PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS

EIGHTH EDITION

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THE LAWS OF THE INDIES
Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine* Nelson, *Leadership in a New Era*
NOTES AND QUESTIONS

Insert at Notes and Questions at the end of 3. *Restricting nuisances and promoting segregation* on p. 13:

Using two datasets of land regulations for the largest U.S. metropolitan areas, Rothwell found that anti-density regulations are responsible for large portions of the levels and changes in segregation from 1990 to 2000. A hypothetical switch in zoning regimes from the most exclusionary to the most liberal would reduce the equilibrium gap between the most and least segregated Metropolitan Statistical Areas by at least 35%. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 Am Law Econ Rev. 290 (2011). He concludes:

> Whatever the motivations [for enacting zoning regulations], however, the disparate impacts of zoning are becoming clear. Anti-density zoning is strongly associated with the segregation of the three largest minority groups in the United States; moreover, evidence and straightforward logic suggest that its effect is causal. After so many years of enabling and protecting the elite local interests that create and enforce low-density regulatory regimes, liberalizing federal policy action will likely be necessary if this continuing barrier to racial equality is to be dismantled. [Id., 59.]

[1.] The Challenge of Land Use Policy
R. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW AND PUBLIC POLICY,
W. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS,
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A NOTE ON THE RATIONAL MODEL AND ALTERNATIVES TO TRADITIONAL PLANNING APPROACHES

Insert at A Note on the Rational Model and Alternatives to Traditional Planning Approaches on p. 40 before the last sentence in the third full paragraph 3 under *Participatory planning*:

Since the publication of this article, Fainstein has further developed her ideas into a book. S. Fainstein, The Just City (2010).

[b.] Statutory Authorization for Comprehensive Planning
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[2.] State and Regional Planning
[a.] State Planning Agencies and Plans
AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE,
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Insert at Notes and Questions at the end of 3. "*Transportation planning*", on p. 61:

For a fascinating technical account of how the Atlanta Regional Commission (ARC), the designated metropolitan planning agency for the seven-county Atlanta, Georgia, area, formulated its 1975 regional development plan, see Basmajian, *Projecting Sprawl? The Atlanta Regional Commission and the 1975 Regional Development Plan of Metropolitan Atlanta*, 9 J. Plng. His. 95 (2010). Basmajian contends that the development policies ARC ultimately adopted encouraged the building of a vast, low-density landscape, exactly as the urban transportation model it employed predicted.

A. NUISANCE LAW
Bove v. Donner-Hanna Coke Co.
NOTES AND QUESTIONS
B. THE TAKINGS ISSUE
[1.] Eminent Domain
Kelo v. City Of New London
NOTES AND QUESTIONS

Add at end of Notes and Questions 4. *State legislative responses*, page 83:

Although many states have adopted new laws, little change has taken place in what local and state governments are actually doing. Harvey M. Jacobs and Ellen M. Bassett, *All Sound, No Fury? The Impacts of State-Based* Kelo *Laws*, in American Planning Association: Planning & Environmental Law, 1, 7 (2011). This could be because *Kelo*-style takings seldom occur, and when they do, they appear to be voluntary. *Id.*

Add at end of Notes and Questions 5. *State judicial responses*, page 85:

The court in *County of Los Angeles v. Glendora Redevelopment Project,* 185 Cal. App. 4th 817 (Cal. Ct. App. 2010) used a California statute to determine blight in Glendora's redevelopment plan. The statute, effective 2008, explains four requisites for a proper blight finding: the area must be "predominantly urbanized"; the area must be "characterized by" one or more conditions of physical blight; the area must be "characterized by" one or more conditions of economic blight; and these "blighting conditions must predominate in such a way as to affect the utilization of the area, causing a physical and economic burden on the community." *Id.* at 832-33. The court found that Glendora had not met the "physical blight" test (unsafe and unhealthy buildings; code violations; dilapidation and deterioration; and/or defective design or construction) and therefore the area was not blighted. *Id.* at 837-41. For a discussion of the court's willingness to scrutinize blight findings, rather than deferring to the agency's determination, as in *Kelo see* Rick E. Rayl, *New Published Decision Strikes Down Blight Findings*, California Eminent Domain Report (June 6, 2010) available at www.californiaeminentdomainreport.com/2010/06/articles/court-decisions/new-published-decision-strikes-down-blight-findings.

For a review of state court interpretations of state constitutional public use clauses since *Kelo* and a consideration of judicial interpretations of *Kelo*'s "pretext" standard see Ilya Somin, *The Judicial Reaction to Kelo,* 4 Alb. Govt. L. Rev. 1 (2011).

[2.] Regulatory Takings

Add at end of textual note on *Judicial takings?* on p. 87 immediately before [a]:

Though not technically a judicial takings issue, state courts have contended with "rolling" easements. For example, the Supreme Court of Texas in *Severance v. Patterson*, ruled that "rolling" easements were not recognized when the land and attached easement were "swallowed" by the adjacent body of water (the Gulf of Mexico in this case). No. 09-0387, 2010 WL 4371438, at *1 (Nov. 5, 2010), rehearing granted 2011 WL 4371438. The court noted that a new easement on adjoining private properties may be established if proven pursuant to the Open Beaches Act or the common law. *Id*. at *15. Based on the history of the land, the court held that

> Texas does not recognize a "rolling" easement on Galveston's West Beach. Easements for public use of private dry beach property do not change along with gradual and imperceptible changes to the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property.

Id. at *11.

A strong dissent emphasized that the public in Texas has used the beaches continuously for nearly 200 years. *Id*. at *15. The dissent noted that hurricanes and tropical storms are frequent occurrences on the Texas coasts, and by failing to recognize rolling easements, the court has placed a costly and unnecessary burden on the state if it is to preserve the heritage of open beaches. *Id*. at *18. The dissent is concerned with the court's decision because it "defies not only existing law but logic as well." *Id*.

For a discussion of Justice Scalia's conclusion that "the Takings Clause bars the State from taking private property without paying for it, no matter which branch [of government] is the instrument of the taking" *see* Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 Duke J. Con. L.& Pol'y 91 (2011). *See also* Timothy M. Mulvaney, *The New Judicial Takings Construct,* 120 YALE L.J. ONLINE 247 (2010) http://yalelawjournal.org/2011/2/15/mulvaney.html (arguing that the plurality opinion may have articulated a new category of per se takings).

[a.] The Early Supreme Court Cases
- *Pennsylvania Coal Co. v. Mahon*
- NOTES AND QUESTIONS
- *Village Of Euclid v. Ambler Realty Co.*
- *Ambler Realty Co. v. Village Of Euclid*
- *Village Of Euclid v. Ambler Realty Co.*
- NOTES AND QUESTIONS
- Tarlock, Euclid Revisited, Land Use Law & Zoning Digest,
- NOTES AND QUESTIONS

[b.] The Balancing Test
- *Penn Central Transportation Co. v. City Of New York*
- NOTES AND QUESTIONS
- A NOTE ON THE *KEYSTONE* CASE
- A NOTE ON PHYSICAL OCCUPATION AS A PER SE TAKING
- A NOTE ON "FACIAL" AND "AS-APPLIED" TAKINGS CHALLENGES

Add at end of A Note on "Facial" and "As-Applied" Takings Challenges, p. 126:

The Ninth Circuit Court of Appeals vacated its earlier opinion in *Guggenheim v. City of Goleta*: a claim based on a *Penn Central* analysis. 638 F.3d 1111, 1120-21 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011). The court emphasized that plaintiffs lacked investment-backed expectations: "[s]peculative possibilities of windfalls do not amount to 'distinct investment-backed expectations' unless they are shown to be probable enough materially to affect the price." *Id.*

The court stated

> Ending rent control would be a windfall to the Guggenheims, and a disaster for tenants who bought their mobile homes after rent control was imposed in the 70's and 80's. Tenants come and go, and even though rent control transfers wealth to "the tenants," after a while, it is likely to affect different tenants from those who benefitted from the transfer. The present tenants lost nothing on account of the City's reinstitution of the County ordinance.

Id. at 1122.

Nollan v. California Coastal Commission
NOTES AND QUESTIONS
[3.] *First English:* The Inverse Condemnation Remedy
First English Evangelical Lutheran Church Of Glendale v. County Of Los Angeles
NOTES AND QUESTIONS

Add at end of Notes and Questions 1. *All use?,* p. 141:

Can an action of inverse condemnation be found where the government did not "intend" to take the private property, and where the damage was "reparable"? The Oregon Court of Appeals found that evidence brought by plaintiff against the City of Milwaukie for raw sewage coming through her bathroom fixtures when the city "hydrocleaned" a nearby sewer line was sufficient to prove a claim of inverse condemnation. *Dunn v. City of Milwaukie*, 250 P.3d 7(Or. Ct. App. 2011).

The court determined that an action for inverse condemnation is satisfied if the harm is a "natural and ordinary consequence" of the government's action. *Id*. at 12. The government did not have to "intend" to take the property or damage the property. *Id*. The court also held that a "substantial interference" with the plaintiff's use and enjoyment of her property includes damage to the property: in this case because the damage "significantly diminished the value" of the plaintiff's home. *Id*. at 16.

[4.] The *Lucas* Case: A Per Se Takings Rule
Lucas v. South Carolina Coastal Council
NOTES AND QUESTIONS

Add to Notes and Questions 5, *Sources*, page 153:

Patrick C. McGinley, *Bundled Rights and Reasonable Expectations: Applying the Lucas Categorical Taking Rule to Severed Mineral Property Interests,* 11 Vt. J. Envtl. L. 525, (2009-2010).

A NOTE ON HOW THE COURTS HAVE DRAWN THE TEETH OF THE *LUCAS* DECISION

Insert page 158 at the end of the paragraph that starts "Mandelker, Investment-Backed Expectations. . . .":
Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. Land Use & Envtl. L. 239 (2011).

[5.] *Penn Central* Vindicated
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, Inc.
NOTES AND QUESTIONS

Insert page 169 end of paragraph 2, *Vindication for Penn Central?*: Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 Kan. J.L. & Pub. Pol'y 1 (Fall 2010) **(discussing the application of the Penn Central factors in light of fairness and justice concerns).**

Add at end of Notes and Questions 3, page 170, *Applying the Penn Central test:*

For a discussion of an inverse condemnation claim arising from a nuisance conducted by an entity that has the eminent domain power, see *Rader Family Limited Partnership, L.L.L.P v. City of Columbia*, 307 S.W.3d 243 (Mo. App. 2010) stating that in inverse condemnation cases, the appropriate measure of damages is lost fair market value immediately after the taking.

Add at end of Notes and Questions No. 3, Page 179 at the end of the paragraph:

For a case in which the court found that the property owner's substantive due process claim was ripe but that the property owner still could not move forward on the claim because it failed to "plead a plausible arbitrary and capricious substantive due process claim" see *Acorn Land, L.L.C. v. Balt. County*, 2010 LEXIS 19582 (4th Cir. 2011). The court held that, in order to establish a substantive due process claim based upon arbitrary and capricious conduct, Acorn had to prove '" (1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency.'" Acorn's complaint failed the third prong because a state court remedy was available and Acorn failed to allege that its injury could not be rectified by seeking relief in state court.

[6.] Removal of the "Substantially Advances" Test From Takings Jurisprudence
Lingle v. Chevron U.S.A. Inc.

NOTES AND QUESTIONS

Insert page 180 at the end of note 5:

Spohr, *Cleaning Up the Rest of Agins: Bringing Coherence to Temporary Takings Jurisprudence and Jettisoning "Extraordinary Delay"*, 41 Envtl. L. Rep. News & Analysis 10435 (2011);
Siegel & Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479 (2010);

[7.] Federal Takings Executive Orders and Federal and State Takings Legislation
Note on Takings Legislation in the Oregon State Land Use Program.

See also Edward J. Sullivan and Ronald Eber, *Protecting our Farmlands: Lessons from Oregon 1961-2009*, 62 Plan. & Env. Law 3 (2010) (explaining Oregon's updated zoning laws).

Insert page 187 at the end of the paragraph that starts "For a discussion of these laws":

Carter, *Oregon's Experience with Property Rights Compensation Statutes,* 17 Southeastern Envtl. L.J. 137 (2008);

Add to end of Note, *Federal takings legislation,* p. 188:

In April 2011, the House of Representatives passed a bill prohibiting states or political subdivisions of a state from exercising eminent domain over property to be used for economic development. Private Property Rights Protection Act of 2011, H.R. 1433, 112th Cong. § 2(a) (2011).

A NOTE ON THE TAKINGS CLAUSE LITERATURE

C. SUBSTANTIVE DUE PROCESS LIMITATIONS UNDER THE FEDERAL CONSTITUTION
George Washington University v. District Of Columbia
NOTES AND QUESTIONS

D. EQUAL PROTECTION LIMITATIONS UNDER THE FEDERAL CONSTITUTION
Village Of Willowbrook v. Olech
NOTES AND QUESTIONS

E. FEDERAL REMEDIES FOR CONSTITUTIONAL VIOLATIONS
[1.] Relief Under Section 1983 of the Federal Civil Rights Act
[a.] The Scope of Section 1983
[b.] Custom and Policy
[c.] Procedural Due Process Actions
[d.] State Tort Liability Analogy
[e.] Immunity from Section 1983 Liability

Add at end of *Legislative immunity*, p. 207:

In determining whether an action was legislative for the purposes of legislative immunity, the Ninth Circuit concluded that decisions to approve and promote the lease and sale of property were legislative in character and thus the mayor and city council members were entitled to absolute immunity. *Community House, Inc. v. City of Boise, Idaho,* 623 F.3d 945, 952 (9th Cir. 2010). Two municipal employees also were entitled to qualified immunity because "a reasonable official would not have known that such actions would violate the Establishment Clause or the FHA," the court concluded.

[f.] Damages and Attorney's Fees

PROBLEM

[2.] Barriers to Judicial Relief: Ripeness

Williamson County Regional Planning Commission v. Hamilton Bank Of Johnson City

Add at end of Notes and Questions 2, *More on the final decision requirement,* p. 216:

Applying *Williamson County* and *Palazzolo*, the Fourth Circuit Court of Appeals in *Acorn Land, LLC v. Baltimore County, Maryland, supra,* held that the County Council's refusal to act on a developer's petition to amend its property's water/sewer classification to permit development, and the Council's subsequent rezoning of the developer's property to a less dense classification "satisfied *Williamson's* final decision prong." The court concluded that "it is clear that the Council has 'dug in its heels' and will not allow Acorn to receive necessary access to public water/sewer systems to residentially develop its property." 402 Fed. Appx., at 815.

> Thus…it would be both futile and unfair to require Acorn to jump through any additional administrative hoops to obtain a 'final decision.'…We are satisfied that the 'permissible uses of [Acorn's] property are known to a reasonable degree of certainty,' and *Williamson's* first prong is satisfied. *Id*.

The court then held that while Acorn "has sufficiently pled a regulatory takings claim that is plausible on its face," its substantive due process claim failed because it "did not plausibly plead that no state-court process could cure Acorn's injury." *Id,* at 817.

NOTES AND QUESTIONS

[3.] Barriers to Judicial Relief: Abstention

PROBLEM

[4.] Review COPPLE v. CITY OF LINCOLN

NOTES AND QUESTIONS

[5.] Remedies in Land Use Cases

[a.] Forms of Remedy

[b.] Specific Relief

CITY OF RICHMOND v. RANDALL

NOTES AND QUESTIONS

PROBLEM

A. THE HISTORY AND STRUCTURE OF THE ZONING SYSTEM
[1.] Some History
[2.] Zoning Enabling Legislation
NOTES AND QUESTIONS
A NOTE ON CONTEMPORARY APPROACHES TO ZONING ENABLING LEGISLATION
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Even zoning to help reduce obesity involves issues of what is enabled: Paul A. Diller and Samantha Graff SYMPOSIUM ARTICLE: EMERGING TOPICS IN PUBLIC HEALTH LAW AND POLICY: Regulating Food Retail for Obesity Prevention: How Far Can Cities Go? Special Supplement Spring 2011, 39 J.L. Med. & Ethics 89:

"Even if, as the Town contends, Town Code § 198-21.2 requires that development of lot 73 include a swimming pool and community center not to exceed 5,000-square feet, such a provision would be ultra vires and void as a matter of law (*see BLF Assoc., LLC v Town of Hempstead,* 59 AD3d 51, 55-56 [2008])…. While the enabling statutes in Town Law article 16 confer authority upon a town to enact a zoning ordinance setting forth permitted uses, nothing in the enabling legislation authorizes the Town to enact a zoning ordinance which mandates the construction of a specific kind of building or amenity (*see BLF Assoc., LLC v Town of Hempstead,* 59 AD3d at 55; *Blitz v Town of New Castle,* 94 AD2d 92, 99 [1983])." 82 A.D.3d 1203 (2011); 920 N.Y.S.2d 198.

Town of Huntington v. Beechwood Carmen Bldg. Corp., 920 N.Y.S.2d 198 (N.Y. App. Div. 2d Dep't 2011).

[3.] The Zoning Ordinance
NOTES AND QUESTIONS

What happens when a use straddles two districts? It may be a good case for a variance: "We conclude that BSA's finding that the proposed building satisfies each of the five criteria for a variance set forth in § 72-21 has a rational basis and is supported by substantial evidence (see Matter of SoHo Alliance, 95 NY2d at 440). BSA rationally found that there are "unique physical conditions" peculiar to and inherent in the zoning lot such that strict compliance with the zoning requirements would impose "practical difficulties or unnecessary hardship" (Zoning Resolution § 72-21[a]). Among the physical conditions BSA considered unique was that the zoning lot in question straddles two zoning districts:…"

Kettaneh v. Board of Stds. & Appeals of the City of New York, 2011 NY Slip Op. 5410 (N.Y. App. Div. 1st Dep't 2011).

PROBLEM
B. ZONING LITIGATION IN STATE COURTS
PROBLEM
[1.] Standing
Center Bay Gardens, Llc v. City Of Tempe City Council
NOTES AND QUESTIONS

An abutter is presumed aggrieved with standing, but once challenged must "present credible evidence to substantiate their particularized claims of harm to their legal rights."

Kenner v. Zoning Bd. Of Appeals, 459 Mass. 115 (Mass. 2011).

[2.] Exhaustion of Remedies

Ben Lomond, Inc. v. Municipality Of Anchorage

NOTES AND QUESTIONS

"Generally, 'one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law` '[A]bsent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency' The doctrine of exhaustion of administrative remedies applies to actions for declaratory judgments However, there are exceptions to the exhaustion doctrine applicable where the agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or where resort to administrative remedies would be futile or would cause irreparable injury."

Town of Oyster Bay v. Kirkland, 917 N.Y.S. 2d 236 (N.Y. App. Div. 2d Dep't 2011).

[3.] Securing Judicial Review

Copple v. City Of Lincoln

NOTES AND QUESTIONS

"[T]he crucial test for determining what is legislative and what is administrative [quasi-judicial] is whether the ordinance is making a new law, or one executing a law already in existence … Clearly, adoption of amendments under the Ordinance constitutes the creation of new law and is therefore a legislative act by the City Council."

King's Ranch of Jonesboro, Inc. v. City of Jonesboro, 2011 Ark. 123 (Ark. 2011).

[4.] Remedies in Land Use Cases

[a.] Forms of Remedy

Equitable remedies, including estoppel: "a landowner must establish the following elements of good faith action on the landowner's part: (1) that he relied to his detriment, such as making substantial expenditures, (2) based upon an innocent belief that the use is permitted, and (3) that enforcement of the ordinance would result in hardship, ordinarily that the value of the expenditures would be lost."

DeSantis v. Zoning Bd. Of Adjustment, 12 A.3d 498 (Pa. Commw. Ct 2011)

[b.] Specific Relief

City of Richmond v. Randall

NOTES AND QUESTIONS

Appellate court ordered site-specific relief for a methadone clinic.

Habit OPCO v. Borough of Dunmore, 17 A.3d 1004 (Pa. Commw. Ct. 2011)

PROBLEM

C. JUDICIAL REVIEW OF ZONING DISPUTES

A PRELIMINARY NOTE ON JUDICIAL REVIEW

Krause v. City Of Royal Oak

NOTES AND QUESTIONS

"Abuse of discretion" standard of review applied where trial court denied preliminary injunction in zoning enforcement case.

Town of Coventry v. Baird Props., 13 A.3d 614 (R.I. 2010)

A NOTE ON FACIAL AND AS-APPLIED CHALLENGES: NECTOW v. CITY OF CAMBRIDGE

D. Zhou, *Rethinking the Facial Takings Claim*, Yale Law Journal, Vol. 120, 2011, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1748847

Facial challenge under RLUIPA was upheld in *Elijah Group Inc. v. City of Leon Valley*, 2011 U.S. App. LEXIS 11966 (5th Cir. Tex. June 10, 2011).

D. RECURRING ISSUES IN ZONING LAW

[1.] Density and Intensity of Use

A NOTE ON THE BUSINESS OF DEVELOPMENT

[a.] Density Restrictions: Large Lot Zoning

Johnson v. Town of Edgartown

NOTES AND QUESTIONS

Large-lot zoning to stop affordable housing challenged.

Berry v. Volunteers of Am., Inc., 2011 La. App. LEXIS 482 (La. App. 5th Cir. Apr. 26, 2011.

[b.] Site Development Requirements as a Form of Control

NOTES AND QUESTIONS

Upheld waiver of floor area ratio waived to permit density bonus for affordable housing.

Wollmer v. City of Berkeley, 2011 Cal. App. Unpub. LEXIS 1785 (Cal. App. 1st Dist. Mar. 11, 2011).

A NOTE ON OTHER APPROACHES TO REGULATING DENSITY AND INTENSITY OF USE

[2.] Residential Districts

A "private motocross riding track" is not a "outdoor recreation" permitted in a single-family zone.

Cross-Up, Inc. v. Zoning Hearing Bd., 12 A.3d 497 (Pa. Commw. Ct. 2011).

[a.] Separation of Single-Family and Multifamily Uses

Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property* 28 Yale J. on Reg. 91 (2011).

[b.] Single-Family Residential Use: The Non-Traditional "Family"

Village of Belle Terre v. Boraas

NOTES

City of Cleburne v. Cleburne Living Center

NOTES AND QUESTIONS

City violated the Fair Housing Act in refusing to waive the definition of family in the zoning ordinance to enable group home operator to house eight children and two house parents in a single family unit.

King's Ranch of Jonesboro, Inc. v. City of Jonesboro, 2011 Ark. 123 (Ark. 2011).

A NOTE ON FAMILY ZONING IN THE STATE COURTS

Use of the term "functional equivalent of a traditional family" in zoning is not void for vagueness.

Matter of Morrissey v. Apostol, 2010 N.Y. Slip Op 6714 (N.Y. App. Div. 3d Dep't(2010).

A NOTE ON ALTERNATIVES TO SINGLE-FAMILY ZONING: THE ACCESSORY APARTMENT

Upheld division of a house into two units housing a total of 11 Bowdoin students under accessory apartment regulations, rejecting boarding house argument.

Adams v. Town of Brunswick, 987 A.2d 502, (Me. 2010).

[c.] Manufactured Housing

"Trailer park" distinguished from manufactured housing.

Smith County Reg'l Planning Comm'n v. Hiwassee Vill. Mobile Home Park, LLC, 304 S.W. 3d 302 (Tenn. 2010).

PROBLEM

A NOTE ON ZONING AND THE ELDERLY

See Wollmer under D.1.b above

PROBLEM

A NOTE ON HOME OCCUPATIONS

Pet sitting "kennel-like" business operated out of a single-family home is not a home occupation.

Lariviere v. Zoning Bd. of Review, 2011 R.I. Super. LEXIS 65 C.R.I. Super Ct. 2011).

[3.] Commercial and Industrial Uses

Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U.Chi. L. Rev. 249 (2010)

A winery at a single-family home is an agricultural use exempt from any regulation under Ohio law.

Terry v. Sperry, 204 Ohio 3364 (Ohio July 12, 2011).

[a.] In the Zoning Ordinance

BP America, Inc. v. Council of The City Of Avon

NOTES AND QUESTIONS

"The Downtown Business district (B-3) is intended to apply to the Village's downtown business district and Village center. This area is typified by small lots, and buildings with minimal setbacks. The downtown business district is intended to offer greater flexibility in area requirements and setback requirements than other districts in order to promote the reuse of buildings and lots and the construction of new developments in the downtown business district consistent with the existing scale of development. The character, appearance and operation of any business in the downtown district should be compatible with any surrounding areas."

Gage Inc., LLP, v. Vill. of Sister Bay, 2011 Wisc. App. Lexis 538 (Wis. Ct. App. July 6, 2011).

Loreto Development Co., Inc. v. Village Of Chardon
NOTES AND QUESTIONS

Formula retail:

Dina Botwinick et al., *Saving Mom and Pop: Zoning and Legislating for Small and Local Business Retention*, 18 T. L. & Pol'y 607 (2010).

A NOTE ON "BIG BOX" RETAIL ZONING

Self-storage facility not permitted in the Village Commercial District: "In the same vein, the Environmental Court's construction allowing any non-wholesale commercial establishment would provide little meaningful limitation on the size or type of business facility allowed in the VC District, except to exclude wholesalers. Carried to its logical end, the court's definition would allow so called big-box stores or other large-scale businesses to intrude into the village environment, thereby undermining the VC District's express purpose. Applicant's facility itself provides an example of how over-inclusive the standard is. The storage complex would consist of three stand-alone buildings, with multiple bays and traffic at potentially any hour of the day or night. There would be no retail activity or character, residentially compatible or otherwise, in such a facility. Permitting this facility is inconsistent with both the language and purpose of the Bylaws."

In re Tyler Self-Storage Unit Permits, 2011 VT 66 (Vt. 2011).

A NOTE ON INCENTIVE ZONING AND SPECIAL DISTRICTS IN DOWNTOWN AND COMMERCIAL AREAS

Special districts sometimes require covenants and restrictions in their implementation and later changes in zoning can run afoul of those restrictions.

See, *CMR D.N. Corp. v. City of Phila.,* 2011 U.S. Dist. LEXIS 25396 (E.D. Pa. Mar. 10, 2011).

[b.] Control of Competition as a Zoning Purpose
Hernandez v. City Of Hanford
NOTES AND QUESTIONS

The flip side of zoning to control competition is the federal intervention in matters of local land use to increase competition through the Telecommunications Act. "Congress enacted the TCA so as to foster competition and to accelerate the deployment of telecommunications services around the country. A component of the TCA places limitations on local zoning boards, such that local governments cannot unreasonably discriminate among service providers, cannot prohibit or have the effect of prohibiting the provision of personal wireless services, cannot fail to act in a timely manner, and cannot deny a request to provide services without substantial evidence."

Arcadia Towers LLC v. Colerain Twp. Bd. of Zoning Appeals, 2011 U.S. Dist. LEXIS 27445 (S.D. Ohio Mar. 15, 2011).

PROBLEM

[c.] Antitrust Problems

NOTES AND QUESTIONS

Noerr-Pennigton immunity not extended to malicious prosecution action where argument was untimely and issues could be decided on other grounds.

Baldau v. Jonkers, 2011 W. Va. LEIS 13 (W. Va. Mar. 10, 2011).

Parker doctrine protects local government "The Parker doctrine or "state-action" doctrine shields state governments from antitrust liability for anti-competitive actions taken in their capacity as sovereigns."

Comprelli v. Town of Harrison, 2011 U.S. Dist. LEXIS 5872 (D. N.J. Jan. 21, 2011).

[4.] Districting and Nonconforming Uses

A NOTE ON THE HISTORY OF NON-CONFORMING USES

Conforti v. City Of Manchester

NOTES AND QUESTIONS

Marina and yacht club are not "tandem" uses for determining whether nonconforming use was expanded.

Campbell v. Tiverton Zoning Bd., 15 A.3d 1015 (R.I. 2011).

The are hundreds of nonconforming uses cases every year, many of them entertaining oddities. One is those is the case of whether a "tree house" (really an elevated storage building: "16 feet high, with doors on the first and second levels, and a pulley for hoisting objects to the top level") was a legal nonconformity. It was determined to be illegal.

Buckley v. City of Solon, 2011 Ohio 3468 (Ohio Ct. App., Cuyahoga County July 14, 2011).

CITY OF LOS ANGELES v. GAGE

NOTES AND QUESTIONS

Truly bothersome uses, like nude dancing and medical marijuana dispensaries, are often amortized on rather short timeframes. A mandatory amortization requirement for nude dancing establishments was upheld after changes were made in certain provisions in *Jacksonville Prop. Rights Ass'n v. City of Jacksonville*, 635 F.3d 1266 (11th Cir. Fla. 2011.)

[5.] Uses Entitled to Special Protection

[a.] Free Speech-Protected Uses: Adult Businesses

City Of Renton v. Playtime Theatres, Inc.

NOTES AND QUESTIONS

Citing *Renton*, court upheld prohibition on adult establishment in downtown development authority area where 27 other sites were available.

Big Dipper Entmit, LLC v. City of Warren, 641 F.3d 715 (6th Cir. Mich. 2011).

[b.] Religious Uses

Civil Liberties For Urban Believers, Christ Center, Christian

Covenant Outreach Church v. City Of Chicago

NOTES AND QUESTIONS

In a case of "RLUIPA meets billboard law" the Court of Appeals of Kentucky found a compelling governmental objective in restricting billboards and upheld limitations on billboards with religious speech along certain highways as reasonable time, place and manner restrictions, and held that such restrictions did not create a substantial burden under RLUIPA.

Harston v. Commonwealth Transp. Cabinet, 2011 Ky. App. LEXIS 40 (Ky. Ct. App. Mar. 4, 2011).

Requiring a religious use to get a conditional use permit, whereas bars did not need a permit, violated the equal terms provision.

Centro Familiar Cristiano Buenas Nuevas v.City of Yuma, 2011 U.S. App. LEXIS 14247 (9th Cir. Ariz. July 12, 2011).

E. MIXED-USE ZONING, FORM-BASED ZONING, AND TRANSIT-ORIENTED DEVELOPMENT

[1.] Mixed-Use Development

Mixed use development held inconsistent with certain zoning and plan requirements.

Haro v. City of Solana Beach, 195 Cal. App. 4th 542 (Cal. App. 4th Dist. 2011)

[2.] Transit-Oriented Development

For issues arising out of Joint Development Agreements for TOD, see

Greenbelt Ventures, LLC v. Wah. Metro. Area Transit Auth., 2011 U.S. Dist. LEXIS 60824 (D. Md. June 17, 2011).

The Miami 21 Code, a form-based code, received the American Planning Association's 2011 National Planning Award for Best Practice (among other national awards). Nancy Stroud was the legal counsel. The code is the first city-wide form based code in a major American city.http://www.miami21.org.

[3.] New Urbanism, Neotraditional Development, Form-Based (and Smart) Codes

See: Nicole Stelle Garnett, *Restoring Lost Connections: Land Use, Policing, and Urban Vitality*, 36 Okla. City U. L. Rev. 253 (2011).

and

Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 Stan. L. Rev. 591 (2011).

The following information is provided by Mark White of White & Smith LLC:

General Resources

The Codes Project: http://codesproject.asu.edu/

Codifying the New Urbanism. American Planning Association, Planning Advisory Service Report No. 526, 2004.

Form-Based Codes Institute: http://www.formbasedcodes.org/

Freilich, Robert & White, Mark. *A 21st Century Land Development Code.* American Planning Association, 2008.

Garvin, Elizabeth. *Understanding Form Based Regulations* (International Municipal Lawyers Association, Portland, Oregon – September 18, 2006).

Moynihan, "Implementing Form-Based Zoning in Your Community," *Municipal Lawyer* (July/Aug. 2006), at 14.

Slone, Daniel & Goldstein, Doris, eds. *A Legal Guide to Urban and Sustainable Development for Planners, Developers and Architects* Hoboken, NJ: John Wiley & Sons, 2008.

Parolek, Dan; Parolek, Karen; and Crawford, Paul. *Form-Based Codes: A Guide for Planners, Urban Designers, Municipalities, and Developers*. Hoboken, NJ: John Wiley & Sons, 2008.

Sitkowski & Ohm, "Form-Based Land Development Regulations," 38 *Urban Lawyer* 163 (2006).

Smartcode Central: http://www.smartcodecentral.com/

White, "Form Based Codes: Legal Considerations" (Institute on Planning, Zoning & Eminent Domain, November 18, 2009), online at http://www.planningandlaw.com/Publications___Speaking.html.

White, *Form Based Codes: Practical & Legal Considerations* (Institute on Planning, Zoning & Eminent Domain, November 18, 2009), online at http://www.planningandlaw.com/Publications___Speaking.html.

White, "Unified Development Codes," *Municipal Lawyer* (July/Aug. 2006), at 14.

White & Jourdan, "Neotraditional Development: A Legal Analysis," *Land Use Law & Zoning Digest*, at 3 (Aug. 1997).

Contrary Views:

White, "Improving Community Design without Form Based Codes" (American Planning Association, National Conference, April 11, 2011), online at http://www.planningandlaw.com/Publications___Speaking.html.

Zyscovich, Bernard. *Getting Real on Urbanism*. Urban Land Institute, 2008.

Sample Codes

Green type (also *) indicates a hybrid code

- Albuquerque, New Mexico Form-Based Code: http://www.cabq.gov/council/completed-reports-and-studies/form-based-code
- Arlington County, Virginia (Columbia Pike): http://www.arlingtonva.us/departments/CPHD/forums/columbia/current/CPHDForumsColumbiaCurrentCurrentStatus.aspx
- Azusa, California Development Code: http://library.municode.com/HTML/10418/level2/MUCO_CH88DECO.html
- Benecia, CA Downtown Mixed Use Master Plan:
- Bradenton, Florida Form-Based Code Land Use Regulations: http://bradenton.govoffice.com/index.asp?Type=B_BASIC&SEC={22A39C69-2543-469F-9E3C-DBB5B813967F}
- Denver, Colorado: Denver Commons Design Standards (http://www.formbasedcodes.org/files/Denver-CommonsDesignStandards.pdf) and Zoning Code (http://www.denvergov.org/tabid/432507/Default.aspx)*

- Farmers Branch , TX Station Area Form-Based Code: http://www.ci.farmers-branch.tx.us/work/planning/ordinances/station-area-codes
- Fort Myers Beach Land Development Code: http://www.formbasedcodes.org/files/FortMyersBeachCode.pdf
- Gulfport, MS Smartcode: http://homepage.mac.com/bounds/SmartCode/SmartCode.html
- Hercules , CA Regulating Code for the Central Hercules Plan: http://www.formbasedcodes.org/files/CentralHerculesFBC.pdf
- Leander, Texas Leander TOD Code: http://www.leandertx.org/page.php?page_id=39
- Miami 21: http://www.miami21.org/final_code_AsAdoptedMay2010.asp *
- North St. Lucie County , FL Towns, Villages and Countryside: http://www.formbasedcodes.org/downloads/StLucieFL_TVC_FBC.pdf
- Overland Park, Kansas Vision Metcalf Form-Based Code: http://www.opkansas.org/Doing-Business/Vision-Metcalf
- Panama City Beach, Florida: http://www.pcb-formbasedcode.com/
- Peoria, IL Heart of Peoria Form Districts: http://www.ci.peoria.il.us/development-codes
- Petaluma , CA Central Petaluma SmartCode: http://cityofpetaluma.net/cdd/cpsp.html
- Pleasant Hill , CA BART Station Property Code: http://www.formbasedcodes.org/samplecodes?page=1
- Prince George's County Urban Centers and Corridor Nodes Development and Zoning Code, County Code, Subtitle 27A: http://egov.co.pg.md.us/lis/default.asp?File=&Type=TOC
- San Antonio, Texas Unified Development Code (Chapter 2, Use Patterns)(http://library.municode.com/index.aspx?clientID=14228&stateID=43&statename=Texas), including § 35-209 (Form Based Development)*
- Sarasota County , FL Mixed-Use Infill Code: http://www.spikowski.com/Sarasota.htm
- St. Petersburg, Florida Land Development Regulations: http://www.stpete.org/development/Land_Development_Regs.asp*
- Suffolk, Virginia Unified Development Ordinance, § 31-411 (Use Patterns) (http://library.municode.com/index.aspx?clientID=14461&stateID=46&statename=Virginia)*
- Ventura , CA Downtown Specific Plan (http://www.cityofventura.net/downtown), Midtown Code (http://www.rangwalaassoc.com/Portfolio/Formbasedcodes/midtown%20code%20assets/midtowncode.html), and Saticoy Wells Community Plan and Code (http://www.rangwalaassoc.com/Portfolio/Formbasedcodes/SaticoyWells/SaticoyWells.htm)
- Woodford County , KY New Urban Code: http://planning.woodfordcountyky.org/designwebsite/welcome.htm

You can find a more detailed description of some of these codes Form-Based Codes Institute, Sample Codes at http://www.formbasedcodes.org/samplecodes.

NOTES AND QUESTIONS

A. PRESERVING AGRICULTURAL LAND

[1.] The Preservation Problem

NOTES AND QUESTIONS

Add at end of Notes and Questions 2, The structure of American farming., p. 390:

For more regarding the emerging trend towards larger industrial farms, see *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy is Destroying the Family Farm and the Environment*, 22 Vill. Envtl. L.J. 141 (2011).

[2.] Programs for the Preservation of Agricultural Land

Cordes, Takings, Fairness and Farmland Preservation,

NOTES AND QUESTIONS

Add to the end of Notes and Questions, p. 395:

5. *Overlay zoning.* Overlay district zoning has been used for some time to preserve natural resource areas and prime agricultural lands. In a recent decision, however, a Pennsylvania court held that while state law requires protection of prime agricultural land, it also requires reasonable provisions for development. Because the overlay zoning at issue in that case would require that 75% of land zoned for commercial, industrial, or residential use remain untouched, it unduly disturbed the expectations created by the existing zoning. *Main St. Dev. Group, Inc. v. Tinicum Twp. Bd. Of Supervisors,* 2011 WL 944375 (March 21, 2011).

A NOTE ON PURCHASE OF DEVELOPMENT RIGHTS AND EASEMENT PROGRAMS

[3.] Agricultural Zoning

Cordes, Takings, Fairness and Farmland Preservation,

NOTES AND QUESTIONS

Gardner v. New Jersey Pinelands Commission

NOTES AND QUESTIONS

Tonter Investments v. Pasquotank County

NOTES AND QUESTIONS

A NOTE ON THE TRANSFER OF DEVELOPMENT RIGHTS AS A TECHNIQUE FOR PROTECTING AGRICULTURAL AND NATURAL RESOURCE AREAS

Add to the end of the Note, top of p. 398:

For a good discussion of transfer of development rights in the agricultural context, see *Building Industry Assoc. v. Co. of Stanislaus,* 2010 WL 5027136 (Cal.App. 5th District 11/29/2010). The California appellate court considered a challenge to the County Farmland Mitigation Program (FMP) guidelines that required developers to obtain an agricultural conservation easement over an equivalent area of comparable farmland but respondent developer challenged the validity of such a requirement. The trial court found in favor of the developer primarily citing to the County's excessive use of police power. The appellate court disagreed with the trial court and determined that the prevention of loss of farmland through conservation easements was reasonable in relation to residential development. The FMP attempted to balance protecting vital farmland while also preserving the ability to develop land. In addition, the Court determined that because the FMP gave developers the option to have a third party convey an easement to a land trust, the County was not compelling involuntary creation of an easement.

NOTES AND QUESTIONS

[4.] Right-To-Farm Laws

Buchanan v. Simplot Feeders Limited Partnership

NOTES AND QUESTIONS

Add to the end of the Notes and Questions, p. 421:

8. *Urban Agriculture.* Urban agriculture has taken on a new life recently, and is being driven by an emphasis on local and organic food, as well as the economic downturn. However, small backyard gardens on suburban residential properties have expanded and city dwellers have begun raising chickens and goats on small urban lots. Many city ordinances prohibit these practices and cities are hearing from residents both in favor and opposed to expanding urban agricultural practices in residential zones. For more information about these controversial land uses, see P. Salkin, *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, Zoning and Planning Law Report, Vol. 34, No. 3 (March 2011).

A NOTE ON THE INDUSTRIALIZATION AND ENVIRONMENTAL IMPACTS OF AGRICULTURE

Add to the end of "*The other side of agriculture*" p. 422:

See also T. Centner, *Addressing Water Contamination From Concentrated Animal Feeding Operations*, Land Use Policy, Vol. 28, Issue 4, 706-11 (October 2010).

Add to the end of "*Proliferation of CAFOs?*", p. 422:

For more regarding the emerging trend towards larger industrial farms, see *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy is Destroying the Family Farm and the Environment*, 22 Vill. Envtl. L.J. 141 (2011).

Add to the end of "*Preemption of Local CAFO Restrictions*", p. 422:

In a recent decision by the Fifth Circuit Court of Appeals, the Court held that the U.S. EPA cannot require a CAFO to apply for a National Pollutant Discharge Elimination System permit based on "proposing" to discharge pollutants. Various farm groups had sought review of the EPA's 2008 Clean Water Act rules that required CAFO's to apply for and obtain a NPDES permit if the CAFO discharges or proposes to discharge pollutants. The Court held that the EPA lacks authority to require CAFOs to apply for permits based on *proposing* to discharge because until there is discharge, there is no point source of pollution. Actual discharges from a CAFO would require a permit, however. *National Pork Producers Council v. U.S. EPA,* 635 F.3d 738 (5th Cir. 2011).

B. ENVIRONMENTAL LAND USE REGULATION

NOTES AND QUESTIONS

[1.] Wetlands

NOTES AND QUESTIONS

[2.] Floodplain Regulation

Add to the end of Note 2, *State legislation*, on p. 434:

Local ordinances may also govern development in the flood plain. In *Town of Kirkwood v Ritter*, 80 A.D. 3d 944, 915 N.Y.S. 2d 683 (3 Dept. 1/13/2011), the Town's local law, enacted in accordance with FEMA's National Flood Insurance Program to take advantage of incentives for adopting flood plain management measures, required property owners to obtain a flood plain development permit prior to making any "substantial improvement" to a structure in the designated area and further requires that owners receive a certificate of compliance before the structure is reoccupied. After a flood destroyed their property, defendants made improvements without obtaining the necessary permits, approvals and compliance certificate, and they claim that they did not have to obtain these because the work they did was not a "substantial improvement" that would trigger the application of the local law. Under the National Flood Insurance Program regulations, "substantial improvement" includes repairs that equal or exceed 50% of the pre-flood market value of the home.

Missouri Coalition for the Environment, The State of Missouri's Floodplain Management Ten Years After the 1993 Flood

NOTES AND QUESTIONS
A NOTE ON OVERLAY ZONES
[3.] Groundwater and Surface Water Resource Protection
NOTES AND QUESTIONS
[4.] Protecting Hillsides
[a.] The Problem
[b.] Regulations for Hillside Protection
[c.] Takings and Other Legal Issues
[5.] Coastal Zone Management
NOTES AND QUESTIONS
[6.] Sustainability

A NOTE ON LAND USE PLANNING AND SUSTAINABILITY

Add to the end of paragraph beginning "*Sources*" on p. 450

For additional information about integrating sustainable development, see *Integrating Sustainable Development Planning and Climate Change Management: A Challenge to Planners and Land Use Attorneys*, P. Salkin, Planning & Environmental Law, Vol. 63, p. 3 (March 2011) (http://ssrn.com/abstract=1774013).

[7.] Climate Change

Add a new note on p. 456, immediately above "*Sources*":

Preemption Issues and Climate Change.

See *American Electric Power Co., Inc., et al. v. Connecticut et al.* 564 U.S. ____ (2011). The United States Supreme Court reaffirmed the EPA's authority under the Clean Air Act to enforce any regulation regarding greenhouse gas emissions. The Court also held that States cannot use Federal common law nuisance claims to impose limits on greenhouse gas emissions as the EPA's authority under the Clean Air Act displaces the Federal common law claim. The issue of whether State common law claims are also barred has yet to be determined. (http://www.supremecourt.gov/opinions/10pdf/10-174.pdf).

A 2009 amendment to Washington's Building Energy Code promoted energy efficiency in new buildings. In enacting the new law, the state legislature stated that, "…energy efficiency is the cheapest, quickest, and cleanest way to meet rising energy needs, confront climate change and boost our economy." In 2011, the Building Association of Washington filed suit against the Washington State Building Code Council claiming a portion of the 2009 amendment violated 42 U.S.C. § 6297 by imposing energy efficiency standards higher than those set by the federal government and should be preempted by Energy Policy and Conservation Act (EPCA). *Building Industry Ass'n of Washington v. Washington State Building Code Council,* 2011 WL 485895 (W.D. Wash. February 7, 2011). The Energy Policy and Conservation Act (EPCA) preemption exemption test contain seven requirements which must be met in order for a code to be exempt from preemption. 42 U.S.C. § 6297(f)(3). The court found the code to be compliant with the requirements of the EPCA and denied the movant's motion for summary judgment.

But c.f., The Air Conditioning, Heating & Refrigeration Institute v. City of Albuquerque unreported decision, Civ. No. 08-633 MV/RLP (9/30/2010) striking down Albuquerque's new energy efficiency requirements, finding the prescriptive regulations were preempted by the EPCA.
(http://lawoftheland.files.wordpress.com/2010/10/ahri.pdf)

Ecker Bros. v. Calumet County
NOTES AND QUESTIONS

Chapter 5 EQUITY ISSUES IN LAND USE: "EXCLUSIONARY ZONING" AND FAIR HOUSING

A. EXCLUSIONARY ZONING AND AFFORDABLE HOUSING: STATE LAW
[1.] The Problem
Southern Burlington County NAACP v. Township Of Mount Laurel (1)
NOTES AND QUESTIONS
A NOTE ON ZONING, REGULATION AND MARKETS
[2.] Redressing Exclusionary Zoning: Different Approaches
Southern Burlington County NAACP v. Township Of Mount Laurel (II)
NOTES AND QUESTIONS
A NOTE ON POLICY AND PLANNING ISSUES
A NOTE ON EXCLUSIONARY ZONING DECISIONS IN OTHER STATES
[3.] Affordable Housing Legislation
[a.] Decision Making Structures
A NOTE ON STATE AND LOCAL APPROACHES TO PLANNING FOR AFFORDABLE HOUSING NEEDS
[i.] "Top Down": The New Jersey Fair Housing Act
A NOTE ON RECENT *MOUNT LAUREL* DEVELOPMENTS
[ii.] "Bottom Up": The California Housing Element Requirement
[iii.] Housing Appeals Boards
[iv.] Approaches in New Hampshire, New York, Rhode Island, and North Carolina
[b.] Techniques for Producing Affordable Housing

Insert at the end of "*California*" on p. 499:

See also Wollmer v. City of Berkeley, 122 Cal. Rptr. 718 (Cal. App. 2011) (upholding city's two approvals for a mixed-use affordable housing or senior affordable housing project as not violating the state's density bonus law or the California Environmental Quality Act) .

[i.] Inclusionary Zoning
A NOTE ON INCLUSIONARY ZONING AND REGULATORY TAKINGS
[ii.] Funding Mechanisms
[iii.] Other Tools
B. DISCRIMINATORY ZONING UNDER FEDERAL LAW
[1.] The Problem
[2.] Federal "Standing" Rules
[3.] The Federal Court Focus on Racial Discrimination
[a.] The Constitution
Village Of Arlington Heights v. Metropolitan Housing Development Corp.
NOTES AND QUESTIONS

Insert at Notes and Questions at *4. Standing* on p. 515:

But standing for other groups is more difficult to come by. *See National Association for the Advancement of Colored People v. City of Kyle, Texas*, 626 F.3d 233 (5th Dist. 2010) (holding that a civil rights organization did not have associational standing and a home builders association did not have organizational standing under the Fair Housing Act to challenge amendments to a city's zoning and subdivision ordinances governing new single-family residences that increased the minimum lot and home sizes for such residences and required full exterior masonry)..

[b.] Fair Housing Legislation

Huntington Branch, NAACP v. Town Of Huntington

NOTES AND QUESTIONS

Insert at the end of "*Westchester County, N.Y.*", on p. 527:

For an excellent analysis of the settlement in the Westchester County case that argues that Westchester and other counties and municipalities throughout the country should enact legislation incentivizing mixed-income housing developments, see *Note. Integrating the Suburbs: Harnessing the Benefits of Mixed Income Housing in Westchester County and Other Low-Poverty Areas*. 44 Colum. J.L. & Soc. Probs. 1 (2010).

C. DISCRIMINATION AGAINST GROUP HOMES FOR THE HANDICAPPED

Larkin v. State Of Michigan Department Of Social Services

NOTES AND QUESTIONS

Chapter 6 THE ZONING PROCESS: EUCLIDEAN ZONING GIVES WAY TO FLEXIBLE ZONING

A. THE ROLE OF ZONING CHANGE
Mandelker, Delegation of Power and Function in Zoning Administration,
NOTES AND QUESTIONS
NOTES AND QUESTIONS PROBLEM
B. MORATORIA AND INTERIM CONTROLS ON DEVELOPMENT
NOTES AND QUESTIONS
Ecogen, LLC v. Town Of Italy
NOTES AND QUESTIONS
A NOTE ON STATUTES AUTHORIZING MORATORIA AND INTERIM ZONING
C. THE ZONING VARIANCE
Puritan-Greenfield Improvement Association v. Leo
NOTES AND QUESTIONS

Add to Note 6: "*Self-Created Harship*" at p. 566:

Morikawa v. Zoning Bd. of Appeals of Weston, 11 A.3d 735 (Conn. App. Ct. 2011) (Error of homeowner architect or contractor is a self created hardship that disallows grant of a variance).

A NOTE ON AREA OR DIMENSIONAL VARIANCES
ZIERVOGEL v. WASHINGTON COUNTY BOARD OF ADJUSTMENT
NOTES AND QUESTIONS
D. THE SPECIAL EXCEPTION, SPECIAL USE PERMIT, OR CONDITIONAL USE
County v. Southland Corp.
NOTES AND QUESTIONS
Crooked Creek Conservation And Gun Club, Inc. v. Hamilton County North Board Of Zoning Appeals
NOTES AND QUESTIONS

Add to Note 2: "*What if*" at p. 583:

Richard A. Demonbreun v. Metropolitan Board of Zoning Appeals, 2011 Tenn. App. LEXIS 314 (June 10, 2011) (Board of Zoning appeals acted arbitrarily in denying a special exception for bed and breakfast business in a residential neighborhood by focusing on the applicant's prior history of noncompliance rather than the use, where prior noncompliance is not a statutory factor in the decision).

Add to Note 3: "The Standards issue" at p. 584:

Montgomery County v. Butler, 9 A.3d 824 (Md. 2010) (Providing an update of Maryland law on special exceptions and the role of requirement of "compatibility.").

E. THE ZONING AMENDMENT
[1.] Estoppel and Vested Rights
Western Land Equities, Inc. v. City Of Logan
NOTES AND QUESTIONS

Add to Note 9: "*Sources*" at p. 596:

Note. Statutory Development Rights: Why Implementing Vested Rights Through Statute Serves the Interests of the Developer and Government Alike. 32 Cardozo L. Rev. 265-303 (2010).

A NOTE ON DEVELOPMENT AGREEMENTS

Add at p. 597:

Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 191 Cal. App. 4th 435 (Cal. App. 3d Dist. 2010), 2010 Cal. App. Lexis 2172 (describing California legislative history and upholding finding of breach of contract, award of $30 million in damages, and attorneys fees).

NOTES AND QUESTIONS

Add to Note 3 "*Sources*" at p. 598:

Article: Daniel P. Selmi, The Contract Transformation in Land Use Regulation. 63 Stan. L. Rev. 591 (2011). The author argues that the trend toward the negotiation of terms governing individual projects threatens fundamental public law norms.

[2.] "Spot" Zoning
Kuehne v. Town Of East Hartford
NOTES AND QUESTIONS

Add to Note 1 "*The Problem*" at p. 602:

Ely v. City Council of City of Ames, 2010 Iowa App. Lexis 673 (June 30, 2010) (designation of single site with nonconforming use, which was a boarding house for Africa American students, to historic landmark classification is not spot zoning).

[3.] Quasi-Judicial Versus Legislative Rezoning
Board Of County Commissioners Of Brevard County v. Snyder
NOTES AND QUESTIONS

Add to Note 2 "*Why should zoning be quasi-judicial?*" at p. 611:

King's Ranch of Jonesboro, Inc. v. City of Jonesboro, 2011 Ark. Lexis 114 (March 31, 2011). City's decision to grant or deny a conditional use permit is a quasi-judicial, not a legislative act, entitled to *de novo* review. The decision was made by a fact-intensive act of applying the facts to an existing standard, and no new law was created.

A NOTE ON PROCEDURAL DUE PROCESS IN LAND USE DECISIONS

NOTES AND QUESTIONS

Add to end of Note 2. "*Bias and conflict of interest*" at p. 616:

Citizens State Bank v. Dixie County, 2011 U.S. Dist. Lexis 38067 (N.D. Fla., April 7, 2011). A county attorney represented an applicant for development approval while also opining as county attorney that the applicant's development plans complied with the county's comprehensive land use plan. A subsequent county attorney determined that the development did not comply and the county issued a stop work order. The developer defaulted on its loan, and the bank sued the county for violation of procedural due process, based on allegations that the county was deliberately indifferent to the risk created by allowing the attorney to assume the dual roles. The court denied the county's motion to dismiss, allowing the case to continue.

Nevada Commission on Ethics v. Carrigan, 2011 U.S. Lexis 4379 (June 13, 2011). The Court overturned the Nevada Supreme Court's decision that the state ethics statute violated the First Amendment by prohibiting a city councilman from voting on a zoning matter where the councilman had a possible conflict of interest because his campaign manager represented the zoning applicant. The Court found that the vote was not protected speech, and that to view otherwise was inconsistent with long-standing federal and state traditions. A legislator's vote is not a personal prerogative, but an apportionment of the legislative power used in trust for the service of constituents.

Davenport Pastures, LP v. Morris County Board of County Commissioners, 238 P. 3d 731 (Kan. 2010). Landowner made an application for damages based on the county's vacation of a roadway. He claimed a violation of due process based on the county attorney's dual role as advocate for the county in the damages hearings against the application, while also providing the county board advice on legal and procedural matters. Given the totality of the facts, the Court found more than an appearance of impropriety of bias, but instead a "'probable risk of actual bias too high to be constitutionally tolerable" and thus sufficient to find a due process violation.

A NOTE ON BRIBERY AND CORRUPTION IN ZONING
[4.] Downzoning
Stone v. City Of Wilton
NOTES AND QUESTIONS
F. OTHER FORMS OF FLEXIBLE ZONING
[1.] With Pre-Set Standards: The Floating Zone
NOTES AND QUESTIONS
[2.] Without Pre-Set Standards: Contract and Conditional Zoning
Collard v. Incorporated Village Of Flower Hill
NOTES AND QUESTIONS

Add to Notes and Questions 10 "*Sources*" at p. 698:

Article. Fazio, Christine A. and Judith Wallace, Legal and Policy Issues Related to Community Benefits Agreements. 21 Fordham Envtl. L. Rev. 543-558 (2010).

Student article. Why Marginalized Communities Should Use Community Benefit Agreements as a Tool for Environmental Justice: Urban Renewal and Brownfield Redevelopment in Philadelphia, Pennsylvania. 29 Temp. J. Sci. Tech. & Envtl. L. 31-51 (2010).

G. SITE PLAN REVIEW

Charisma Holding Corp. V. Zoning Board Of Appeals Of The Town Of Lewisboro

NOTES AND QUESTIONS

H. THE ROLE OF THE COMPREHENSIVE PLAN IN THE ZONING PROCESS

NOTES AND QUESTIONS

Haines v. City Of Phoenix

NOTES AND QUESTIONS

Add to Note *3* **"*Consistency not found*" at p. 651:**

Heffernan v. Missoula City Council, 2011 Mont. LEXIS 122 (May 2, 2011) (City's approval of a 37-unit subdivision in a rural area at five times the density set out in the adopted growth policy was unlawful. Although the growth policy is not regulatory, the state statute requires that the city is statutorily required to be guided by the growth policy).

A NOTE ON SIMPLIFYING AND COORDINATING THE DECISION MAKING PROCESS

A NOTE ON ALTERNATIVE DISPUTE RESOLUTION

I. INITIATIVE AND REFERENDUM

Township Of Sparta v. Spillane

NOTES AND QUESTIONS

Add to Note 1 "*Referendum*" at p. 633:

Grant County Concerned Citizens v. Grant County Bd. of Comm'rs, 794 N.W. 2d 462 (S.D. 2011) (county board's rejection of a zoning amendment is not subject to referendum).

City Of Eastlake v. Forest City Enterprises, Inc.

Add to Note 7 "*Sources*" at p. 667:

Article. Kenneth A. Stahl, The Artifice of Local Growth Politics: At-large Elections, Ballot-box Zoning, and Judicial Review. 94 Marq. L. Rev. 1-75 (2010) (Using a case study from Yorba Linda, California).

NOTES AND QUESTIONS

J. STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPP SUITS)

TRI-COUNTY CONCRETE COMPANY V.HUFFMAN-KIRSCH 2000 Ohio App. LEXIS 4749 (2000)

Add to Note 2 "*The First Amendment*" at p. 679:

Oasis West Realty, LLC v. Goldman, 250 P.3d 1115 (Ca. 2011) (Applying the California Anti-SLAPP statute, the court found that Goldman's activity in publicly working in support of a referendum seeking to overturn a redevelopment project was not protected by the statute. Goldman represented Oasis earlier in the redevelopment project. Goldman's Motion to Strike the complaint was denied because Oasis stated and substantiated the sufficiency of its legal claims against Goldman for breach of fiduciary duty. A lawyer's misuse of confidential information is not protected speech).

A. SUBDIVISION CONTROLS
[1.] In General
NOTES AND QUESTIONS
A NOTE ON SUBDIVISION COVENANTS AND OTHER PRIVATE CONTROL DEVICES
[2.] The Structure of Subdivision Controls

Add to the end of Note 1 "*Vested Rights*" at p. 696

Subdivision approval, while ministerial in some instances, can be denied for failure to comply with local requirements, including conditions on the provision of utility services. In *Rose Woods, LLC v. Weisman*, 2011 WL 2279520 (N.Y. App. Div. 06/07/2011), the Planning Board approved petitioners' application for a four-lot residential development, but held final approval subject to certain specific conditions, including that one sewer pump must serve all four lots. Petitioners modified their subdivision design to a four-pump system and filed a mandamus action to compel the Planning Board to sign the subdivision plat. The court determined that mandamus was inappropriate because in this case, approval involved the performance of a discretionary act by a municipal agency. (http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2011/D31599.pdf); *see also* *Nexum Development Corp. v. Planning Board of Framingham*, 943 N.E.2d 965 (Mass. App. 2011) (upholding planning board's denial of a subdivision where the applicant failed to conduct required soil tests and plan did not comply with board of health conditions for water supply).

Meck, Wack & Zimet, Zoning And Subdivision Regulation, In The Practice of Local Government Planning 343, 362–369
NOTES AND QUESTIONS
Garipay v. Town Of Hanover
Baker v. Planning Board
NOTES AND QUESTIONS
B. DEDICATIONS, EXACTIONS, AND IMPACT FEES
[1.] The Takings Clause and the Nexus Test
A NOTE ON THE PRICE EFFECTS OF EXACTIONS: WHO PAYS?
[2.] The "Rough Proportionality" Test
Dolan v. City Of Tigard
NOTES AND QUESTIONS
[3.] *Dolan* Applied
[a.] Dedications of Land
Sparks v. Douglas County
NOTES AND QUESTIONS
[b.] Impact Fees
NOTES AND QUESTIONS

Add to the end of Note 2 "*Park and school fees*" at p. 737

In Matter of Legacy at Fairways, LLC v. Zoning Board of Appeals of Town of Victor, 2010 WL 3282667 (N.Y.A.D. 4 Dept. 8/20/2010), the owners of a parcel of property on which an assisted living center is located, sought to terminate the "per unit recreation fee" that had been imposed on their property. The Town Code authorized such a fee to be established by the Town board "in lieu of parkland." The appellate court struck down the fee because the Planning Board had not made the necessary findings in order to impose the per unit recreation fee and an assisted living facility did not qualify as a "'proper case' for such a fee."

The Drees Company v. Hamilton Township, Ohio
NOTES AND QUESTIONS
A NOTE ON STATUTORY AUTHORITY FOR DEDICATIONS, IN-LIEU FEES AND IMPACT FEES

Add after discussion of the Texas statute on p. 744

A new law in Utah sets standards for development review fees. The new law requires local governments to provide justification for the fees that are charged as a general practice and to conform with existing provisions in state code. It also requires that upon request, local governments must provide the basis for any fee charged and an accounting of where fees go and what they are expended for. A local process for appeal of fees must also be established. *See* 2011 Utah New Laws, H.B. 78. (http://le.utah.gov/~2011/bills/hbillenr/hb0078.pdf)

A new Colorado law requires local governments who collect impact fees for capital expenditures as a condition of approval of land development to annually post on their official websites information about these fees. 2011 New Laws, H.B. 1113. The posted information must include the amount of each collected land development charge allocated to an account or accounts, the average annual interest rate on each account, and the total amount disbursed from each account during the most recent fiscal year. The bill also requires that the information be presented in a clear, concise and user-friendly format. Language in the new law specifically exempts municipal and county governments that do not have a web site. (http://e-lobbyist.com/gaits/text/203853/203853.pdf)

A NOTE ON OFFICE-HOUSING LINKAGE PROGRAMS
C. PLANNED UNIT DEVELOPMENTS (PUDs) AND PLANNED COMMUNITIES
PLANNED UNIT DEVELOPMENT AS A ZONING CONCEPT,
NOTES AND QUESTIONS
City Of Gig Harbor v. North Pacific Design, Inc.
NOTES AND QUESTIONS
Cheney v. Village 2 At New Hope, Inc.
NOTES AND QUESTIONS
A NOTE ON PUD PROJECT APPROVAL STANDARDS

Add to the end of "*Project approval standards*" on p. 764, before "*Density*"

For an interesting discussion on the approval standards for planned developments*, see Tagliarini v New Haven Board of Alderman*, 2011 WL 1887330 (CT. Sup. 4/26/2011). A neighboring property owner appealed creation of a Planned Development District (PPD) for Yale University as "arbitrary and illegal substantively." The Court upheld the approval, determining that it would not interfere with local legislative decisions unless an abuse of discretion or action contrary to law occurred, meaning that the zone change must be in accord with a comprehensive plan and it must be reasonably related to the normal police power purposes enumerated in the city's enabling legislation. The court concluded that the Board acted in the best interests of the entire community and therefore met the first prong of the test since there was a comprehensive plan. The second prong was also met since the PPD zone change was related to the normal police power purposes found in the city's enabling legislation. The court found that by granting the application, the Board was improving economic development, there was a positive environmental impact, and surrounding property values were not negatively impacted. Since both prongs of the test were met the court concluded that the Board did not act arbitrarily or illegally.

PROBLEM

A. AN INTRODUCTION TO GROWTH MANAGEMENT
E. KELLY, PLANNING, GROWTH, AND PUBLIC FACILITIES: A PRIMER FOR LOCAL
OFFICIALS 16
NOTES AND QUESTIONS

Add to Note 5 "*Growth management and market monopoly*" at p. 772

Article

Russell-Evans & Hacker, Expanding Waistlines and Expanding Cities: Urban Srawl and its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Build Healthier and More Active Communities. 29 Va. Envtl. L.J. 63 (2011).

The Urban Lawyer published by the American Bar Association devoted a double issue to infrastructure: The Urban Lawyer, Vol. 42, No. 4/Vol 43, No. 1, Fall/Winter 2010/2011; http://www.americanbar.org/publications/urban_lawyer_home.html

PROBLEM
B. GROWTH MANAGEMENT STRATEGIES
[1.] Quota Programs
[a.] How These Programs Work
[b.] Takings and Other Constitutional Issues: The *Petaluma* Case
NOTES AND QUESTIONS
Zuckerman v. Town Of Hadley
NOTES AND QUESTIONS
[2.] Facility-Related Programs
[a.] Phased Growth Programs
Golden v. Ramapo Planning Board
NOTES AND QUESTIONS
[b.] Adequate Public Facility Ordinances and Concurrency Requirements
[i.] Adequate Public Facilities Ordinances
NOTES AND QUESTIONS
Maryland-National Capital Park And Planning Commission v. Rosenberg
NOTES AND QUESTIONS

Adequate Public Facilities Ordinances

Add to Note 1 "*Making APF ordinances work*", at p. 803

For a case in which the court held the city failed to follow the requirements in its own ordinance and failed to make adequate findings of fact see *Anselmo v. Mayor of Rockville*, 7 A.3d 710 (Md. App. 2010).

Add new Note 4, p. 804

4. New York State Smart Growth Public Infrastructure Policy Act

Recently adopted legislation in New York provides that "no state infrastructure agency shall approve, undertake, support or finance a public infrastructure project" unless it is consistent with criteria provided by the Act. N.Y . Envtl. Conserv. L. § 6-0107. These are some of the statutory criteria:

●To advance projects in developed areas or areas designated for concentrated infill development in a municipally approved comprehensive land use plan, local waterfront revitalization plan and/or brownfield opportunity area plan

●To foster mixed land uses and compact development, downtown revitalization, brownfield redevelopment, the enhancement of beauty in public spaces, the diversity and affordability of housing in proximity to places of employment, recreation and commercial development and the integration of all income and age groups

●To promote sustainability by strengthening existing and creating new communities which reduce greenhouse gas emissions and do not compromise the needs of future generations, by among other means encouraging broad based public involvement in developing and implementing a community plan and ensuring the governance structure is adequate to sustain its implementation

[ii.] Concurrency
PROBLEM
[c.] Tier Systems and Urban Service Areas
[3.] Growth Management in Oregon: The Urban Growth Boundary Strategy
Mandelker, *Managing Space to Manage Growth*
NOTES AND QUESTIONS
Hildebrand v. City Of Adair Village
NOTES AND QUESTIONS
[4.] Growth Management Programs in Other States
[a.] Washington
[b.] Vermont
[c.] Hawaii

Add new "[d.] Florida" on p. 826:

[d.] Florida

Drastic Changes in Florida's Growth Management Program

Legislation adopted in 2011 made drastic changes in the state's growth management program. Here are some of the highlights:

● The Department of Community Affairs (DCA), which was responsible for the growth management program, has been eliminated and its state land planning agency functions included as a division in the new Department of Economic Opportunity. The number of planners assigned to the planning function has been substantially reduced.

●The critical DCA rule specifying requirements for complying with the growth management program has been repealed, though many of its provisions are now incorporated into legislation. This includes its definition of urban sprawl, and the requirement for an urban sprawl analysis in comprehensive plans.

● The periodic Evaluation and Appraisal Report is no longer mandatory; but local governments must notify the state whether they will choose to conduct it.

● Provisions for energy efficiency and greenhouse gas reduction have been eliminated.

●The requirement, that a comprehensive plan may only be amended twice a year, has been eliminated.

●The state concurrency requirement for transportation, schools, parks and recreation facilities is made optional with local governments.

●The burden of proof in cases challenging the compliance of a comprehensive plan or plan amendment with statutory requirements has been weakened. For example, in challenges in private litigation, a plan or plan amendment it will be enough if a local government's determination of compliance is fairly debatable.

The legislation also prohibits local referenda for development orders and comprehensive plan amendments. For a powerpoint presentation on the amendments see http://www.dca.state.fl.us/fdcp/dcp/compplanning/Files/DCAGrowthManagementWorkshopPresentation.pdf. For the text of the bill see http://laws.flrules.org/2011/139. See http://www.dca.state.fl.us/fdcp/dcp/compplanning/Files/7207FAQs.pdf, for FAQS on the legislation. The governor vetoed funding for the regional planning agencies.

[5.] An Evaluation of Growth Management Programs
C. CONTROLLING GROWTH THROUGH PUBLIC SERVICES AND FACILITIES
[1.] Limiting the Availability of Public Services
Dateline Builders, Inc. v. City Of Santa Rosa
NOTES AND QUESTIONS

Add following second full paragraph on p. 833 before "*5. Sources*":

5. Washington State Growth Management Program

●**Density Limits:** The court reversed the Growth Management Hearings Board's approval of a county's comprehensive plan under the Growth Management Act in *Suquamish Tribe v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 235 P.3d 812 (Wash. App. 2010). It rejected the county's use of "bright line" density rules and held, in part, that the county improperly used a bright line density of four units to the acre in deciding whether an Urban Growth Areas should be expanded. On remand, the Board was "to consider the current, specific local circumstances before resolving the issue of appropriate densities to be used in the County's revisions to its comprehensive plan," and to decide whether four units to the acre was an appropriate urban density for the county. The court also rejected aspirational design standards the county adopted to preserve rural character.

Renumber "Sources" as "6".

[2.] Corridor Preservation

NOTES AND QUESTIONS

Add new "5. Sources" on p. 835:

5. Sources

From Bricks and Mortar to Mega-Bytes and Mega-Pixels: The Changing Landscape of the Impact of Technology and Innovation on Urban Development

Reforming Infrastructure Financing with 2020 Vision

Infrastructure Need in the United States 2010-2030: What Is the Level of Need? How Will It Be Paid For?

Measuring Regional Transportation Sustainability: An Exploration

Sustainable Urban Development and the Next American Landscape: Some Thoughts on Transportation, Regionalism, and Urban Planning Law Reform in the 21st Century

Transportation Concurrency, Mobility Fees, and Urban Sprawl in Florida

The Future of Electricity Infrastructure

Sewers: Infra Dig and Infra Dug

The Last Thing That Planners Talk About Should Be the First

Wastewater Resources: Rethinking Centralized Wastewater Treatment Systems, Land Use Planning and Water Conservation

Affordable Housing as Infrastructure in the Time of Global Warming

Affordable Housing as Urban Infrastructure: A Comparative Study from a European Perspective

Draft Convention on the international Status of Environmentally-Displaced Persons

Green Infrastructure: The Imperative of Open Space Preservation

Mandatory Set-Asides as Land Development Conditions

The U.S. Regulatory Takings Debate Through an International Lens

Property Rights and Local Zoning v. Nature Protection: Some Comparative Spotlights

Resolving Land Use and Impact Fee Disputes: Utah's Innovative Ombudsman Program

Urbanization and Growth Management in Europe

The Next Wave in Growth Management

Loving Growth Management in the Time of Recession

Chapter 9 AESTHETICS: DESIGN REVIEW, SIGN REGULATION AND HISTORIC PRESERVATION

A. AESTHETICS AS A REGULATORY PURPOSE

NOTES AND QUESTIONS

B. OUTDOOR ADVERTISING REGULATION

PROBLEM

[1.] In the State Courts

Metromedia, Inc. v. City Of San Diego

NOTES AND QUESTIONS

A NOTE ON THE FEDERAL HIGHWAY BEAUTIFICATION ACT

[2.] Free Speech Issues

Metromedia, Inc. v. City Of San Diego

NOTES AND QUESTIONS

Add to Note on p. 863 immediately before "Sources":

Sign Regulation and Free Speech.

●**Exemptions, Content Neutrality:** *Bowden v. Town of Cary*, 754 F. Supp. 2d 794 (E.D.N.C. 2010), held that exemptions in the sign ordinance, such as "temporary signs erected as part of a 'Town-recognized event' and signs erected on behalf of a governmental or quasi-governmental agency" were content-based. The court cited *Solantic*.

●**Special Use Permit; Vagueness:** *CBS Outdoor, Inc. v. City of Kentwood*, 2010 U.S. Dist. LEXIS 107172 (W.D. Mich. Oct. 6, 2010), upheld a special use permit provision in a sign ordinance as a time, place and manner regulation. It regulated "the location and physical characteristics of signs and their compatibility with existing structures and facilities," and so established standards that related to the significant interests of the city in regulating billboards. However, the court held that several standards for special uses were unconstitutional because they were not objective and definite. These included standards requiring that the special use must ""[b]e designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance, with the existing or intended character of the general vicinity," and that "The construction or maintenance of a billboard may not act as a detriment to adjoining property, act as an undue distraction to traffic on nearby streets, or detract from the aesthetics of the surrounding area."

●**Political Signs:** *Kolbe v. Baltimore County*, 730 F. Supp. 2d 478 (D. Md. 2010), upheld an eight-foot square size limit that was applied to prohibit a campaign sign that was regulated as part of a provision regulating "temporary" signs. The requirement was content-neutral because it applied regardless of the content of the sign and advanced legitimate aesthetic and traffic safety interests of the county. Ample alternative means of communication existed, because the county does not limit the number of signs and is not enforcing durational limits.

●**Murals; Vagueness:** *Wag More Dogs, LLC v. Artman*, 2011 U.S. Dist. LEXIS 14642 (E.D. Va. Feb. 10, 2011) , held that a 960-square-foot cartoon mural of dogs, bones, and paw prints on the rear wall of a canine day care business facing a park used by dog owners violated a 60-square-foot size limit. The ordinance was not content-based, because it regulated signs based on size along with whether they were commercial advertising signs. Nor did the ordinance target speech based on the specific message it conveyed. The cartoon dogs in the mural were strikingly similar to cartoon dogs in the business' logo, which was prominently displayed on its web site. The definition of a sign as "any word, numeral, [or] figure . . . [that] is used to direct, identify, or inform the public" was not unconstitutionally vague. A provision in the ordinance authorizing the approval of Comprehensive Sign Plans was also constitutional because the standards applied to these Plans recognized "proper zoning interests in health, safety, the public welfare, and property values."

A NOTE ON FREE SPEECH PROBLEMS WITH OTHER TYPES OF SIGN REGULATIONS

Add to "*Sources*" on p. 863

Article

Miller, Historic Signs, Commercial Speech, and the Limits of Preservation, 25 J. Land Use & Envtl. L. 227 (2010).

C. URBAN DESIGN
[1.] Appearance Codes
State Ex Rel. Stoyanoff v. Berkeley
NOTES AND QUESTIONS
[2.] Design Review
In re Pierce Subdivision Application
NOTES AND QUESTIONS
A NOTE ON DESIGN GUIDELINES AND MANUALS
[3.] Urban Design Plans
A NOTE ON VIEW PROTECTION
D. HISTORIC PRESERVATION
NOTES AND QUESTIONS
[1.] Historic Districts
Figarsky v. Historic District Commission
NOTES AND QUESTIONS

Add immediately before Notes and Questions, p. 895

Historic Preservation

[3]. Due Process, Equal Protection, Spot Zoning: In *Ely v. City Council*, 2010 Iowa App. LEXIS 673 (Iowa App. June 30, 2010), the court upheld the designation of a home as an historic landmark that had been used to house African-American students at the university when they were denied housing elsewhere. It is also an example of the Craftsman architectural style. The court held that neighbors do not have a protected property interest in the historic landmark status of adjoining properties sufficient for a procedural due process claim. There was no equal protection violation because "Promoting preservation of historical and cultural lands has been found to be a legitimate government interest to support the differing treatment of properties." Neither was there a spot zoning because the historic and cultural significance of the property was a reason for distinguishing it from the surrounding area. See also *Baltimore St. Parking Co., LLC v. Mayor & Balt.*, 5 A.3d 695 (Md. 2010) (rejecting claim of procedural due process violations).

[2.] Historic Landmarks
NOTES AND QUESTIONS

Add to *Sources*, p. 898

Articles

Note: Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation, 63 Fla. L. Rev. 985 (2011).
Note, Smash or Save: The New York City Landmarks Preservation Act and New Challenges to Historic Preservation, 19 J.L. & Pol'y 271 (2010).

A NOTE ON FEDERAL HISTORIC PRESERVATION PROGRAMS
[3.] Transfer of Development Rights as a Historic Preservation Technique
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Fred F. French Investing Co. v. City Of New York
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