to review the challenge as any challenge based on subject matter jurisdiction is

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[409] 48 Mass.App.Ct. 281, 730 N.E.2d 311 (2000).

[410] 17 S.W.3d 414 (Tex.App.—Houston [1st Dist.] 2000).

reviewed. A party who is aggrieved has standing to challenge a permit decision.[411] The ZBA had been informed by its attorney that had the Foundation been the lessee of an adjacent building it would be an aggrieved party but since the leased premises were further away, it would be up to the ZBA to determine if they were truly aggrieved. There has been little litigation in Texas concerning who is an aggrieved party in the ZBA context.[412] The court found that the Foundation would have to show that the injury or damage suffered is different than that suffered by the public at large. But the level of injury or damage is less than that required for showing standing to sue in court. Relying on out-of-state jurisprudence, the court found that persons residing or owning property within a zoned area have standing to challenge zoning decisions affecting that area. Thus owners of lands within the overlay district would have standing to sue. The Foundation's allegations that it operated a business within the overlay district was sufficient to attain the aggrieved status requirement. The Foundation did not have to show that there was a direct link between the sign permit and its activities on the leased premises. It was also not required to show that legal harm had already occurred.

[7] Accessory Uses

[a] **Kam Hampton I Realty Corp. v. Board of Zoning Appeals**[413]

A corporation owned by Martha Stewart purchased a 2.5 acre tract from a museum that was improved with a house, garage and an accessory structure described as a studio. The corporation received a certificate of occupancy that described the layout of the studio. Several building permits were received to renovate the studio. The corporation also sought permits to construct several other accessory buildings including a library, home office and gym. In a separate case, the corporation got a variance and a freshwater wetlands permit to destroy and then rebuild some wetlands located on the parcel.[414] Some neighbors challenged the original certificate of occupancy claiming that it created a second residence on the single parcel in violation of the village's zoning ordinance. The BZA upheld the issuance of the certificate.

Judicial review of BZA decisions is limited to determining whether the decision has a rational basis, is not arbitrary or capricious and is supported by substantial evidence. The designation of the studio and the other buildings as accessory uses to the main residence is entitled to substantial deference. There was no evidence that the corporation intended to convert the studio into a separate residence. The BZA had a history of allowing new structures within a single parcel that provide such amenities as office or workout space. Thus the decision to issue the certificate of occupancy would be upheld.

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[411] Tex.Local Gov't Code § 211.010(a).

[412] See Austin Neighborhoods Council, Inc. v. Board of Adjustment, 644 S.W.2d 560 (Tex.App.—Austin 1982, writ ref'd n.r.e.); Texans to Save the Capitol, Inc. v. Board of Adjustment, 647 S.W.2d 773 (Tex.App.—Austin 1983), writ ref'd n.r.e.).

[413] 709 N.Y.S.2d 613 (App.Div. 2000).

[414] See Kam Hampton I Realty Corp. v. Board of Zoning Appeals, 710 N.Y.S.2d 915 (App.Div. 2000), where the court disallowed several proffered affidavits since they were not in the administrative record and upheld the decision of the ZBA.

[b] National Cathedral Neighborhood Association v. District of Columbia Board of Zoning Adjustment[415]

A private school sought a special exception to permit construction of a new athletic facility. The BZA granted the permit finding that the proposed new use was either an extension of the principal use or an accessory use, both authorized by the zoning ordinance. A neighborhood organization challenged the permit at both the administrative and judicial levels. Under the District of Columbia laws, the BZA has a limited role in granting or denying special exceptions. The BZA's findings that the proposed use was either an extension or accessory use to the school was supported by the evidence. While the size of the new facility was large, the court found that athletic facilities and the buildings supporting such facilities are clearly an adjunct to the educational mission of the school. In fact, much of the facility was to be located below ground so that the expansion would not dwarf the surface footprint of the existing school. In defining what is an accessory use the court looked at the degree of impact on the surrounding neighborhood. Because the structure was largely underground and designed to minimize noise and visual exposure, the negative externalities were not severe. While the facility would have some impact of neighborhood traffic, most of the traffic impacts were caused by the existence of the school, no the athletic facility.

[c] Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment[416]

An owner of an old mansion located in a moderate density residential district converted the building into a bed and breakfast (B&B). The owners were originally given a permit to operate a B&B as a home occupation. Several years later they were told they would have to seek a special exception from the BZA. The BZA granted a waiver from some of the requirements for a B&B and issued the special exception. The owner wanted to hold social events, such as weddings at the B&B. The BZA imposed several conditions to meet the concerns of various neighbors and granted the special exception. The basis for allowing the social events was that they were accessory uses to the primary B&B use.

The court defined an accessory use as one that is customarily incidental and subordinate to the principal use. A B&B use, however, is itself an accessory use, with the principal use deemed to be the residential use. The neighbors argued that you cannot have an accessory use to an accessory use, so that the social events business was in reality a second home occupation that is impermissible under the zoning ordinance. The court applied a very deferential scope of judicial review to the BZA's interpretation of the zoning ordinance. Only if that interpretation was plainly erroneous or inconsistent with the ordinance would it be overturned. The court found that the term accessory use as employed in the zoning ordinance was broader than that urged by the neighbors. The principal use referred to in the ordinance could be the accessory use. The BZA's concern about the possible externalities of both the B&B and the social gatherings reflected a concern about the nature of accessory uses consistent with its interpretation of the ordinance. The interpretation was therefore reasonable and would be upheld.

[d] State v. Alawy[417]

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[415] 753 A.2d 984 (D.C.Ct.App. 2000).
[416] 749 A.2d 1258 (D.C.Ct.App. 2000).

In this criminal proceeding, defendant was convicted of violating the city's zoning ordinance that prohibited residential use of property in land zoned for industrial purposes. The ordinance exempted from the prohibition dwelling units used in conjunction with a primary use intended for occupancy by a proprietor, caretaker or night watchman. Defendant asserted that the ordinance was unconstitutionally vague because the term residential uses would not give a person of average intelligence reasonable notice of what activities are prohibited. Defendant, however, did not have standing to raise the void for vagueness claim, since it was clear that he was using the warehouse in question as his residence. Evidence showed that a portion of the building was set up as a residence with a kitchen, living room and bedroom. The court defined residential as the occupation of space as one's dwelling or abode. The exceptions contained in the ordinance do not make it vague given the court's emphasis on permanence of occupancy.

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[417] 2000 WL 1286242 (Ariz.App.).